



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

KUWAIT
IAA reference: IAA19/06477

Date and time of decision: 16 April 2019 09:49:00
B Mericourt, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be stateless. His former country of habitual residence is Kuwait. On 7 August 2017 he lodged an application for a Temporary Protection Visa (TPV). In a decision dated 15 March 2019 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.
2. The delegate accepted the applicant is a stateless Bidoon whose former country of habitual residence is Kuwait and found that he was a documented/registered Bidoon in Kuwait. The delegate accepted the applicant would suffer some discrimination as a Bidoon non-citizen in Kuwait but this did not amount to serious or significant harm. He was satisfied the applicant had departed legally as the holder of an Article 17 passport and that it was valid only for the duration of the specified trip and has since expired. However, he considered the applicant would be able to return to Kuwait voluntarily with the assistance of the International Organisation for Migration (IOM) and there was no real chance or real risk of serious or significant harm for reasons of his failure to return within the specified period, return as a failed asylum seeker, residence in Australia for a prolonged period or as a consequence of being a subject in the Department's data breach in February 2014.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA received a submission from the applicant's representative on 11 April 2019. To the extent that the submission engaged in argument with the delegate's decision based on information which was before the delegate, I have had regard to it. The IAA received a second submission on 15 April 2019 which is a copy of a country report already before the delegate¹.
5. The submission refers to a number of pieces of information sourced from country information reports about the situation in Kuwait, most of which was already before the delegate and therefore does not amount to new information. The only sources not before the delegate were the Human Rights Watch (HRW) World Report dated January 2019 and a Reporters without Borders article dated January 2018². There is no explanation about why this information could not have been provided before the delegate's decision. It is not personal credible information but general country information. The applicant's representative argued there are exceptional circumstances to justify consideration of this information, that is, it is relevant to the review and the applicant's fear of returning to Kuwait, crucial to any meaningful assessment of his claims and "capable of affecting the reviewer's consideration". I take the latter to mean it could have affected the delegate's consideration of the applicant's claims. The Reporters without Borders article reports on restrictions to journalists and lack of freedom of expression in Kuwait. The representative argued this could explain the lack of independent information available to the public (and therefore to the delegate). The HRW Report refers to the Kuwaiti government prosecuting people for criticising the emir, the government, religion and rulers of neighbouring countries.

¹ UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50

² Human Rights Watch (HRW), "Human Rights Watch World Report 2019: Kuwait", 17 January 2019, 20190118091502; Reporters sans Frontières/Reporters without Borders, "Kuwait: Gagging Orders", January 2018

The applicant's representative goes on to argue the fact that the applicant sought asylum in Australia means he would be considered to be criticising the government, ergo there are exceptional circumstances to justify consideration of this information. I consider this is an argument about the implications of the applicant's having sought asylum and have had regard to this argument. However, as the information already before the delegate refers to the risk of harm to people who are perceived to be critics of the emir, Kuwaiti government and religion I do not consider there are exceptional circumstances to justify consideration of the information and it does not meet s.473DD.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
- The applicant is a stateless Bidoon who will never be given citizenship rights in Kuwait. Consequently he is persecuted and discriminated against, in particular in employment. He is not given any respect or safety in Kuwait;
 - The applicant will be imprisoned for not returning to Kuwait within the specified period on his Article 17 passport. The applicant's file will be marked with a 'security block' as a consequence and he will be mistreated by authorities, interrogated and tortured on his return;
 - He will be tortured because the authorities did not want him to leave or to expose them to the rest of the world. The authorities will torture/mistreat his family for the same reason;
 - The authorities now know he lives in Australia as a result of the data breach in February 2014 and this will make things worse for him;
 - The authorities visited his home after he departed and his parents told them he was in Australia. The authorities told his parents that the applicant would never get citizenship. The applicant fears that if he returns the authorities will cancel his relatives' Review Cards (and chance of attaining citizenship) because he did not return earlier.

Refugee assessment

7. 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

8. 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.
9. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.³
 10. The applicant claims to have been born in Kuwait and is stateless. His father and siblings are also stateless and his immediate family currently reside in Kuwait, with the exception of two brothers who reside in Australia. He is a Shia Muslim.
 11. The applicant's claims as to his identity and statelessness have been consistent since his arrival in Australia. He conducted interviews in Arabic. He provided two uncertified copies of his birth certificate, one issued in [year] and the other in 2014, both with accredited translations. He also provided an uncertified copy of his Review Card issued in 2012 with an accredited translation. He previously provided the Department with a scanned copy of another Review Card issued in 2006. The delegate found no evidence that any of these documents were *bogus documents* as defined in s.5(1) of the Act.
 12. At his first protection interview the delegate put to the applicant that his birth certificates record his mother's name differently and the 2014 birth certificate indicated his mother was a Saudi Arabian citizen. At his second protection interview the applicant said he had spoken to his mother who had confirmed she is a Saudi citizen. Different sources of country information provide different advice about whether the applicant would be able to claim Saudi citizenship once he attained 18 years of age⁴. However, as he was not born in Saudi Arabia and never lived there, I am prepared to accept that he is not eligible for Saudi citizenship and that he has not claimed Saudi citizenship.
 13. The UK Home Office reports that all Kuwaiti Bidoon are classed as illegal residents by the Kuwaiti state⁵. Review Cards (also known as security cards) are issued to those Bidoon who are registered with the 'Central System to Resolve Illegal Residents' Status' in Kuwait. The first card's colour and both cards' dates of issue and six and one year validity periods are all consistent with country information about such cards.⁶ The Review Card is the key document which determines whether a Bidoon is documented or not.
 14. The applicant's birth certificates record that his father's nationality is 'unknown' in the first certificate and 'stateless' in the second certificate. The applicant stated both his parents [and siblings] all reside in Kuwait and are all stateless. Two brothers reside in Australia.
 15. The applicant stated that he was able to depart Kuwait legally as the holder of a valid travel document which specified the allowable term of his travel to [another country]. He obtained the travel document on medical treatment grounds. The UK Home Office report states that according to the Foreign and Commonwealth Office (FCO) travel documents are not issued

³ *Chan v MIEA*, (1989) 169 CLR 379 at 389.

⁴ US Department of State, "Country Reports on Human Rights Practices for 2017 – Saudi Arabia", 20 April 2018, OGD95BE927323; The Legal Agenda, "Nationality and Cases of Statelessness in the Middle East and North Africa", 28 July 2017, CISED50AD5011

⁵ UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50

⁶ *Ibid*

routinely to Bidoon, however, some Bidoon are issued with temporary travel documents under Article 17 of the Kuwaiti Nationality Law. They do not confer nationality on the holder. They can only be issued within Kuwait and holders can re-enter Kuwait only within the term of validity of the document.⁷

16. Based on the applicant's evidence and the consistencies between his evidence and the available country information I am satisfied the applicant is a stateless Bidoon whose former country of habitual residence is Kuwait and I have assessed his claims based on his returning to Kuwait without valid travel documents or passport.
17. According to the latest government figures, there were approximately 88,000 Bidoon in Kuwait, while Human Rights Watch estimated the Bidoon population at more than 100,000 in 2018. The law does not provide noncitizens, including Bidoon, a clear or defined opportunity to gain nationality⁸. Some Bidoon and international NGOs reported that the government did not uniformly grant some government services and subsidies to Bidoon, including education, employment, medical care, and the issuance of civil documents, such as birth, marriage, and death certificates.⁹
18. The applicant has claimed that he suffers discrimination in Kuwait as a stateless Bidoon. He received an education to year [level deleted] and left school primarily for financial reasons. In his TPV application he stated that he was unemployed for five years after leaving school and then worked for 10 months in [a job] before departing Kuwait. He was paid at a lower rate than a Kuwaiti citizen. At his protection interview he claimed certain employment was not available to him as a non-citizen and in his [job] he earned [amount] dinar per month whereas a Kuwaiti citizen may earn 10 times more than that for the same job. Country information indicates that the legal minimum private sector wage in 2013 was 60 dinars per month¹⁰ which is considerably less than the applicant earned at that time.
19. The applicant said he had access to medical care (for his asthma) but not at the standard citizens enjoyed.
20. Various sources indicate that documented Bidoons are entitled to government benefits including five-year renewable residency, free healthcare and education and ration cards. However, they are discriminated against in employment and sometimes have difficulty accessing services due to discrimination and bureaucratic red tape¹¹. The UK Home Office states in its report that the individual circumstances of Bidoon in Kuwait varies greatly although all can be stigmatised through their statelessness and the extra difficulty they can face in accessing services. However, some can circumvent such obstacles through their connections to Kuwaiti families. Registered Bidoons are able to access basic services although this may be difficult, costly and to a lower standard than Kuwaiti citizens and expatriates and they can access employment although this might only be possible in the informal sector.¹²
21. I accept the applicant has previously experienced discrimination in employment, level of income and accessing services and this is likely to continue to be his experience now and in the reasonably foreseeable future if he returns to Kuwait. However, based on his evidence

⁷ UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50

⁸ US Department of State, "Country Reports on Human Rights Practices for 2018 – Kuwait", 13 March 2019, 20190314111204

⁹ Ibid

¹⁰ US Department of State, "Kuwait – Country Reports on Human Rights Practices 2012", 1 April 2013

¹¹ UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50; US Department of State, "Country Reports on Human Rights Practices for 2018 – Kuwait", 13 March 2019, 20190314111204; Human Rights Watch, "Prisoners of the Past: Kuwaiti Bidun and the Burden of Statelessness", 1 June 2011, CIS20810;

¹² UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50

and the relevant country information, I am satisfied he has not been denied a capacity to earn a livelihood of any kind, denied access to basic services where the denial threatens his capacity to subsist or suffered such significant economic hardship that threatens his capacity to subsist. I am therefore satisfied that any discrimination he may experience does not amount to serious harm as defined in s.5(5) of the Act.

22. I am satisfied the applicant was in Immigration Detention on 31 January 2014 and his personal details were published on the Immigration Department website in a data breach which occurred in February 2014. He was informed by the Department by letter of the data breach and his personal information, including his name, gender, citizenship (or country of origin), date of birth, boat arrival details and details of detention were published. No information about any claims for protection was released. While there is no definitive information as to whether or not the Kuwaiti authorities accessed this information I accept that they may have done so. If this is the case, the Kuwaiti authorities would have his personal information and the fact that he was in detention because he arrived in Australia unlawfully by boat. Irrespective of this, if the applicant is returned to Kuwait it is more than likely this information would be evident regardless of the data breach as the Kuwaiti authorities would need to be contacted to provide him with a temporary travel document to enable him to return to Kuwait. I therefore find that the data breach does not, of itself, give rise to a real chance of the applicant facing serious harm or significant harm in Kuwait now or in the reasonably foreseeable future.
23. I am satisfied that the applicant departed Kuwait lawfully as the holder of a valid Article 17 travel document, this document expired at the end of the specified period of his trip and he no longer has the necessary documentation to return to Kuwait. The delegate could not locate any source that specifically addressed whether a documented Bidoon who departed Kuwait on a legitimately issued Article 17 passport, but was returned to Kuwait after the expiry of that passport would be readmitted to Kuwait. However, at the applicant's second protection interview the delegate put to the applicant that the Department's experience is that Bidoons can return to Kuwait. The delegate referred to one case in early 2017 when the Embassy of Kuwait in Canberra issued an emergency travel document to a Bidoon voluntary returnee who had departed Kuwait with a legitimately issued Article 17 passport. That asylum seeker had returned with the financial assistance of the International Organisation for Migration (IOM).¹³ The applicant responded that he believed that person would have a 'black spot' (security flag) against his whole life as a consequence.
24. I have had regard to the fact the applicant has travelled to Saudi Arabia on religious pilgrimages three or four times and re-entered Kuwait without difficulty as the holder of an Article 17 passport. However, I do accept that if he returns now or at any time in the future it will not be within the validity of his specified travel. I accept he cannot obtain another Article 17 passport outside of Kuwait and will need to have other temporary travel documents issued to enable him to return. Given the information above, that a voluntary stateless Bidoon was issued such documents and returned to Kuwait, and the fact there is no information before me that stateless Bidoons are not permitted to re-enter under these circumstances I am satisfied it is possible for the applicant to return to Kuwait.
25. I accept that there is a real chance the applicant will be assumed by Kuwaiti authorities to have sought protection in Australia, given his prolonged absence and the means of his arrival in Australia. The delegate put to the applicant at his second protection interview that he had been unable to locate any country information that supported his claim that he would be

¹³ "Evidence of AVR to Kuwait for a stateless Bidoon former asylum seeker in January 2017", CLD2019/11778034

imprisoned or have the imposition of a security flag or block for returning after the expiry of his Article 17 passport. The applicant was adamant this would happen both to him and his entire family. The delegate invited him to consult his representative and provide any further information within two to three weeks. No further information about this issue was provided by the applicant before the delegate made the decision three months later. The applicant's representative did provide a submission to the Department on 20 December 2018 about the treatment of Bidoons in general in Kuwait as reported by Amnesty International which states they continue to suffer discrimination and were denied citizenship rights. It also referred to the imprisonment of government critics and on-line activists and those charged with spying for Iran and Hizbullah. The applicant has no profile as a government critic or political activist. Nor has he suggested he would be accused of breaching national security in any way.

26. In the submission to the IAA the applicant's representative has argued that as he would be identified as a failed asylum seeker he would then be assumed to have an adverse political opinion, that is, he would be assumed to be critical of the Kuwaiti government, emir and/or religion. The applicant himself referred to a friend (also a stateless Bidoon) who had obtained British citizenship or permanent residency and returned to Kuwait. He was jailed and beaten. The British government had to intervene and "take him back". He did not indicate whether this person had a previous adverse political profile in Kuwait or had been involved in anti-Kuwaiti activities outside Kuwait. The applicant claims he will also be jailed, interrogated and beaten if he returns to Kuwait as a stateless Bidoon who sought asylum. He will be asked where he got the money to leave, who helped him to leave and criticise him or accuse him of something. The government is corrupt and they will "celebrate" hitting him.
27. There is no independent information before me to suggest the applicant would be at risk of arrest or serious harm when he has had no profile as a critic of the government, political activist, journalist or blogger. In these circumstances it is also possible to speculate that the Kuwaiti authorities could also assume the applicant departed and applied for asylum for economic reasons given Bidoon's usual economic status in Kuwait. The applicant has not provided any evidence about the reasons his friend was granted residency in the UK or independent country information about harm to returned asylum seekers who do not have an adverse political profile. The applicant has not satisfied me that there is any real risk of serious harm to previously documented Bidoons who have never had an adverse political or criminal profile who return as failed asylum seekers to Kuwait after a prolonged absence.
28. I have given consideration to the applicant's claim that he would have a "black spot" (security block) against his name if he returned and his family would lose their documented status. The UK Home Office report of July 2016 states "In the country guidance case of NM (documented/undocumented Bidoon: risk) Kuwait CG [2013] UKUT 00356(IAC) (24 July 2013), the Upper Tribunal held that the evidence relating to the documented Bidoon does not show that they are at real risk of persecution or breach of their protected human rights. The undocumented Bidoon, however, do face a real risk of persecution and breach of their human rights."¹⁴
29. The same report indicates that a security flag or security block prevents nationality claims and blocks access to government services, including access to free health care. The system was originally intended to deny nationality to those Bidoon who had fought for Iraq during the 1991 invasion, but has since been used against activists and demonstrators as a disincentive to further political activism. The number of Bidoons with blocks is unknown, with 850-900 estimated to have been issued blocks for collaborating with Iraqi forces and some

¹⁴ UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50

observers suggesting as many as 30,000 have been blocked for other reasons.¹⁵ The US Department of State in its 2019 report notes that the Kuwaiti authorities have arbitrarily used security blocks on Bidoons to prevent nationality claims and access to government services based on security or criminal violations either committed by the Bidoon resident or his/her family members.¹⁶ Neither of these sources indicate that stateless Bidoon returnees from overseas are targeted for security blocks. The applicant has not claimed and there is no information before me to suggest that he would be accused of a criminal offence or that he would be accused of breaching national security as a consequence of seeking asylum in a Western country or as a consequence of not returning within the specified travel period of his Article 17 passport. Whilst I accept where a person is unable to renew their security card or is subject to a security block and unable to access basic services they would then be at real risk of discrimination so severe it amounts to persecution¹⁷, the applicant has not satisfied me that there is a real risk this would occur. There is no independent information to support his claim that this would occur as a result of his having not returned within his Article 17 prescribed travel period, or his being a returned failed asylum seeker who sought protection in a Western country and who has resided in a Western country for a prolonged period.

30. The applicant has claimed that his parents were visited at their home by authorities after his departure and enquired about his whereabouts. They told the authorities he is in Australia. The authorities then told his parents he would never get citizenship even if they did. At his protection interview the applicant also said that he thought the authorities would be happy he had left as it was one less stateless person in Kuwait. I note the applicant has not claimed that his family has been unable to renew their security cards (registration as documented Bidoons) since his departure. I accept it is possible the authorities enquired about him with his parents when he did not return within the specified travel period. It is possible the authorities threatened he would never gain citizenship, but the applicant has already claimed one of the reasons he left was because he could not obtain citizenship rights. He said his father and grandfather were born in Kuwait (or more accurately in the area that has now become Kuwait since it became an independent state in 1961) and are considered long-term residents (that is, they are documented Bidoons). His father has been unsuccessfully trying to obtain citizenship for many years. The applicant has not satisfied me that this situation would change if he returns to Kuwait now or in the reasonably foreseeable future. The applicant has not satisfied me that returning to Kuwait outside a prescribed travel period and/or applying for protection in a Western country are reasons to refuse to renew security cards for individuals or family members of individuals unless the authorities have identified the person as having committed a criminal offence or the person has been identified as a person who has criticised the Kuwaiti government or emir or otherwise has an adverse political profile. There is no information before me that the applicant has been identified as having such a profile.
31. Statelessness in and of itself does not give rise to the definition of refugee. S5H(1)(b) which defines the meaning of refugee states that in a case where the person does not have a nationality and is outside the country of his or her former habitual residence is unable or unwilling to return to it owing to a well-founded fear of persecution. In this matter I am satisfied that the applicant does not have a well-founded fear of persecution as I am satisfied there is no real chance that he will suffer serious harm for reasons of his statelessness, failure to return within the prescribed travel period on his Article 17 passport or return as a failed

¹⁵ UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50

¹⁶ US Department of State, "Country Reports on Human Rights Practices for 2018 – Kuwait", 13 March 2019, 20190314111204

¹⁷ UK Home Office, "Country Information and Guidance Kuwait: Bidoons", 1 July 2016, OGD7C848D50

asylum seeker who has sought protection in a Western country, having regard to the extensive examples of serious harm in s.5J(5) of the Act.

Cumulative consideration of the applicant's claims

32. I am satisfied the applicant is a stateless Bidoon who was documented/registered in Kuwait, his former country of habitual residence. I am satisfied he suffered some discrimination in Kuwait, particularly in respect of employment and earnings, but that any discrimination he experienced or may experience in the future does not amount to serious harm having regard to the extensive examples of serious harm in s.5J(5) of the Act. I am satisfied he departed legally as the holder of a valid Article 17 passport and has not returned within the specified period of travel. I accept it is possible the applicant will be known to have been in detention in Australia in 2014 and that he arrived here unlawfully by boat. I accept he will be assumed to be a failed asylum seeker if he returns to Kuwait now or in the reasonably foreseeable future and he may be questioned about his departure on his return. However, I am not satisfied that any questioning he undergoes amounts to serious harm. There is no information before me that the applicant or any members of his family will lose their review cards or status as documented stateless persons as a consequence of his return after a prolonged absence. I am satisfied there is no real chance the applicant will suffer serious harm for reasons of being a member of a particular social group, that is, failed asylum seekers who are stateless Bidoons, who have failed to return within the specified travel dates of their Article 17 issued passports and who have sought protection in a Western country and resided for a prolonged period in a Western country.
33. Having regard to all the applicant's specific circumstances in the context of the country information about the current situation in Kuwait for stateless Bidoons, I am not satisfied that there is a real chance of the applicant being seriously harmed by the Kuwaiti authorities or by any other group or person. I am not satisfied that any of the treatment I accept he may experience will amount to serious harm when considered cumulatively.

Refugee: conclusion

34. 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

35. 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

36. 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.

37. Real chance and real risk involve the same standard.¹⁸

38. I am satisfied the applicant was a documented stateless Bidoon who was born in Kuwait and his former country of habitual residence is Kuwait. I am satisfied that he suffered some discrimination in accessing services, particularly employment and discrimination in the amount of income he earned. However, for the reasons discussed above, I am satisfied the discrimination the applicant may suffer on his return to Kuwait as a stateless Bidoon does not constitute significant harm having regard to the definition of significant harm in s.36(2A) of the Act. I do not consider that he will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment as defined in s.5(1) of the Act.

39. I am satisfied the applicant had no adverse political profile in Kuwait prior to his departure and has not engaged in any activities since his departure that would attract the adverse attention of the Kuwaiti authorities. There is no information before me to suggest the applicant has committed any criminal offence in Kuwait. I am satisfied the applicant will return to Kuwait outside the prescribed travel period on his Article 17 passport which has since expired and that there is a real risk he will be assumed to be a failed asylum seeker who has sought asylum in a Western country. However, the applicant has not satisfied me there is any real risk he will suffer significant harm as a consequence of these factors.

40. Considering the treatment I have accepted the applicant will experience as a whole, I am not satisfied that it cumulatively amounts to significant harm. Nor am I satisfied that there is a real risk that the applicant will suffer significant harm based on the cumulative effect of his circumstances and profile.

Complementary protection: conclusion

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

Decision

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

¹⁸ *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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