



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA21/09446

Date and time of decision: 10 August 2021 16:08:00
M Oakman, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Pakistani citizen. He arrived in Australia on 11 June 2013 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 26 September 2017. On 29 June 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the Migration Act 1958 (the Act). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He cannot return to Pakistan. If forced to return, he will suffer harm and possibly be killed by the Taliban because of his religion and membership of the Turi tribe.
 - There are lots of news report about incidents in Pakistan. People in his village have been stopped on the road, kidnapped, demanded money, and killed by the Taliban. There was a bombing in Parachinar in 2017 and people he knew died.
 - He also fears being personally targeted at the hands of Shias in his area because he helped some Sunnis return home to Afghanistan. The police and security forces are unable to protect him.
 - He believes he would be at more risk of harm because he fled Pakistan. The police would consider he has disrespected Pakistan by telling people in Australia that Pakistan is unsafe. He will also be a returnee with a Western lifestyle and practices, which will not be accepted.

Factual findings

Receiving country

4. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Pakistan. I find that the applicant's receiving country is Pakistan.

Background

5. The applicant was born in [village], Parachinar, Kurram District, Pakistan, in [Year] and where he lived with his family until he left Pakistan in 2013. The village is about [Distance]kms from Parachinar city. He is unmarried and has no children. His parents, stepmother, two brothers, two sisters and a half-sister live in Pakistan, in his village in Parachinar. He completed his schooling in Pakistan up to Year [Number]. In Pakistan he worked on the family farm from about 2007 to 2013. In Australia he has worked as [Occupation] for a few years. He reads, writes and speaks Urdu and he speaks English and Pashto. He is a Pashtun Turi and Shia.

Problems in Pakistan

6. In summary, the applicant claims he left Pakistan because as a Shia he was in fear of harm from the Taliban and other extremists. The risk to Shias is everywhere in Pakistan, there is no peace and there are various incidents in the news.
7. The was fighting in the area near his village and the Taliban controlled the roads leading to his and other surrounding villages. No one was safe there and they faced an ongoing risk of being killed. If the Taliban or extremists see his Nation ID card (NIC) they will tell from his surname that he is Shia and kill him. The applicant mostly stayed at home because of the danger; he only travelled to Parachinar when it was necessary, such as getting supplies. He initially attended school, but because of the danger he started home studies, attending school only for exams.
8. He also fled Pakistan because he feared the Shia people in his area. He helped protect some Sunni farmers.
9. It was common for Sunnis to come from Afghanistan to work on Shias' farms. They had a Sunni family living on their farm for many years, with two of the Sunni family's five children born on the applicant's family farm. In about 2006/2007 there was lots of fighting between Shias and Sunnis, with the Turi tribe in conflict with the Taliban. There was a lot of conflict within about 25-30mins of his home. His uncle and other people, including his neighbours, were injured defending their homes. The Turi people also stood against the Sunnis, to get revenge on the Taliban and for the deaths of their loved ones. Sunni people started being threatened and killed by Shias. The applicant heard threats made against Sunnis in the bazaar and, as he had previously heard of it happening to other Sunnis, he knew the Sunni family on their farm were at risk. As he felt a responsibility towards the Sunni family, rather than hand them over to the Shias, he arranged for them to travel safely at night to Afghanistan, taking them to the border with his cousin. This was in about 2008 or 2009.
10. Other people told the applicant that elders were talking about him, saying he was not a good man because he had provided protection to the Sunni family. He is fearful of these Shia people. Even though he knows them, he fears they will harm or kill him because he stopped them getting revenge on the Sunni family.
11. In the three to four years he stayed in Pakistan after that, he generally remained inside or was driving his tractor on the farm; he didn't leave the house at night. He rarely left the village, afraid of the Taliban and extremists, as well as other Shias in their area because he helped the Sunni family. He was never actually threatened and does not have any enemies personally, but he is at risk because he helped the Sunni family. The elders did not take any action against him; his main fear is that Shia families who lost relatives to Sunnis could take revenge. He was not involved in any armed conflict and did not fight in any Shia militia. Neither he nor his family were ever threatened or harmed by the Taliban or any Sunni militant group.
12. The applicant claims he cannot return to Pakistan. If forced to return, he will suffer harm or death from the Taliban or other Sunni extremists because he is a Shia and a Turi. His name also stands out as a Shia name. People from his village have been stopped on the road, kidnapped, demanded money and been killed by the Taliban. In a bombing in Parachinar 2017 a lot of people he knew from his area died. Pakistan is still a very dangerous place.

13. The applicant also fears that he would be at more risk of harm because he fled Pakistan. The police would consider he has disrespected Pakistan by telling people in Australia that Pakistan is unsafe. He will also be a returnee with a Western lifestyle and practices, including drinking and smoking, and that will not be accepted.
14. In assessing the applicant's evidence, I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin. The applicant was generally consistent with his protection claims and background details in his SHEV application, in his January 2018 statutory declaration, and at the SHEV interview. I accept his explanation about why he did not mention the Sunni family and his fear of harm from Shias in his arrival interview. I accept the applicant's claims made in his SHEV application, statutory declaration and at the SHEV interview. In particular, I accept the applicant is a Pashtun Turi Shia, and his address, education, family and employment histories as set out in his SHEV application and at the SHEV interview. I accept that he left Pakistan because of his fear of harm from the Taliban and other Sunni extremists who targeted Turis and Shias in his area; and that he feared possible harm from other Shias in his area because he helped the Sunni family. I accept he knows people who have been injured in the fighting in the area and that there was a bomb blast in Parachinar in 2017 in which many people died and that the applicant knew some of the victims.

Returned Asylum Seeker

15. The applicant claims, and I accept, that he left Pakistan using his own passport, and without any issues through Lahore airport, in about April 2013 to travel by plane to [Country 1]. He then travelled by train to [Country 2] and by boat to [Country 3]. He subsequently left [Country 3] to travel to Australia in a boat organised by smugglers. I find that, if he were to return to Pakistan, he may be identified as a returned asylum seeker. The applicant's passport was due to expire in 2016.
16. The applicant was one of numerous asylum seekers whose personal information was published by the Department in early 2014 due to a data breach on its website. The personal information published was his name, date of birth, nationality, gender, and details of his detention. The information did not include his previous address or protection claims.¹
17. The applicant's parents and siblings continue to live in [the] village. His father owns the house they live in and they have farmland. As his immediate family are living there, and the applicant previously lived there throughout his life in Pakistan, I am satisfied that [the] village and the Parachinar area is the area of Pakistan to which he will return. The applicant indicated his family were supported by their farming and it was not suggested they have had any difficulties in subsisting while he has been in Australia. The applicant has remained in regular contact with his family in Pakistan. Given those factors, I am satisfied that his family in [the] village will be able to provide the applicant with continuing basic support, if needed, now or in the reasonably foreseeable future, if he returns to Pakistan.

Refugee assessment

18. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-

¹ Protection visa decision record, 29 June 2021, page 5.

founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

19. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
20. Pashtuns traditionally live among their own tribes and sub-tribes in Khyber Pakhtunkhwa province and the Federally Administered Tribal Areas (FATA), which includes Kurram Agency (now District) where Parachinar, a Shia majority city, is located. Pashtuns can be identified by their use of the Pashto language and comprise an estimated 15.4 per cent of the population of Pakistan, making them the second-largest ethnic group in the country. Shias comprise around 40 per cent of the population of Kurram. Upper Kurram is estimated to be around 80 per cent Shia, while Central and Lower Kurram is majority Sunni. NICs do not display the holder’s religion and although Pakistani passports do show the holder’s religion they do not distinguish between Sunni and Shia Muslims. However, some Shias may be identifiable by common Shia names. Similarly, ethnic and tribal names can reveal a person’s tribal or sectarian affiliation, as can their address if they are from a predominantly Shia area. Between 2008 and 2014, Turis faced significant violence. Groups such as the Taliban targeted Turis for their Shia faith. Militants frequently stopped and killed Turis travelling on roads. A significant spike in profiling and targeted killings occurred between 2009 and 2014 along the Tall-Parachinar road, which links Kurram District and Peshawar.²
21. The Department of Foreign Affairs and Trade (DFAT) says the security situation in Pakistan is complex, volatile, and affected by domestic politics, politically motivated violence, ethnic conflicts, sectarian violence, and international disputes with India and Afghanistan. According to the South Asian Terrorism Portal (SATP), 3684 civilians have died in terrorism-related violence between 2014 and mid-January 2019. SATP bases its statistics from media reports, so this number may understate the actual number of casualties. Since 2014 however, the Pakistan armed forces have launched several major security operations, including Operation Zarb-e-Azb, Radd-ul-Fasaad, and the National Action Plan (NAP) which have notably impacted on the security situation in the region. In 2018, the Government announced its second National Security Policy, and was reportedly preparing NAP2. These operations have disrupted the activities of militant groups, including the Taliban, and resulted in a significant

² DFAT, ‘DFAT Country Information Report Pakistan’, 20 February 2019, 20190220093409.

decrease in the number and severity of attacks on Turis. Turis reported significantly fewer road attacks in 2018. Militants have been forced into the mountains, which has restored confidence in the community for individuals (but not large groups) to use the Tall-Parachinar Road between dawn and dusk. There are also tighter Afghanistan-Pakistan border controls and the military has implemented a twenty to thirty square kilometre area red zone for Parachinar, and a second, smaller red zone inside the outer red zone, in which markets and schools are located. While these initiatives have improved the security situation in Kurram District they have also resulted in restrictions on freedom of movement and limited the community's access to services and trade opportunities. While noting the success of the counter-terrorism operations, DFAT says there appears to be an increase in societal intolerance and religious extremism. DFAT notes a trend of decreased reports of attacks against Turis during 2018, and expected it to continue to reduce for 2019, though noting that attacks against Turis can, and may, still occur. Overall, DFAT assesses in its 2019 report that in the general security situation sporadic large-scale terrorist attacks are likely to continue to occur, against a background (at a reduced tempo) of ongoing small-scale attacks; and Turis in Kurram District still face a moderate risk of sectarian violence from militant groups because of their Shia faith.³

22. Since that assessment by DFAT, more recent country information notes the continuing reduction in security incidents in the Kurram District for 2019 and 2020. The Pakistan Institute for Conflict and Security Studies (PICSS) indicates that no militant attacks were reported in Kurram in 2019.⁴ The FATA Research Centre (FRC) indicated there was one militant related incident in 2019 with two injured and there were three militant related attacks in Kurram in 2020, resulting in one dead and 18 injured; it identified the 1st and 4th quarters of 2020 as peaceful, said the 2nd and 3rd quarters were tense, described militancy related incidents as sporadic, but identified ongoing land disputes as posing a future threat.⁵ The European Asylum Support Office (EASO) indicated that in the Kurram District in 2019 the FRCs reported one violent incident with two injured while the Pakistan Institute for Peace Studies (PIPS) recorded no terrorist attacks; and in 2020 (up to 31 July 2020) both the FRC and PIPS recorded three violent incidents/terrorist attacks with one dead and 18 injured; and refers to media reports of a May 2020 imambargah bomb blast, tribal clash at the end of June 2020 with a least five killed and 40 injured, and an explosion at a Parachinar market on 23 July 2020 that wounded 18 people and was followed by people protesting and blaming the security forces for the violence in the area.⁶ The SATP has recorded no other terrorist or militant incidents up to June 2021, after that July 2020 incident.⁷ Other media articles concerning the imambargah blast, the market explosion and the tribal land dispute clashes were also before the delegate, as well as an explosion at Parachinar's Mazdoor Chowk and a shooting in the Shalozan area.⁸ Another land dispute incident was reported in 2021.⁹ The land

³ Ibid.

⁴ PICSS, "2019 Annual Security Assessment Report", 9 January 2020, 20200122140652.

⁵ Irfan U Din and Mansur Khan Mahsud, FRC, "Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2020", 7 January 2021, 20210113125205.

⁶ EASO, "Pakistan: Security situation", October 2020, 20201102100212.

⁷ Timeline (Terrorist Activities) July 2020- Jun 2021- SATP, per f/n 70 of the Protection visa decision record, 29 June 2021.

⁸ "At least 1 injured in explosion at imambargah in Lower Kurram", Dawn (Pakistan), 5 May 2020, 20200506121914; "Tribes land disputes claim 5 lives in Kurram", The Nation, 1 July 2020, 20210322144310; "Death toll in rival tribes' clashes in Kurram reaches 14", Tribal News Network (TNN), 2 July 2020, 20200702124328; "Protests erupt over Parachinar bomb attack", Deutsche Welt, 24 July 2020, 20200812152550; "At least 17 injured in IED blast in Parachinar's Turi Bazar", Dawn (Pakistan), 23 July 2020, 20200724103731; "17 injured in bomb blast at open-air market in northwest Pakistan", Hindustan Times, 23 July 2020, 20200724153817; "Cop among two injured in Parachinar blast", News International - Pakistan, 23 June 2020, 20200812152337; and "Four killed as vehicle attacked in Kurram", Dawn (Pakistan), 27 October 2020, 20201028094425.

⁹ "Another land dispute surfaces in Kurram", TNN, 17 January 2021, 20210118111729.

dispute clashes and the militant incidents are unfortunate, but they are not inconsistent with the overall reduction in large scale or frequent attacks in the Kurram District since 2017 or the ongoing improvement in the general security situation in Parachinar.

23. Consistent with DFAT identifying an increased trend of societal intolerance, there were a number of media reports and articles before the delegate concerning various more recent anti-Shia incidents including confrontations and arrests for blasphemy of Shias; attacks; the passing of the Tahaffuz-e-Bunyad-e-Islam legislation by the Punjabi Assembly; and anti-Shia rallies.¹⁰ However, none of the material appears to refer to any such incidents in the Kurram District or, in particular, to Upper Kurram and Parachinar which is a Shia majority area. Nor does there appear to have been any corresponding increase in violent incidents involving Shias in Kurram, which has remained low.¹¹ Additionally, although there are reports of anti-Shia sentiment and clashes in 2019 and 2020 around Muharram,¹² other country information indicates that Shias in Pakistan have been able recently to observe Muharram generally without incident, albeit amid government provided security.¹³
24. I am satisfied, see above, that the applicant will be returning to [the] village and the Parachinar area in the Kurram District. It is a Shia majority area and his parents and siblings live in a home the family owns. I accept that area has a history of general and sectarian violence, including both before and after he left Pakistan. I accept that he knows people who have been injured or killed in the Parachinar area, including his uncle and various neighbours. This is an unfortunate result of the generalised violence that previously occurred. However, the applicant's own evidence was that he and his family were never threatened or harmed by the Taliban or any Sunni militant group, or that he has fought with any Shia militias. The applicant also has a general fear of Shia families taking revenge because he assisted the Sunni family get across the border. However, he said at the SHEV interview that he was never threatened and that he has no personal enmity with anyone. Additionally, notwithstanding that he did limit his movements, he continued to live in his village for up to four years after he assisted the Sunni family without suffering any adverse attention from Shias or anyone else. Nor does he claim that his cousin, who also helped him get the Sunni family to the border, has received any threats or suffered any adverse attention as a result. Similarly, he does not claim anyone has approached his family about him, or to make threats against him, since he left Pakistan. It is now 11 or so years since he assisted the Sunni family and the passage of time would have removed any initial concerns the elders may have expressed at the time. Having considered the applicant's circumstances and the country information, I am not satisfied there is a real chance he will suffer any harm from the Taliban, other Sunni militants, the Shia elders, other Shias or anyone else, now or in the reasonably foreseeable future, if he were to return to the Kurram District. The country information does not indicate that there have been any large scale or frequent attacks in the Kurram District, and in the

¹⁰ "Pakistan: Hardline Sunni groups on collision course with Shiites", S. Khan, Deutsche Welle, 14 September 2020, 20200915102826; "The Changing Landscape of Anti-Shia Politics in Pakistan", The Diplomat, 28 September 2020, 20200929095157; "Why are anti-Shia sentiments on the rise in Pakistan?", Express Tribune, 14 September 2020, 20200915102018; "'Long Live Yazeed' Slogans Chanted At Extremists' Rally In Karachi", Naya Daur, 14 September 2020, 20200915111521.

¹¹ CRSS, "Quarterly Security Report Q3, July-Sept 2020", 8 October 2020, 20201012113549.

¹² United States Department of State, "International Religious Freedom Report for 2019 - Pakistan", 10 June 2020, 20200617121515; US Commission on International Religious Freedom (USCIRF), 'USCIRF 2020 Annual Report', 28 April 2020, 20200429103634; "Why are anti-Shia sentiments on the rise in Pakistan?", Express Tribune, 14 September 2020, 20200915102018; and "'Long Live Yazeed' Slogans Chanted At Extremists' Rally In Karachi", Naya Daur, 14 September 2020, 20200915111521.

¹³ "Youm-i-Ashura observed nationwide amid tight security", Dawn (Pakistan), 31 August 2020, 20200917161348; "9th Muharram observed with solemn remembrance of Karbala", News International, 29 August 2020, 20200917153538; "Entry of 37 clerics in Rawalpindi banned", Dawn (Pakistan), 17 August 2020, 20200817115449.

Parachinar area, since 2017, but it does indicate the military operations have significantly improved the security and sectarian situation in Kurram and Parachinar, including in relation to the use of the roads. I accept that although the security situation has substantially improved, there remains some level of risk of harm from general and sectarian violence in the Parachinar area. However, having regard to the nature and frequency of militant and sectarian incidents in Kurram District, I am not satisfied that, overall, they rise to the level of a real chance.

25. He does not claim that his family in Pakistan has suffered any harassment, discrimination or other harm as Pashtun Turi Shias since he left Pakistan. The applicant may take some time to re-establish himself in the Parachinar area, and I accept his re-integration will also be impacted by the restrictions caused by the military operations and red zones around Parachinar. However, he is a man in his early [Decade] who has shown he is generally resilient and resourceful by adapting to life in Australia while separated from his immediate family. He speaks, reads and writes Urdu and speaks English and Pashto. He worked for several years on the family farm in Pakistan and he has some experience as [Occupations] in Australia. The applicant will face an uncertain period of unemployment while he re-establishes himself in the Parachinar area. However, as discussed above, I am satisfied that his family will be able to provide him with basic support if required. Given those factors, I am not satisfied that any period of unemployment he may experience while he re-establishes himself in the Parachinar area, would threaten his capacity to subsist or otherwise amounts to harm to the applicant.
26. I am not satisfied that there is a real chance of harm to the applicant, a Pashtun Turi Shia from Parachinar, if he returns to the Parachinar area in the Kurram District, due to the general security and sectarian situation, or for any other reason, now or in the reasonably foreseeable future.
27. Country information indicates citizens of Pakistan require a valid passport to enter or exit the country and that attempting to enter or depart Pakistan without valid documentation or on fraudulent documentation is a crime. However, country information also notes that in practice, returnees tend to leave Pakistan on valid travel documents and therefore do not commit immigration offences under Pakistan law. Those who return voluntarily and with valid travel documentation are generally processed like any other citizen returning to Pakistan. The government issues 'genuine returnees' with temporary documents when they arrive. A genuine returnee is defined as someone who exited Pakistan legally irrespective of how they entered destination countries. Those who return involuntarily or who travel on emergency travel documents are likely to attract attention from the authorities upon arrival. The authorities will interview failed returnees and release them if their exit was deemed to be legal but may detain those deemed to have departed illegally. People suspected of or charged with criminal offences in Pakistan are likely to face questioning on return, irrespective of whether they departed legally or not. People returned to Pakistan involuntarily are typically questioned upon arrival to ascertain whether they left the country illegally, are wanted for crimes in Pakistan, or have committed any offences while abroad. Those who left Pakistan on valid travel documentation and have not committed any other crimes are usually released within a couple of hours.¹⁴
28. The applicant fears the police might consider he has disrespected Pakistan by telling people in Australia that Pakistan is unsafe. He also fears his Western lifestyle and practices, will not be accepted. However, the delegate was unable to locate any country information that

¹⁴ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019, 20190220093409.

indicated asylum seekers returning to Pakistan are imputed with pro-Western views or that they are labelled as 'infidel'; any reporting that returnees have been harmed in Pakistan for having lived in a western country; or any reports that failed asylum seekers are persecuted by the Pakistan authorities upon arrival because of their asylum application in Western countries.¹⁵ Indeed, according to DFAT, returnees are typically able to reintegrate into Pakistani community without repercussions arising from their migration attempt and assesses that they do not face a significant risk of societal violence or discrimination as a result of their attempt to migrate, or because of having lived in a western country.¹⁶

29. The applicant left Pakistan legally using his own passport. The applicant has not claimed he is wanted for any criminal offences in Pakistan or that he has committed any crimes while in Australia. Based on the country information, I am satisfied that if the applicant returns voluntarily, he will be allowed to enter the country without questioning. If he returns involuntarily, I am satisfied that he will be interviewed and will be found to have departed Pakistan legally and that he is not wanted in relation to any criminal offences, he will be released within a couple of hours. The personal details of the applicant that were released in the 2014 data breach are all ones that the Pakistani authorities would be aware of by the circumstances of his return to Pakistan. I am not satisfied that the data breach would increase his profile or otherwise alter the treatment he would receive from the authorities at the airport. There is no suggestion by DFAT that returnees are subject to any mistreatment during any such questioning at the airport. As discussed above, country information indicates travel on the Tall Road is generally safe during daylight hours. Nor does country information suggest that roads to and from international airports are at any heightened risk. As such, I am not satisfied that there is more than a remote chance of the applicant suffering harm while travelling from an international airport in Pakistan to the Parachinar area. The country information does not suggest returnees from the west, including those who have spent an extended period abroad in countries such as Australia, are targeted by the Taliban or other militants and, in any event, given the improved security situation in Kurram District I am not satisfied that there is a real chance of the applicant suffering harm on that basis.
30. I am not satisfied that the applicant faces a real chance of harm as a returning asylum seeker from Australia, and for having spent eight years in Australia, now or in the reasonably foreseeable future.
31. I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

32. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

33. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a

¹⁵ Protection visa decision record, 29 June 2021, page 12.

¹⁶ DFAT, 'DFAT Country Information Report Pakistan', 20 February 2019, 20190220093409.

necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

34. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
35. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
36. I accept that if he is returned involuntarily to Pakistan he may be questioned for a few hours by authorities at the airport before being released. The country information from DFAT does not suggest that returnees are subject to any mistreatment during their questioning at the airport. I am not satisfied that in this process there is an intention to cause pain and suffering that can be reasonably regarded as cruel or inhuman in nature, severe pain or suffering or extreme humiliation. Nor is there a real risk of the death penalty, torture or the arbitrary deprivation of life. I am not satisfied on the evidence that if he is returned to Pakistan, and he is questioned at the airport, the applicant would be at real risk of being subjected to significant harm.
37. I have found that the applicant does not otherwise face a real chance of harm in relation to his claims or profile. As 'real risk' and 'real chance' involve the application of the same standard,¹⁷ he also does not face a real risk of any harm in Pakistan. I am not satisfied that the applicant faces a real risk of significant harm in Pakistan.

Complementary protection: conclusion

38. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

¹⁷ *MIAC v SZQRB* (2013) 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.