



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR

IAA reference: IAA18/05997

MYANMAR

IAA reference: IAA18/05998

Date and time of decision: 13 February 2019 10:25:00

M Brereton, Reviewer

Decision

In respect of the referred applicant (IAA 18/05997) the IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of the other referred applicant (IAA18/05998), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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 applicants (the applicants) are a mother and son. The mother (IAA 18/05997 – the first applicant) claims to be a stateless Rohingya Muslim from Myanmar. Applicant IAA 18/05998 (the child applicant) was born in [Country 1] holds a [Country 2] passport. The applicants were living in [Country 1] and in October 2012, the applicants left [Country 1] and travelled to [Country 3]. They left [Country 3] by boat in November 2012 and arrived [in Australia] [on] November 2012. On 8 May 2017, they applied for Safe Haven Enterprise Visas (SHEV). A delegate of the Minister for Immigration refused to grant the visas on 12 November 2018.
2. The first applicant claimed to fear harm: as a stateless Rohingya Muslim with no right to reside in Myanmar; from sexual violence as a Rohingya and a Muslim woman; as a single mother; and because she was a failed asylum-seeker and had travelled on false passports. The first applicant also claimed that the child applicant will be stateless.
3. The delegate had significant concerns with aspects of the first applicant's evidence. The delegate found that the first applicant is a citizen of Myanmar and not a stateless Rohingya. The delegate did not accept that the first applicant had suffered sexual violence. The delegate considered the first applicant's profile as a single mother, a woman, a Muslim and a failed asylum-seeker against country information for Myanmar and found that she did not have a well-founded fear of persecution, or face a real risk of significant harm. The delegate found that the applicants are not persons in respect of whom Australia owes protection obligations.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
5. On 11 December 2018, the applicants, through their migration agent, provided a submission to the IAA. Parts of this submission refer to and make argument in respect of information that was before the delegate and the delegate's decision, and to that extent are not new information.
6. The IAA submission refers to the delegate's findings as to the first applicant's credibility and describes the delegate's questioning and findings as presumptive and unfair. The applicants submit that this cannot be resolved by listening to the two interviews conducted by the delegate and that if the IAA has concerns about credibility it needs to interview the first applicant. For the reasons I give below, I have formed a different view of the first applicant's evidence and I am not satisfied that an interview is warranted in the present circumstances.

Applicant's claims for protection

7. The first applicant made claims at the entry interview [in] December 2012 (the entry interview) that her husband had been taken for forced labour in Myanmar and was missing. When she lodged her SHEV application she advised that this was not true. She said that the people smuggler had told her what to say when she first arrived in Australia and she did so. In her application and at the first interview she made what she said were her actual claims. These may be summarised as follows:

- She is a stateless Rohingya Muslim who was born in Mon State, Burma in 1984. She has a Rohingya name and a Burmese name.
 - Her family in Myanmar consists of her parents, a sister, uncles and aunts. Her other sister (and this sister's husband and child) came to Australia with the first applicant.
 - Her father is Rohingya and her mother is Burmese. Her father spoke Rohingya and her mother spoke Burmese but could understand a little Rohingya. The first applicant spoke to her parents in Burmese and did not speak to them in Rohingya.
 - She left the family home at an early age and went to live with an aunt in Yangon. She attended school in Yangon using her Burmese name.
 - She does not have any rights in Myanmar because she is a Rohingya. She has no identity documents or any right to enter Myanmar.
 - She has suffered mistreatment and assaults, including sexual assaults, a forced (illegal) abortion and sexual violence in Myanmar. She has been insulted, discriminated against and taunted when trying to practise her religion. The sexual violence in Myanmar was perpetrated by employers, her first husband and her first husband's family.
 - In 2009 she obtained a false passport and travelled to [Country 1] to work in a [professional role] but when she got to the [Country 1] she found that she had to work as a [labourer]. Her employers mistreated her and kept her passport and the male employer sexually assaulted her. They forced her to accompany them whenever they travelled to [Country 2].
 - She met a [man from Country 2] in [Country 1] and was able to get her passport and travel with him to [Country 2], where they married. They returned to [Country 1] and the first applicant gave birth to the child applicant. Her husband arranged a passport for the child applicant.
 - The husband's family did not accept the first applicant and wanted to take the child applicant to live in [Country 2]. The husband began abusing and assaulting the first applicant. She spoke to her sister, who was in [another country], and to an [woman from Country 3] who lived in [Country 1]. The [woman from Country 3] helped her to arrange visas and the applicants left [Country 1] and travelled to [Country 3], where they met the first applicant's sister. The families travelled together to Australia.
 - The first applicant has had no contact with her husband since 2015.
 - The first applicant's family has told her that the situation for Rohingyas in Myanmar has got worse. She fears being harmed, mistreated and jailed as a stateless Rohingya, because she has used a false passport, and as a Muslim woman. She fears sexual assault by authorities and others. She fears that as a single mother, she will be considered as bringing shame on the family and community and no one will support her. She has no lawful right to enter and remain in Myanmar.
8. Following the interview with the delegate on 14 June 2018 (the first interview), the delegate obtained further information including copies of two passports which appear to have been issued by the Myanmar government and which contain the first applicant's Burmese name, date of birth and photograph. One of the passports indicates that the first applicant had returned to Myanmar in 2011. The delegate conducted a further interview on 15 August 2018 (the second interview) and also wrote to the first applicant pursuant to s.57 of the Act. The first applicant's responses may be summarised as:
- She obtained a false passport through an agent. She is not a citizen of Myanmar.

- She travelled on the false passport to [Country 1] and between the [Country 1] and [Country 2] for work. She returned to Myanmar briefly in 2011 and believed this was to get the false passport extended.
- She did not know about the second passport until the Department showed it to her.

Refugee assessment

9. 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

10. 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.
11. The first applicant claims to be a stateless Rohingya Muslim who was born in Myanmar. She claims to have no identity documents from Myanmar but said that she was able to travel to [Country 1] on a false passport that was arranged by an agent. Following the first interview, the Department obtained copies of two Burmese passports bearing the first applicant’s photograph, name and date of birth. The first passport, [number], was issued in Yangon on [date] 2006 and was valid until [date]2009. A stamp in this passport states that it was renewed in 2008 and was then valid until 29 July 2011. The passport also contains a stamp showing that the first applicant had returned to Myanmar on [date] July 2011. The second passport, [number deleted], was issued in Yangon on [date] 2011 and was valid until [date]2014. A stamp in this passport states that it was issued as a replacement for[the first passport].
12. At the second interview the delegate asked the first applicant to comment on these passports and her (previously undisclosed) return to Myanmar. The first applicant said that she did not know how the extensions were obtained because the family she worked for had arranged all of that. She confirmed that she did return to Myanmar in 2011 and said that this was for an extension, and that she travelled with an agent. She did not handle or look inside her passport and did not know that a new passport had been issued. The delegate put to her that she had said at the first interview that she obtained her false passport in 2009 in order to travel to the

[Country 1], but the first passport had been issued in 2006. It was then extended in 2009. The first applicant said that she could not remember the years or the dates of these events. She said that the agent took her photograph and arranged the passport.

13. The delegate wrote to the first applicant on 28 August 2018, pursuant to s.57 of the Act, to invite her to provide any further comment on the two passports. The first applicant responded (together with post-interview submissions) on 28 September 2018. She referred to the statements in her application and the previous interviews where she had said she had never held a legitimate passport. She reiterated that she had obtained a false passport through a woman she had worked with in Myanmar. She referred to information contained in a report by the Australian Department of Foreign Affairs and Trade (DFAT)¹ that document fraud is highly prevalent in Myanmar and can take the form of fake documentation, or genuine documentation provided on the basis of fraudulent information. She submitted that this was supported by other information which notes the ease with which fake Burmese passports can be obtained.² She referred to her statement in her SHEV application that her employers in [Country 1] were aware her passport was fake and used threats to report this to keep her in [Country 1], which was consistent with other country information.³ She submitted that she was unaware of the second passport and that her passports were kept in the possession of her employers. When she travelled, including to Myanmar in 2011, the passport was held by the agent who travelled with her. The first applicant submitted that possessing a passport from Myanmar does not necessarily mean that the first applicant has a right to one.
14. In her submission to the IAA, the first applicant submits that the delegate's conclusion that the passports were genuine is not supported by country information that was before the delegate. She submits that if it is accepted that there is a real possibility of someone from Myanmar obtaining a false passport relatively easily, then she should have been given the benefit of the doubt that the passports were false as she had claimed.
15. The first applicant's claim that the passport contains false information is, on its face, not inconsistent with the country information before me; however, I am unable to reconcile this claim against the fact that the first applicant returned to Myanmar in 2011 and obtained a replacement passport. The information before me indicates that false Myanmar passports were readily obtainable, including outside Myanmar. If the first applicant's passports were, as she claims, obtained and extended by an agent without any input from the first applicant (and as claimed in the case of the second passport, without the first applicant's knowledge), I consider it unlikely that the first applicant would have needed to return to Myanmar in 2011 to extend or renew her passport. The first applicant did return and she entered Myanmar on her first (and claimed false) passport through [Airport 1]. She has not claimed to have faced any difficulties doing so. Her new passport was issued 14 days later. These factors strongly suggest that the first applicant returned to Myanmar in order to obtain a new passport and that doing so required her presence. While that does not, of itself, exclude the possibility that the passport was issued on the basis of false information, I have noted that the first applicant has claimed that she was unaware of the second passport. I do not consider this is plausible given my finding that she returned in order to obtain this. I also take into account her failure to disclose her return to Myanmar until this fact was raised by the delegate. These factors lead me to conclude that the first applicant was trying to conceal her return and the issue of the second passport in order to obfuscate the details around its issue. This casts doubt on the

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Myanmar - January 2017 ", 10 January 2017, CISED50AD28.

² [Source deleted].

³ World Health Organisation, "World Report on Violence and Health" 2002; United Kingdom Home Office, "Country Policy and Information Note Vietnam: Victims of trafficking", 1 September 2018, CIS7B839419728.

credibility of her evidence in this respect and I do not accept the first applicant's claim that the information in the passports is false. Overall, I am not satisfied that the passports have been issued on the basis of false information and I find that the passports are genuine and were issued on the basis of the first applicant's true information.

16. The first applicant claims that she is a stateless Rohingya and does not have any other identity documents. She claims that her father is Rohingya and her mother is ethnic Burmese. She claims that she was born in Mon State, but later moved with an aunt to live in Yangon, the capital.
17. The Myanmar Government recognises eight major ethnic groups (the Kachin, Kayah/Karenni, Kayin/Karen, Chin, Bamar, Mon, Rakhine and Shan) as part of 135 'national races'. The law grants full citizenship to members of the 135 officially-recognised national races. DFAT states that the Muslim population who identify as Rohingya are not among the 135 recognised ethnic groups; nor are people of Indian, Chinese, Anglo-Burmese or Nepali descent.⁴ I am satisfied that the first applicant was issued passports as a national of Myanmar, which contradicts the claim that she has no documents, is a Rohingya and that she is stateless. I find that she is a documented national of Myanmar and that Myanmar is the receiving country for the purposes of this review. However, I have not formed the view that the remainder of the first applicant's evidence is not credible on its face, or when considered in light of the passports and nationality evidence and the circumstances behind them.
18. The child applicant, who is currently aged about six, was born in [Country 1]. His father is a [Country 2] national who, the first applicant believes, has no right to enter or reside in Myanmar. The first applicant claims that she has had no contact with the father since 2015. The child applicant holds [Country 2] citizenship and a [Country 2] passport but I am satisfied that the child applicant will be able to and will remain with the first applicant if she returns to Myanmar. The applicants' post interview submission submitted that the operation of the citizenship laws in Myanmar mean that the child applicant is unlikely to be able to obtain citizenship there but, for the reasons that have given below, I have not found it necessary to address this issue.
19. The first applicant has consistently claimed to be Muslim and answered some general questions about the Muslim faith during the interviews. The documentary evidence in the review material does not refer to the first applicant's religion but does indicate that she is married to a Muslim man and that her son has what appears to be a Muslim name. The country information before me indicates that Muslims live throughout Myanmar and as noted above, some Muslim ethnic groups can obtain citizenship and passports. I accept that the first applicant is a Muslim.
20. The first applicant has provided a history of significant sexual violence, abuse and exploitation, including an illegal forced abortion (arranged by an employer). It is not necessary to recount the details of the claimed incidents other than to note that the perpetrators are said to be a number of her former employers and their friends in Myanmar, her first husband and his family in Myanmar, her employer in [Country 1], and her second husband and his family in [Country 1] and [Country 2]. Some of these incidents are related to domestic or intimate partner violence but most are claimed to relate to her vulnerable status as a young woman and a young Muslim woman (and, to an extent, a Rohingya). These claims were not raised at the entry interview. At the entry interview the first applicant's reason for leaving Myanmar was said to arise from the disappearance of her husband, apparently at the hands of the Myanmar

⁴ DFAT, "DFAT Country Information Report - Myanmar - January 2017 ", 10 January 2017, CISED50AD28.

authorities. At the SHEV interview she said that the people smuggler told her to say this but that the abuse claims she has now made were the truth. I also take into account the detail that she was able to provide in relation to the current claims and the consistency of her evidence in this regard. Having regard to all of these factors, I am satisfied that her explanation for the discrepancy with the entry interview is reasonable and credible. I am satisfied that her current claims in relation to domestic, physical and sexual abuse and assault have not been fabricated for the purpose of her application.

21. I accept that the first applicant was subjected to domestic and family violence, including sexual assault, by her ex-husband, her current husband, and their families. She has not claimed to have had contact with her ex-husband in Myanmar since she went to [Country 1] in 2009 and has not claimed that he has been looking for her in Myanmar or that he will become aware of her presence should she return. Her current husband is not a national of or resident in Myanmar and she has not claimed that he will become aware of her location should she return. I am not satisfied that she faces a real chance of serious harm now or in the reasonably foreseeable future arising from her past experiences of domestic violence.
22. I accept that the first applicant was subjected to mistreatment and sexual violence by her employers and other persons in Myanmar and later in [Country 1]. She claims that this was in part due to her status as a Muslim and a Rohingya and that the authorities would not protect her, but I have not accepted that the first applicant is a Rohingya. Nevertheless, I consider that the first applicant was in a vulnerable position as a young Muslim woman working in Myanmar and later as a foreign worker and a Shi'a Muslim in [Country 1] on a temporary visa. I accept that her employers (and later, her in-laws) exploited her status as part of the abuse and violence that was perpetrated on the first applicant. As noted earlier, however, the first applicant has not claimed to have any ongoing contact with her husband or his family, none of whom are said to be Myanmar citizens or resident in Myanmar. She has not claimed to have any ongoing contact with her former employers in Myanmar or [Country 1], or that she will need to resume working for them should she return to Myanmar. While I have sympathy for the first applicant and her experiences, I am not satisfied that she faces a real chance of harm from her ex-husband, her current husband, their families or her former employers in Myanmar or [Country 1] should she return to Myanmar.
23. I have considered whether she faces a real chance of similar harm from other persons now or in the foreseeable future should she return to Myanmar. The first applicant's post-interview submission is that her risk profile should be considered cumulatively; as a woman, a Muslim woman and a single mother, in the context of her past history of sexual exploitation and violence.
24. The first applicant claims that she lived with her aunt in Yangon but when her aunt became aware of the sexual violence incidents, the aunt said that this brought shame on the family and forced the first applicant to leave. The first applicant claims that she left and lived in a hostel until she went to [Country 1] for work. Her SHEV application indicates that her parents and one sister live in Mon State; however, her entry interview states that her parents live in Yangon, her sister lives with her aunt, her aunt is her emergency contact in Yangon, and that she has contacted her aunt to tell her that she is safe. At the interviews she said that her parents live in Mon State but occasionally come to Yangon to visit family, including her aunt. She said that she has not had contact with her parents for some years and that she is not close to her sister in Myanmar. I have listened to the audio recording of the entry interview and I take into account that when first asked about family contact in Myanmar, she indicated that she had no such contact. When the interviewing officer asked again, the first applicant gave the aunt's number. I am satisfied that the information in the entry interview is not

inconsistent with the first applicant's claims that she has no contact with her parents. I am prepared to accept that the first applicant has little or no contact with her immediate family in Myanmar and that she may not be able to access her aunt for support should she return to Yangon. I am prepared to accept that she will have no access to family support in Myanmar.

25. The DFAT information before me reports that women in Myanmar may be at risk from sexual violence. According to DFAT, the laws prohibiting rape and violence against women in Myanmar are outdated; for example, the *Penal Code 1861* has language prohibiting assault of a woman with intent to 'outrage her modesty'. There is no specific legislation outlawing spousal abuse or domestic violence. Under the current legislation women need to provide medical records to pursue a rape case, but the lack of doctors in rural areas and the requirement to go to the police before undergoing the medical examination make successful prosecution difficult. The delays can also prevent the woman receiving timely medical attention, including preventing pregnancy or HIV. All abortion is illegal, including for a rape-induced pregnancy. While rape is illegal in Myanmar, marital rape is not, unless the 'wife' is under 14 years of age.
26. The parliament has been developing new laws around gender-based violence since 2012, but there is reportedly some resistance to the new laws from within the civil service and the judiciary. The new draft legislation reportedly would allow women to abort rape-induced pregnancies, albeit subject to the agreement of a (currently all-male) health committee. DFAT understands that the draft law also proposes making marital rape illegal. While reliable data on the prevalence of rape and violence against women is unavailable, DFAT understands that these incidents are highly prevalent. Credible sources reported that women rarely seek justice for violence or rape through formal legal mechanisms, and more often resolve issues through customary laws. Under these customary processes, community harmony can often be seen as more important than the individual woman's wellbeing. These processes typically involve the victim discussing the incident with other women and, if it is deemed sufficiently serious, with the men in the family. If the male family members agree that the incident was unacceptable, they then take it up with local leaders. The solution often takes the form of an apology rather than a punishment; for example, a pig or cow may be killed and used to feed the whole village.
27. DFAT concludes that violence against women is reportedly highly prevalent and notes consistent and credible reporting of rapes of Muslim women (not restricted to Rohingyas), including by security forces, and that the authorities often do not investigate these crimes. More generally, DFAT assesses that women from the Muslim community, particularly in Rakhine state, face high levels of discrimination on the basis of their gender.⁵ While I note the reference to Rakhine state in particular, I do not understand this reference to mean that Muslim women outside Rakhine state do not face similar levels of discrimination.
28. Other information before me⁶ also notes that rape laws are not enforced effectively and that rape and domestic violence, including spousal abuse, remain serious problems in Myanmar. There are reports of police verbally abusing women who have reported rape and women could be sued for impugning the dignity of the perpetrator, although victims typically did not report spousal abuse or domestic violence.
29. The first applicant's evidence is that she was harmed on multiple occasions by different employers. It is not a case of a single employer exploiting her, or a single opportunistic event. I consider that these experiences, together with the first applicant's cumulative profile as a single mother and a Muslim woman are significant factors in her risk profile. The first applicant

⁵ DFAT, "DFAT Country Information Report - Myanmar - January 2017 ", 10 January 2017, CISED50AD28.

⁶ United States Department of State, "Country Reports on Human Rights Practices for 2017 – Burma", 20 April 2018, OGD95BE927379.

was vulnerable in the past because of her profile as a single woman without male protection and she was a victim of ongoing sexual violence and exploitation by her employers and others as a consequence. The information before me does not indicate that the situation for Muslim women, including women who have already suffered sexual violence or sexual exploitation in Myanmar has improved. There is nothing in the current country information that comforts me that she would not continue to be vulnerable to sexual violence or exploitation because of her cumulative profile. Further, her profile has not changed in a positive sense (for example, now having the protection of a domestic partner) and in fact now includes being a single mother with the added responsibility of a young child. In my view, that responsibility is likely to exacerbate her vulnerability and I take into account that she has no established home or community to return to, has no contact with her immediate family and was forced to leave her aunt's house when she reported being subjected to sexual assault in the past. As she is a single mother without any family or domestic partner support, I consider that her vulnerability to sexual violence or exploitation is significantly more pronounced than a Muslim woman or a single Muslim woman who is able to access such support and protection.

30. Having regard to the information above and the totality of the first applicant's circumstances, I am satisfied that there is a more than remote chance that the first applicant would face serious harm, in the form of sexual violence and exploitation, should she return to Myanmar. I am satisfied that she faces this harm for the essential and significant reason of being a Muslim woman.
31. Section 5L of the Act provides that a person is to be treated as a member of a particular social group 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.
32. I am satisfied that Muslim women are a particular social group as those characteristics are shared by each member of the group. I am satisfied that the first applicant shares the characteristic and that the characteristic is an innate or immutable characteristic. I am also satisfied that the characteristic is not a fear of persecution.
33. Section 5J(2) of the Act provides that a person will not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country. I have noted above the concerns and criticisms of the Myanmar authorities' approach to crimes against women and Muslim women. There is no information in the material before me that indicates that the police or other authorities take effective steps to protect Muslim women from exploitation or sexual violence. The information does not indicate that the first applicant would be able to access such protection in any particular area of Myanmar. I am satisfied that the first applicant will not be able to access effective protection measures in Myanmar.

34. Section 5J(3) of the Act provides that a person will not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution. I am satisfied that the harm that the first applicant would face would be directed at her because of her religion and gender and I am satisfied that there are no reasonable steps that she could take to modify her behaviour so as to avoid the real chance of persecution. I find that s.5J(3) does not apply.
35. Having regard to all of the above, I am satisfied that the first applicant has a well-founded fear of persecution within the meaning of s.5J of the Act.

Refugee: conclusion

36. The first applicant meet the requirements of the definition of refugee in s.5H(1).

Member of same family unit

37. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is relevantly defined in r.1.12(4) of the Migration Regulations 1994 to include a dependent child of the family head.
38. I have found that the first applicant meets the criterion in s.36(2)(a). I am satisfied on the evidence before me that the child applicant is a dependent child of the first applicant and therefore meets the definition of 'member of the same family unit'. I am satisfied that the child applicant meets the family unit criterion in s.36(2)(b).

Decision

In respect of the referred applicant (IAA 18/05997) the IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of the other referred applicant (IAA18/05998), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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.