



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

INDIA

IAA reference: IAA17/03127

Date and time of decision: 1 September 2017 16:43:00

Lesley Hunt, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant), who is [age], claims to be a national of India. He arrived in Australia by boat [in] October 2013. [In] November 2016 he applied for a Safe Haven Enterprise Visa (SHEV).
2. [In] July 2017 a delegate of the Minister for Immigration and Border Protection refused the visa. The delegate accepted that the applicant is a Sikh from Haryana State in India and that he supported the Indian National Lok Dal (INLD) political party. However the delegate did not accept that the applicant had any significant involvement with the INLD or that he had any negative interactions with members of the Rashtriya Swayamsevak Sangh (RSS), a Hindu nationalist organisation. The delegate concluded that the applicant does not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 17 August 2017, after being granted an extension of time, the applicant's representative provided additional material to the IAA. In making my decision on the review application, by law (s.473DD) I must not consider any new information unless, in summary, I am satisfied there are exceptional circumstances to justify its consideration (s.473DD(a)); and the new information was not, and could not have been provided before the delegate's decision was made (s.473DD(b)(i)); or the new information is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims (s.473DD(b)(ii)). In considering the additional material provided by the applicant and applying the law I make the following findings.
5. The additional material consists of a three page submission from the representative, a copy of the applicant's Indian Identification Card, a statement setting out the applicant's claims, and a letter from the applicant's treating doctor. I note that the submission is mainly a reiteration of the applicant's claims and legal argument referencing the "Migration Act 1958". In addition it states that the applicant had difficulty understanding the Hindi interpreter during the SHEV interview and the applicant was worried about going over the parking meter limit where his car was parked. After listening to the interview recordings I note that the applicant was given the opportunity during the SHEV interview to indicate if he was not happy to proceed with the interpreter and he did not do so. I also note that the applicant's responses to questions during the interview indicate that he understood the interpreted questions. I also note that the applicant was allowed to attend to his car twice during breaks in the interview and he did not raise any concerns about the interpreter during or at the end of the interview. I am satisfied that the applicant was able to answer questions and provide information at the SHEV interview without any undue difficulty that could be attributed to these two matters raised in the representative's submission. After assessing this new information I am not satisfied that the s.473DD(b)(i) and (ii) requirements are met or that there are exceptional circumstances to justify its consideration: s.473DD.
6. The statement setting out the applicant's claims is undated and unsigned. I note that it is a copy of the statement (without the covering letter dated [October] 2016) from [a senior

official] of the INLD in Haryana that was included in the visa application. As this statement was submitted to the delegate prior to the delegate's decision it is not new information and I have considered it.

7. The copy of the Indian Identification Card was also previously submitted to the delegate before the decision was made. It is not new information and I have considered it.
8. The letter from the medical practitioner post-dates the delegate's decision. It is therefore new information and I am satisfied it could not have been provided before the delegate's decision was made. In assessing whether there are exceptional circumstances to justify its consideration I note that it refers to the applicant's [medical condition] and his referral for counselling sessions. The medical practitioner requests, in view of the applicant's psychological state, the applicant is given time to recover as he is "not in a position to give a true account of his situation before the Tribunal."
9. I note that s.473DB of the Act provides that subject to Part 7AA, the IAA must review decisions "on the papers" without interviewing the applicant. I also note that s.473DC provides that the IAA does not have a duty to get, request or accept any new information, whether the IAA is requested to do so by an applicant or in any other circumstances. The IAA may only consider new information in the limited circumstances outlined in paragraph 4 above. At the IAA there is no statutory entitlement to a hearing. I am satisfied that the applicant had ample opportunity to provide a complete account of his past experiences and claims at his interviews. The information he provided was generally consistent with his written claims. Also the letter states that the applicant has been the author's patient since 2015. There is no indication as to why the information about the applicant's medical condition could not have been obtained and provided earlier. As such, I am not satisfied there are exceptional circumstances to justify the consideration of this new information from the medical practitioner: s.473DD.
10. The decision record had minimal information regarding the Indian National Congress (INC) party. As this was the governing party in the applicant's home state of Haryana at the time relevant to his claims of past harm and political interference preventing his access to police protection I am satisfied there are exceptional circumstances that justify the consideration of new country information contained in the Department of Immigration and Border Protection (DIBP), "Background Paper: India: Political Parties", August 2014, the INC website regarding the INC, and Department of Immigration and Border Protection, "Issues Paper: India: The Treatment of Sikhs", March 2014: s.473DD.
11. I also note that the decision record does not address the applicant's claim that fabricated charges were laid against the former leader of the INLD. I am satisfied there are exceptional circumstances that justify the consideration of new country information contained in news reports about this matter: s.473DD.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows:
 - The applicant was born in [birth date] in [Haryana State], India. He is a Sikh and is married with [children]. His wife and children continue to live in the family home [and] are supported by the applicant's parents who also live there. The applicant's father is a [occupation]. The applicant's siblings live in [another country].

- The applicant completed secondary school in [year] and a [degree] in 2007. In his arrival interview the applicant stated that from 2010 to 2013 he was employed in [a company], [Town 1]. In his SHEV application form he has not listed any employment in India.
- The applicant claims that he left India because he was working for the INLD and the opposite party, the Bharatiya Janata Party (BJP) and RSS were against him. They asked him for money and injured him badly a couple of times and they threatened to kill him. He fears they are still looking for him and want to kill him. They previously harmed him financially and physically. The police are under the control of the BJP and the RSS and the BJP is in power so nobody can help or protect him. He claims the central government belongs to the same party therefore they will be able to find him anywhere.
- Details of the attacks against the applicant are set out in a letter written in October 2016 from [a senior official] of the INLD in Haryana. The [senior official] states in the letter that he knew the applicant personally from May 2007 until October 2013 and the applicant is a hard worker for the INLD. He also states that the applicant's family members are workers of the INLD, Haryana, India. The [senior official] goes on to state that in 2007 the applicant completed his studies, married his wife, and their [children] were born in [dates]. In 2009 the applicant started his business at [Town 1], started to earn a handsome income from the business and joined the INLD.
- [In] January 2010 the applicant received a phone call from the workers of the RSS who demanded he make [an amount] donation to the RSS. They threatened to kill him if he continued to work for the INLD. The applicant refused to give such a large amount of money to the RSS.
- [Later In] 2011 the applicant was attacked by [a number of] RSS workers who entered the shop and asked the applicant to again donate this amount of money to the RSS. When he refused he was beaten. [An amount] was taken illegally from his shop and the applicant was threatened with being killed along with his family if he complained. The applicant and his father made a complaint at the police station in [Town 1] however the police did not take any action against the culprits as they belong to the RSS party also.
- [In] March 2012 RSS workers again entered the applicant's shop and demanded he donate [an amount] to the RSS party. The applicant again refused, was physically assaulted, and an attempt was made to rob him however there was no money in the shop at the time. The RSS workers threatened they will come again to demand the donation and if the money was not paid they will kidnap the applicant's mother from his house.
- [In] September 2012 workers from the RSS and the BJP attacked the applicant's family members. The family did not sustain any injuries however threats were made to kill them if they went to the police to make a complaint.
- The BJP and the RSS form an alliance and they rule. They won the parliamentary election and since then the police have been under their control.
- The applicant's father sent him to Australia in September 2013 to save his life. The RSS registered a false case against Om Parkash Choutala, the leader of the INLD and he is now in jail.
- The RSS threatens to kill the applicant if he returns from Australia.
- The Immigration Department wrote to the applicant in March 2017 inviting him to comment on the fact that he has a right to enter and reside in Nepal under Article 7 of

the “1950 Treat of Peace and Friendship” (the Treaty) between Nepal and India. In response the applicant states that he cannot relocate to Nepal because it is a Hindu country like India. He has never been to Nepal. The present governments of both India and Nepal are the same and the Indian government could bring him back to India from Nepal at any time. The present government in India is ruled by the BJP. The RSS are linked to Nepal. They could find him very easily in Nepal, kill him and return to India without any problem.

- At the SHEV interview the applicant claimed that he fears harm from the Indian government because of his Sikh religion; many Sikhs were killed in 1984; Sikhs convicted of small crimes are given excessive convictions; the government may fabricate a case against him and have him imprisoned.

Refugee assessment

13. 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-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

14. 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.

Does the applicant have a well-founded fear of persecution?

Nationality and Identity

15. The referred material includes copies of an Election Commission Identity Card, Passport, Extract from the Marriage Register and other documents issued by the government of the Republic of India to the applicant. I note that the delegate queried the genuineness of a driver’s license provided by the applicant. I find that any doubts about the genuineness of the driver’s license has no bearing on the applicant’s claims for protection and I have not taken the driver’s license into consideration in assessing the applicant’s identity or his claims for protection. Based on the documentation provided and the applicant’s oral evidence, I accept

that the applicant is a national of India and no other country. I therefore find that India is the receiving country for the purposes of the Act.

16. The applicant claims that both he and his father actively support the INLD. The letter from the Member of the Legislative Assembly, [Town 1], Haryana State, which sets out the applicant's claims was provided as evidence in this regard. While I have some doubts regarding the authenticity of the letter I am prepared to accept that it is a genuine letter. I am also prepared to accept that both the applicant and his father have worked to support the INLD in their village. The applicant claimed at his SHEV interview that both his [siblings] have permanent residence in [another country] after being granted protection there based on their fears of harm arising from their father's involvement with the INLD. While no corroborative evidence has been provided in support of this claim, I am prepared to accept that this is true. I note that, according to the applicant, one [sibling] left India in 2000 and the other in 2004.
17. The applicant clarified at the SHEV interview that he joined the INLD in 2010. At the SHEV interview the applicant was asked a number of questions about the parties' policies, its election symbol, and its success or otherwise in elections. The applicant's answers were hesitant and confused. Also, initially he was not able to identify the INLD's election symbol, appeared unaware of with which other party the INLD had formed an alliance, and incorrectly stated that the BJP won the 2009 election in Haryana, which was in fact won by the Indian National Congress (INC).¹
18. In response to some of these concerns being put to the applicant at the SHEV interview the applicant clarified that he only worked for the INLD for two months leading up to the elections and that his primary focus was on his family and business. He also stated that the boat journey to Australia and his separation from his family in India have affected him mentally and physically; that he used to have good recall however his memory has been adversely affected. Taking these matters into consideration I am prepared to accept that the applicant was a member of the INLD and worked with his father to support the INLD at the State and Lower House Parliamentary elections in 2009; however, I find after assessing all the evidence that his involvement and commitment to the INLD and to politics in India in general is minimal and his claims of having worked for the party for many years have been exaggerated.
19. I accept the applicant's evidence that he is a Sikh. His name identifies him as a Sikh and he conveyed a high level of knowledge of Sikh history, religion and culture at the SHEV interview. He claims that he was targeted by the men from the RSS because he is a Sikh and they are Hindu nationalists.
20. The applicant claims that he operated two [businesses]. The businesses were jointly operated by him and his friend. They had no permanent employees. The two of them operated the business and engaged casual employees at very busy times. He stated that the businesses were successful. He clarified that when he left India his friend paid him out for his share of the business and his friend is still running the business. I accept that the applicant operated [a] business with his friend as claimed and that he is no longer involved in the business.
21. The applicant claims that men from the RSS stole money from him and physically assaulted him and his family and made threats to harm him and his family again if he did not pay donations and support the RSS and stop supporting the INLD. He claims he also received numerous phone calls demanding donations and making threats. He clarified that his business partner was not assaulted or asked to donate money and stated that this is because he is Hindu and

¹ Election Commission of India, "Statistical Report on General Election, 2009 to the Legislative Assembly of Haryana".

the applicant was targeted because he is a Sikh. The applicant clarified that he did not require hospitalisation or medical treatment after the assault and his only injuries were bruising. He clarified that nobody in his family was actually harmed only threatened with harm. He clarified that he did not pay the donations as demanded however an amount was stolen from the business by the RSS once in 2011. He clarified that his family continue to live at the same home address, his father continues to [work], and he does not claim that his family lives in fear of harm or have been subjected to harm since the applicant's departure from India in 2013.

22. The applicant claims that he and his father reported the first assault to the police however the police told them not to pursue their complaint, "let it be, move on", "otherwise your family may face problems from the RSS". He claims he and his father also approached their local member of parliament who told them that as they were not in power there was nothing they could do.
23. The applicant's claims as summarised above have been generally consistent throughout the processing of his application. I note there is inconsistency in his claims regarding the dates when these events occurred however given that they occurred more than five years ago I am satisfied that these inconsistencies of themselves do not undermine the veracity of the claimed events.
24. While I have some concerns regarding the veracity of the applicant's claims I am prepared to give him the benefit of the doubt. I accept that he was threatened and money was demanded from him in 2010; assaulted and robbed by men from the RSS in 2011; assaulted again in 2012; and he and his family were threatened with harm by men from the RSS if the applicant did not support and donate money to the RSS and stop supporting the INLD. I note the country information which indicates that inaction by police and police corruption is widespread in India.² After assessing the evidence I accept that the applicant's complaint to the police after the first assault resulted in no action by the police and I accept that his complaint to his local Member of Parliament also resulted in no action.
25. The applicant claims that he was targeted because he is Sikh, ran a successful business, and supported the INLD. In assessing the chance of the applicant facing harm now and in the foreseeable future in India I have considered the following. These events occurred between five and seven years ago when the applicant was co-owner of a successful [business]. He is no longer involved with that business. The applicant departed India in September 2013, twelve months after the last assault by men from the RSS, with no further attempts to harm or extort money from the applicant or any member of his family occurring in that twelve months prior to his departure. Since the applicant's departure from India four years ago in September 2013 no member of his family has been subjected to further threats or harm from the RSS.
26. The applicant claims that he was targeted because he is a Sikh and because he supported the INLD. He claims he will not be protected from harm in the future because he is a Sikh and because the Haryana government and the central government are BJP and they are affiliated with and support the RSS. Country information supports the claim that the BJP and the RSS are closely aligned. The BJP is the political wing of the RSS.³ However as noted by the delegate in the SHEV interview at the time of the assault and threat against the applicant by the RSS it was the INC not the BJP that was in government in Haryana.⁴ The INC was also the major party in the governing United Progressive Alliance at the national level after the 2009 elections.⁵ The

² Department of Foreign Affairs and Trade (DFAT), "Country Information Report: India", 15 July 2015.

³ Department of Immigration and Border Protection (DIBP), "Background Paper: India: Political Parties", August 2014.

⁴ Ibid

⁵ Ibid

INC describes its core values as socialism, secularism and democracy. They regard the RSS as being responsible for the assassination of their founder, Mahatma Gandhi and they remain highly critical of the RSS because of its anti-secular, Hindu nationalist principles.⁶ I find that these factors undermine the applicant's claims of political interference in his request for police intervention because the RSS are allied with the BJP and the BJP was in power both at the state level and centrally at the times when he was assaulted and threatened by the RSS. I do not accept that any inaction on the part of the police was because of political interference from the ruling BJP – they were not ruling at that time. I find that inaction by the police in response to the applicant's claim is more likely attributed to poor training, lack of resources and police corruption which is reportedly pervasive throughout India.⁷

27. I note however that in 2014 the general election to the Legislative Assembly in Haryana was contested by four major parties - the Indian National Congress (INC) which was the incumbent, the INLD, the BJP and the Haryana Janhit Congress (HJC).⁸ The BJP won a majority with 47 seats. They had formed an alliance with the Shiromani Akali Dal (SAD), which won 1 seat, giving the alliance 48 seats in total.⁹ The INLD won 19 seats with 24.1% of the vote and the INC won 15 seats.¹⁰
28. I have considered whether this change in government in Haryana will lead to a real chance of the applicant facing harm from men from the RSS. I note that the BJP have a sizeable majority in government in Haryana and are no longer struggling to win government in that state. I note also that the applicant had very minimal involvement with the INLD in the past. He clarified at the SHEV interview that he may not continue his involvement with the INLD if he returns to India however he fears he may be forced to do so by the elders. He did not clarify or provide any further information as to how he may be forced into this and considering his lack of knowledge of politics and of the INLD at the SHEV interview I find this to be an opportunistic claim made to strengthen his application. I accept that the applicant may vote for the INLD in upcoming elections however I am not satisfied that he will become more involved than this. I am satisfied that this will not be because of a fear of harm but because his evidence at the SHEV interview indicates that he is not particularly interested in politics.
29. I also note that the applicant no longer runs a successful [business] and the previous harm to the applicant from the RSS occurred five to seven years ago. I note also that the applicant's father, a long term supporter of the INLD, has not been harmed or threatened by the RSS, with the exception of the threats to the family occurring five years ago in 2012 arising from the demands for donations and support from the applicant who ran a successful business at that time. These factors combined lead me to find that the change of government in Haryana will not give rise to a real chance of the applicant facing harm now and in the foreseeable future in India.
30. I have also considered the applicant's claims of facing harm because he is a Sikh and the BJP is a Hindu nationalist party. In so doing I note that historically serious human rights abuses have been perpetrated against Sikhs in India. Country information indicates that in the 1980s and 1990s, serious human rights abuses were perpetrated against thousands of Sikhs by authorities during operations 'Blue Star', 'Woodrose', and 'Black Thunder'. In addition, as stated by the applicant thousands of innocent Sikhs were massacred in late 1984 by mobs in Delhi and

⁶ INC Website.

⁷ United States Department of State (USDOS), "Country Report on Human Rights Practices 2016 – India", 3 March 2017.

⁸ Election Commission of India, "Statistical Report on General Election 2014 to the Legislative Assembly of Haryana", 11 February 2015.

⁹ Ibid

¹⁰ Ibid

elsewhere, including northern Haryana, following the assassination of the then Prime Minister Indira Gandhi by her Sikh bodyguards.¹¹ Sources indicate that Sikh communities in India and throughout the diaspora remain deeply aggrieved by these historical events. Their grievance is attributed to the perceived lack of justice and the fact that relatively few perpetrators have been investigated and prosecuted in relation to killings and other human rights abuses committed during the 1980s and 1990s.¹²

31. However the most recent reports from Amnesty International and Human Rights Watch do not report that Sikhs in India are ill-treated on the basis of their religion, identity, appearance or any other reason. Also, reports from these groups indicate that in April 2013, pro-Khalistan Sikh groups Sant Samaj, Damdami Taksal, Shiromani Akali Dal (Amritsar) and Akali Dal (Panch Pardhani) staged a rally in Delhi calling for clemency regarding the death sentence imposed on Sikh militant Devenderpal Singh Bhullar. These groups were allowed to demonstrate, without police interference.¹³
32. Reports indicate that while communal violence is not uncommon in India, communal violence involving Sikh communities is now rare. I accept that historically Sikhs have been targeted by Hindu ultra-nationalist groups, collectively known as “Sang Parivar”.¹⁴ However there are no recent reports of such acts and past reports did not indicate that such acts were widespread. It is also notable that, as put to the applicant in the SHEV interview, in the past in the Sikh dominated Punjab the Shiromani Akali Dal (Badal), a party that has strong support among orthodox Sikhs, was in coalition with the BJP.¹⁵
33. In addition the Indian Constitution provides for religious freedom throughout India. The USDOS Human Rights report refers to the International Religious Freedom Report for 2016 noting that, subject to considerations of public order, morality, and health, the Indian Constitution provides for freedom of conscience and the right of all individuals to profess, practice, and propagate religion freely, and mandates a secular state. It prohibits government discrimination on the basis of religion, including with regard to employment, as well as any religion-based restrictions on individuals’ access to public or private facilities or establishments open to the general public. The constitution states religious groups have the right to establish and maintain institutions for religious and charitable purposes, manage their own affairs in religious matters, and own, acquire, and administer property. It prohibits compelling anyone to pay taxes to promote or maintain any specific religion. National and state laws make freedom of religion “subject to public order, morality, and health.” The constitution stipulates that the state shall endeavor to create a uniform civil code applicable to members of all religions across India.¹⁶ The USDOS report does not refer to any incidents of violence against Sikhs.¹⁷
34. There are no current reports indicating that Sikhs at risk of harm would be denied state protection in Haryana or any other Indian state. I note that there are large Sikh minorities in Haryana, Rajasthan, Uttar Pradesh, Delhi, Chandigarh, Jammu & Kashmir, and Himachal Pradesh.¹⁸ No country reports referred to indicated that Sikhs in these locations are subject to discrimination, harassment or targeted harm.

¹¹ Department of Immigration and Border Protection, “Issues Paper: India: The Treatment of Sikhs”, March 2014

¹² Department of Immigration and Border Protection, “Issues Paper: India: The Treatment of Sikhs”, March 2014.

¹³ Amnesty International, “Amnesty International Report 2016-2017” 23 February 2017; Human Rights Watch, “World Report 2017”, 13 January 2017.

¹⁴ Department of Immigration and Border Protection, “Issues Paper: India: The Treatment of Sikhs”, March 2014

¹⁵ Ibid

¹⁶ USDOS, “Country Report on Human Rights Practices 2016 – India”, 3 March 2017.

¹⁷ Ibid

¹⁸ Department of Immigration and Border Protection, “Issues Paper: India: The Treatment of Sikhs”, March 2014

35. I note the applicant's claim that the RSS registered a false case against Om Parkash Choutala, the leader of the INLD and he is now in jail. News reports indicate that in 2008 he was charged along with 53 others for illegally recruiting over 3000 unqualified teachers. He was sentenced to ten years imprisonment and his sentence was upheld by the Delhi High Court and the Supreme Court.¹⁹ Other than the applicant's claim I find no evidence indicating that this was a fabricated case against the INLD leader. I am satisfied that this claim does not give rise to the applicant facing a real chance of harm in India because he is a Sikh and a supporter of the INLD.
36. Given the country reports which indicate no violence targeting Sikhs in recent years and the constitutional and legal safeguards in place to protect Sikhs, I find that the chance of the applicant facing harm now and in the foreseeable future because he is a Sikh is remote.
37. At the SHEV interview the delegate referred to information available to the delegate which indicated that the applicant, since arriving in Australia, has sent significant amounts of money to various people in India and one person in New Zealand. The applicant stated that he sent money to people to help them and gave the examples of helping them pay for their education and for a daughter's wedding. The applicant did not raise any claims of fearing harm in India arising from his having sent significant amounts of money to various people in India and one in New Zealand. As such I am satisfied that this not a relevant consideration in assessing the applicant's claims for protection in Australia.
38. After assessing all the evidence I am satisfied that the applicant does not face a real chance of serious harm now and in the foreseeable future in India because he is a Sikh; because the BJP currently form the government in Haryana and centrally; because he was previously assaulted, robbed and threatened and his family were threatened; because he was previously involved in a successful business; because he was pressured by the RSS to donate money and support the RSS; because the police and a member of parliament failed to respond to his complaint in the past; or for any of the other reasons claimed by the applicant; and for these matters considered cumulatively. I do not accept the applicant's claim that the police will fabricate a case against him because he is a Sikh. I find that the applicant's fears of persecution in India are not well-founded.

Refugee: conclusion

39. 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

40. 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 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

41. Under s.36(2A), a person will suffer 'significant harm' if:

¹⁹ Times of India, "Recruitment scam: Ex-Haryana CM Om Prakash Chautala convicted, arrested", 16 January 2013.

- 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.

Is there a real risk that the applicant will suffer significant harm?

42. I have considered the applicant’s claims individually and cumulatively. As outlined in the preceding pages I have found that the applicant does not face a real chance of serious harm in India in relation to his claims when considered individually and cumulatively.
43. I note that the “real risk” test in the complementary protection provisions imposes the same standard as the “real chance” test applicable to the assessment of “well-founded fear”.²⁰As I have found that the applicant does not face a real chance of serious harm in relation to his claims I find also that he does not face a real risk.
44. I am satisfied that the applicant does not face a real risk of being arbitrarily deprived of his life; of the death penalty; of being subjected to torture or cruel or inhuman treatment or punishment; or degrading treatment or punishment for any of the claims raised by the applicant and assessed in the preceding pages. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is not a real risk that he will suffer significant harm now or in the foreseeable future.

Complementary protection: conclusion

45. 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.

²⁰ *MIAC v SZQRB (2013) 210 FCR 505* per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.