



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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PAPUA NEW GUINEA  
IAA reference: IAA19/06847

PAPUA NEW GUINEA  
IAA reference: IAA19/06849

PAPUA NEW GUINEA  
IAA reference: IAA19/06848

PAPUA NEW GUINEA  
IAA reference: IAA19/06850

Date and time of decision: 21 August 2019 15:38:00  
C Wilson, Reviewer

**Decision**

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In respect of the referred applicant (IAA19/06847) the IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

In respect of the other referred applicants (IAA19/06848, IAA19/06849, IAA19/06850) the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(c)(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

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### Visa application

1. The referred applicants (the applicants) are a mother (the applicant, IAA19/06847) and her three youngest children. The applicant is from [Village], Papua New Guinea (PNG) and the three children were born in Australia.<sup>1</sup> [Village] is in 'the Protected Zone': an area covered by the *Torres Strait Treaty*, which allows free movement between Australia and PNG for inhabitants of the Protected Zone, for the performance of traditional activities within the Protected Zone. The applicant arrived in Australia [in] September 2012, when she came by boat to [Island 1], an excised offshore place<sup>2</sup> in the Torres Strait, seeking medical attention. Seeking medical treatment does not meet the definition of 'traditional activities' as defined in s.5(1) of the *Migration Act* and Article 1K of the *Torres Strait Treaty*, and no argument has been put forward by the applicant that it does. I find the applicant did not make a traditional visit under the *Torres Strait Treaty* when she arrived in Australia, and I find therefore she arrived as an *unlawful* non-citizen, not a *lawful* non-citizen as defined in s.13(2) of the *Migration Act*.
2. On 19 June 2017 the applicant applied for a Safe Haven Enterprise Visa (SHEV). As an unlawful non-citizen who entered Australia by sea at an excised offshore place, the applicant is an unauthorised maritime arrival as defined in s.5AA(1) of the *Migration Act* and is a fast-track applicant under s.5(1). The children are fast-track applicants as they are children of a fast-track applicant within the meaning of s.5(1).<sup>3</sup> Only the applicant made claims for protection, and her children applied as members of her family unit.
3. On 17 July 2019 a delegate of the Minister for Home Affairs (the delegate) refused the application. The delegate did not accept the applicant faced a real chance or real risk of harm from her ex-husband.

### 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).
5. On 8 August 2019 the applicant provided a written statement responding to the delegate's decision. The only new information provided in the statement is information regarding the medical facilities at [Village], particularly those for giving birth. The applicant says the nurse in [Village] is not trained to deliver babies, it is culturally inappropriate in any event to give birth there, and the clinic built by AUSAID in 2003 remains unused. The applicant appears to be providing this information in response to the delegate's comments in their decision that the applicant should have given birth at the medical facilities and would have taken her children there for immunisations and other health visits, and therefore there should be birth certificates and baby books for her three children in PNG.

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<sup>1</sup> Although the children were born in Australia, there is no claim and no evidence to indicate they are Australian citizens. There is also no evidence they have PNG citizenship. However as I have reached a favourable conclusion on the basis of their mother's claims, I have found it unnecessary to determine their country of nationality or 'receiving country' for the purpose of this review.

<sup>2</sup> Section 5(1) *Migration Act 1958*; r.5.15C *Migration Regulation 1994*.

<sup>3</sup> IMMI 16/049.

6. There is no explanation from the applicant why the information about health facilities could not have been provided to the Department before the decision was made. The lack of birth certificates for her three oldest children was an issue known by the applicant and her then representative. Having regard to the reasons in my decision, nothing turns on this new information in any event. The new information is not information arising post-decision and I am not satisfied it could not have been provided before the delegate made their decision. It is also not credible *personal* information, as it is not information about an identified or identifiable individual. I find neither s.473DD(b)(i) or (ii) are met, and therefore I must not consider this new information.

### **Applicants' claims for protection**

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7. Only the applicant has made protection claims. As noted above, her three young children have applied as members of her family unit.
8. The applicant's claims can be summarised as follows:
  - The applicant was born in [Village], PNG. Her father had [number] wives and [number] children. She was customarily adopted and raised by her [relative]. She has extended family including cousins in [Village].
  - The applicant met her ex-partner when she was [age] years old. He pressured her to leave school at [age]. They married in a customary marriage when she was [age]. They had three children (dates of birth not provided) before she came to Australia at [age]. He ex-partner was violent towards her from the beginning of the relationship.
  - The applicant spent 7 months in a hospital in [Australian City], from February to September 2012, for the treatment of [medical condition].
  - When the applicant returned to her village in September 2012, her husband severely beat her. She claims he was jealous of the attention she had been getting. He beat her with [an object], in particular damaging [details deleted]. Her family took her to [Island 1] for medical help. She was transferred to [Island 2] Hospital for treatment of her injuries. She did not return to PNG after treatment and raised protection claims.
  - The applicant claims she cannot return to her home in PNG as she fears further harm, including being killed, by her ex-partner. She claims that since she left PNG her ex-partner has threatened her mother and beaten their three children.
  - Since being in Australia the applicant has had three more children, with three different fathers. She claims her ex-partner will want to harm her for having children with other men.
  - The applicant claims the authorities in PNG cannot and will not protect her, and nowhere would be safe for her to relocate to in PNG. He ex-partner's family also want to harm her. His father is an influential [person] in Port Moresby.

### **Refugee assessment**

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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 applicant claims to be a citizen of PNG, and provided a Birth Certificate to the Department as evidence of this. She has provided a consistent and persuasive account of being from [Village], [District], Western Province, PNG. Her mother, oldest three children and many members of her extended family continue to live in [Village], and I accept this is the only home she knew in PNG and the place she would return to. I find PNG is her country of reference and [Village] is her home area.
12. The applicant claimed to have experienced significant domestic violence at the hands of her ex-partner. The applicant claims to fear serious harm from him, or even members of his family, if she is returned to her home area. Before I make findings on whether the persecution she fears is for one of the reasons in s.5J(1)(a), I have considered whether she has suffered harm from her ex-partner in the past and faces a real chance of harm from him in the future.
13. At the SHEV interview the delegate appeared to accept the applicant had been the victim of domestic violence throughout her relationship with her ex-partner, and did not test this claim or put the applicant on notice that it may not be accepted. However in their decision the delegate found they had concerns about the veracity of the claims. Whilst accepting the applicant was assaulted by her ex-partner in September 2012, the delegate found the applicant had not experienced ongoing domestic violence because there was a lack of documentary medical evidence or witness statements to support the claim. The delegate also took into account that the applicant's ex-partner was now in a new relationship. The delegate considered there was not a real chance the ex-partner would assault the applicant should she return to her home area.
14. The applicant provided medical evidence to support her claim to have been physically harmed by her ex-partner in September 2012, including:
  - Doctor's Consultation notes, [Island 1] clinic, [date] September 2012. *'Deformity [specifics of physical injury]. Was assaulted by husband with [an object] yesterday*

*4pm to stop her from moving out of the house...[Transfer for] review in [Island 2] for x-ray and consideration of need for [transfer] south’;*

- Nursing Progress Notes [date] September 2012. *‘Carried in following alleged assault [date]...In obvious distress...Abusive partner known to authorities’;*
  - [Island 2] Hospital Admission record dated [date] October 2012 which notes a history of *‘assaulted 2 days ago by husband, [specifics of injury]’;*
  - Letter dated [date] October 2012 from [Ms A], Clinical Nurse Consultant, [Island 1] [Health] Care Centre, regarding the need for the applicant’s mother to remain on [Island 1] *‘until such time as [Island 2] authorities have developed a safety management plan for her daughter ...[The applicant] is currently an inpatient at [Island 2] Hospital following an alleged brutal attack with [an object] by her partner...which left her with multiple life threatening injuries’.*
15. I accept the first three pieces of evidence as reliable evidence that on [date] September 2012 the applicant sought medical care for injuries sustained in an assault. I accept she stated at the first possible opportunity that the person who assaulted her was her then partner. I note one report records that the ex-partner was known to authorities to be abusive. There is nothing to indicate a person other than her then partner assaulted her, and no apparent motive why anyone would. I accept her claim, supported by the medical evidence, that in September 2012 the applicant was assaulted by her ex-partner.
16. I have some concerns about the letter from Ms [A]. The letter contains two different fonts and refers to the applicant having ‘multiple life threatening injuries’ which appears inconsistent with the other medical evidence which describes serious but not life threatening injuries. The delegate noted similar concerns about the letter, but there appears to have been no attempt to verify it with the clinic. I find this letter is not reliable and I give it no weight. If it is a non-genuine document, I find it does not undermine the credibility of the claim to have been assaulted by her ex-partner.
17. The applicant also provided a psychological assessment by Ms [B], a psychologist with the [Organisation]. Ms [B] assessed the applicant in [year]. The assessment included an interview and use of the Harvard Trauma Questionnaire (HTQ) and the Hopkins Symptoms Checklist (HSC). The report records the applicant claiming her ex-partner was physically and emotionally abusive towards her from early in the relationship. He was controlling and tried to isolate her from her family. He was also abusive to the children. Ms [B] noted the applicant had visible scars on her body from the violence she had suffered. Ms [B] concluded the applicant’s presentation showed symptoms of depression, anxiety and post-traumatic stress disorder (PTSD). Her score for the HSC test also showed significant anxiety and clinical levels of depression. Ms [B] also concluded that the applicant’s clinical presentation and psychological symptoms were consistent with the account given by her of suffering severe domestic violence perpetrated by her partner. I find this report is credible evidence of the applicant suffering symptoms consistent with her claim to have been in an abusive relationship with her ex-partner.
18. I have also sighted case history notes from the Department. Those notes record that in her dealings with the Department the applicant has consistently claimed to have suffered domestic violence from her ex-partner throughout that relationship, and not just on one occasion in September 2012. On a number of occasions she also told Department staff she

feared for the safety of her first three children, still [in Village], because their father had allegedly threatened them and been physically abusive toward them.

19. The assault on the applicant in September 2012 by her ex-partner was a serious assault. The applicant claims her ex-partner was a controlling, jealous and violent man who had physically assaulted her throughout the relationship. Her claim is supported by country information, which describes domestic and family violence towards women in PNG as 'pervasive' and 'endemic'.<sup>4</sup> It is also supported by her claims to have been forced to finish school at [age] by her ex-partner. Whilst the medical evidence before me is from one assault, I consider it unlikely to have been a one-off attack, particularly in light of the psychologist report which also supported the applicant's claims to have been abused over a long period of time. On the evidence before me, I accept the applicant was the victim of domestic violence throughout her relationship with her ex-partner.
20. The applicant claims her ex-partner will still want to harm her, even though she left PNG nearly 7 years ago and he is in a new relationship. She fears he will particularly want to harm her for having three children with other men whilst in Australia. Whilst I cannot know what the ex-partner's motivations are, I consider it is not farfetched, given his past abuse of her, that he would continue to harbour controlling and jealous feelings towards the applicant as the mother of his three children. The evidence before me indicates the ex-partner is still present in [Village] and has regular access to the children. He will therefore have opportunities to interact with the applicant. I note also that although the applicant considers him to be her ex-partner, it is possible he does not view the relationship as finalised. He has taken on another partner with whom he has children, but it is customarily acceptable for a man in PNG to have multiple wives or partners. If she were to return to [Village] he may view her as his partner still. I consider it is not farfetched, and in fact that there is a real chance, that he would seriously harm the applicant in the reasonably foreseeable future in light of his history of violence towards her, his possible jealousy regarding her relationships with other men in Australia resulting in three more children, the need for them to have at least some level of ongoing contact because of their three children, and the endemic levels of violence against woman in PNG.
21. The delegate refers to information known to the Department about the applicant's family. There is an allegation that the applicant's extended family are known to Department staff in the [Island 2] office, and many members of the family have been asking for visas to come to Australia. Two female members of the family are said to have made applications for protection visas on the basis of domestic violence. One is said to have been granted the visa, and the other to have admitted her claims were false. The imputation is that if one member of her family made false domestic violence claims, then the applicant may have too. However the applicant has provided persuasive medical and other evidence that shows she has suffered domestic violence. Her strong desire, and that of members of her family, to reside in Australia may raise doubts about the credibility or exaggeration of her claims, but do not necessarily mean her claims are false. I have accepted on the persuasive evidence before me that the applicant has been the victim of domestic violence and I have accepted she would be at risk of future violence amounting to serious harm from her ex-partner if she returns to her home area.
22. The applicant claims to fear harm not only from her ex-partner, but also from members of his family. In relation to his extended family, there is no evidence the applicant was harmed by

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<sup>4</sup> DFAT Country information Report Papua New Guinea, 10 February 2017; Violence against women in PNG: How men are getting away with murder, Jo Chandler, Lowy Institute, August 2014.

any of them in the past. As the delegate discovered when looking at the applicant's [social media] page, the applicant is in fact friends on [social media] with many members of her ex-partner's family. The delegate was critical of this, but I accept she may maintain friendships with his family members, who she would have grown up with in her community, and this is not inconsistent with her claimed fear of her ex-partner. There is no claim anyone in his family ever harmed her in the past and her willingness to maintain contact with them also indicate to me there is no subjective fear of harm from them. I consider the claim that someone in her ex-partner's family may harm her in the future is mere speculation.

23. The applicant's fear of harm in her home area is from one individual. I find his motivation to harm her is for personal reasons, not for any of the reasons in s.5J(1)(a). In a case that pre-dates the codification of the definition of a refugee in the Act, the High Court held that harm from an individual that is not for any of the reasons specified could still amount to persecution if there is a failure of the state to protect for one of more of the five reasons in the *Refugees Convention* (the Convention).<sup>5</sup> The reasons in the Convention are the same as the five reasons in 5J(1)(a) of the Act, that is, a fear of persecution for reason of race, religion, nationality, particular social group, or political opinion. Given the similar wording between the Convention and the Act, the principles in the case of *Khawar* would seem to be equally applicable to the statutory definition of refugee.<sup>6</sup>
24. DFAT reported in 2017 that gender discrimination existed at all levels in PNG. In 2014 PNG was ranked 158 out of 188 countries surveyed on the UNDP's Gender Inequality Index. Violent crimes against women are extremely high across PNG, with domestic and family violence particularly endemic. Family violence is a crime under the *Family Protection Act* (2013), but the act has not been fully implemented. Police and prosecutors rarely pursue criminal charges against perpetrators of family violence, even in the most serious cases involving attempted murder, serious injury or repeated rape. Police often demand money from victims before acting, or simply ignore the victims. If police did get involved they typically mandated mediation and reconciliation. They are reluctant to refer victims for protection orders.<sup>7</sup>
25. The US Department of State similarly reports that gender based violence against women and girls in PNG is a significant issue. Two thirds of women had reportedly been struck by their partners. Due to stigma, fear of retribution and limited trust in the authorities, most women did not report domestic violence to authorities. Police were unresponsive to complaints of partner violence, and such violence was committed with impunity.<sup>8</sup>
26. Taking this country information into account, I accept the applicant's claim that the police or local authorities could not, and would not, protect her from violence perpetrated by her ex-partner. It may be the failure of the state to protect the applicant could amount to a fear of persecution for one of the reasons in s.5J(1)(a). However, I have not found it necessary to make findings on this issue because, for the following reasons, the fear of persecution is not well-founded as I find the real chance of harm does not relate to all areas of PNG.
27. The applicant's husband resides in [Village] and also travels within the Torres Strait. There is no evidence he has sought to travel to Australia to seek her out for harm, or even that he has made threats to her since she left [Village]. I consider her real chance of harm would be

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<sup>5</sup> *MIMA v Khawar* (2002) 210 CLR 1.

<sup>6</sup> *Khawar* was referred to by the Full Court of the Federal Court in a matter which applied the statutory definition of a refugee: *AOJ18 v MHA* [2018] FCAFC 220.

<sup>7</sup> DFAT Country information Report Papua New Guinea, 10 February 2017.

<sup>8</sup> US Department of State Country Reports on Human Rights Practices 2017 Papua New Guinea, 20 April 2018.



through their regular and chance interactions in [Village], particularly if he was intoxicated or angry for other reasons on such occasions. His lack of contact with her whilst she has been in Australia indicates he is unlikely to want to track her down wherever she may move in PNG. I do not accept he would deliberately seek her out if she relocated to another part of PNG. I find her real chance of harm exists only in her home area.

28. I am satisfied the applicant's real chance of serious harm does not extend to all areas of PNG. Accordingly, I find the applicant's fear of persecution is not well-founded, as defined in s.5J(1).

#### **Refugee: conclusion**

29. 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**

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30. Under s.36(2)(aa) of the Act, 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**

31. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
32. I rely on the findings above to find the applicant faces a real risk of significant harm from her ex-partner if returned to her home area in PNG.

#### **Qualifications to the real risk threshold**

33. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:
- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
  - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or

- the real risk is one faced by the population of the country generally and is not faced by the person personally.
34. The risk to the applicant from her ex-partner is one that is faced by her personally, not the population of the country generally. I find this qualification does not apply.
  35. I have considered whether the applicant could obtain protection from the authorities such that there would not be a real risk. In relation to her home area, and for reasons given above, I find the applicant could not obtain protection such that there would not be a real risk.
  36. I have found the applicant's chance of harm from her ex-partner exists only in her home area. I have considered whether it would be reasonable for the applicant to relocate to an area in PNG where there would not be a real risk.
  37. At the SHEV interview the then representative submitted relocation for a single woman was extremely difficult in PNG. The representative submitted it could not be assumed that the applicant could find family outside of her home area to live with. She would struggle to subsist with her (then) five children to care and provide for.
  38. The applicant is a single mother of six children. Three of her children are currently in the care of her mother, and sometimes their father, and this arrangement has been in place for 7 years. Cultural adoption is a common practice in PNG, as in the applicant's case who was raised not by her biological parents but by [relatives]. It may arguably be reasonable for her oldest three children to remain with her mother in [Village]. I accept however it would not be reasonable to find the applicant should ask relatives in [Village] to take in her three youngest children to enable her to relocate as a single woman. She has been the sole carer of these three children since they were born in Australia, and there is no suggestion she would want them to be adopted, customarily or otherwise, as she has taken no steps for this to occur in Australia even though she has family here who may be in a position to take one or more of her children. I accept that as she is raising these three children in Australia she would want to continue to do so if returned to PNG. She would therefore be relocating as the mother of at least three young children for whom she is the sole parent.
  39. I acknowledge the high risk of social discrimination faced by women in PNG. DFAT reports there are a number of barriers to full participation of women in the workforce. These include cultural stigma, gender discrimination, the risk of violence and sexual abuse, low level of education for women, and other long-standing traditional values that restrict the ability of women to participate fully in the workforce.<sup>9</sup> As a single mother of three with no work history, I accept the applicant would struggle to find employment to support herself and her children wherever she may relocate in PNG. I note the applicant has some relatives in Port Moresby. Her [social media] list of friends shows she has contact on social media with her relatives. There is no evidence however any of them have financially or otherwise supported her whilst she has been in Australia, or are willing or able to support her in PNG. If she were a single woman without children it may be reasonable for her to call on her relatives in Port Moresby to assist her in settling in there. However, as a single woman with three children in her immediate care, and three more she may want to join her, and lack of employment prospects, she will require long term accommodation and financial support for her large family. I consider it would not be reasonable to ask this of her relatives, when there is no evidence before me that any of them are financially able, or even willing, to do so. I have

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<sup>9</sup> DFAT Country information Report Papua New Guinea, 10 February 2017.

considered whether there are support services provided by the state to assist the applicant to relocate and settle in an area such as Port Moresby. I note DFAT refers to a report by Human Rights Watch (HRW) which found a dire lack of services and lack of safe housing for people requiring assistance after suffering family violence. HRW found there was no safety net, particularly for those who had dependent children, to assist survivors to leave their abusers and become financially independent.

40. In all of the circumstances, as a woman with at least three dependent children, limited education, no work history, and no relatives that I can identify who would be willing and financially able to support her and her children, I find it would not reasonable for the applicant to relocate to an area of PNG an area where there would not be a real risk that she will suffer significant harm. For this reason I find the qualification in s.36(2B) regarding the ability to reasonably relocate to avoid significant harm does not apply.

#### **Complementary protection: conclusion**

41. There are 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 IAA19/06847 meets s.36(2)(aa).

#### **Member of same family unit**

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42. 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 defined in r.1.12 of the Migration Regulations 1994 to include children.
43. I rely on the birth certificates to find applicants IAA19/06848, IAA19/06849 and IAA19/06850 are the children of the applicant. I also find they are all under 18 years of age. I find they are the dependent children of the applicant as defined in r.1.03 and are therefore members of her family unit.
44. As applicant IAA19/06847 is a person mentioned in s.36(2)(aa), applicants IAA19/06848, IAA19/06849 and IAA19/06850 meet s.36(2)(c)(i).

#### **Decision**

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In respect of the referred applicant (IAA19/06847) the IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

In respect of the other referred applicants (IAA19/06848, IAA19/06849 and IAA19/06850) the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(c)(i) of the *Migration Act 1958*.

## Applicable law

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### **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.

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#### **36 Protection visas – criteria provided for by this Act**

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- (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.

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*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.