



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA19/06567

Date and time of decision: 31 May 2019 10:55:00

R Topham, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Iranian citizen. On 26 September 2016 he lodged an application for a Safe Haven Enterprise (Class XE) (Subclass 790) Visa (SHEV).
2. In a decision dated 12 April 2019, the delegate of the Minister for Immigration (the delegate) refused to grant the SHEV on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Iran.

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 Immigration Assessment Authority (IAA) has not received any submissions or new information from the applicant.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He rejects and hates Islam. He openly challenged Islamic practices by drinking alcohol, having a girlfriend, getting into arguments and criticising Islam. His military service was extended due to noncompliance with his prayer obligations.
 - In or around a month before he departed Iran, the applicant was detained by authorities for failing to produce evidence of his temporary marriage with [M]. [M] was raped during this incident, which led the applicant to attempt suicide and to drink heavily.
 - Around two to three weeks following the rape incident, the applicant attacked a sheik and caused damage to a mosque. The applicant's brother was arrested, beaten and imprisoned for his involvement in this incident.
 - The applicant fears persecution in Iran for reasons of his religious and political beliefs. To intentionally violate a Shia clergyman and a mosque would be seen as acting against Islam as well as the Iranian government.
 - The applicant fears persecution in Iran because of his membership of the group of persons who have openly rejected Iranian cultural and religious mores through their words and actions.
 - The Department's 'data breach' has exacerbated the danger he would face should he be returned to Iran.

Refugee assessment

6. 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

7. 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.
8. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in Farsi and submitted copies and translations of his Iranian driver's licence and national identification card. Like the delegate, I accept the applicant's nationality and identity are as claimed and find Iran to be the receiving country for the purpose of the application. There is no evidence before me to suggest that the applicant has a right to enter and reside in any country other than Iran and I am satisfied he does not.
9. During the SHEV interview the delegate clarified the applicant's ethnicity. The applicant stated that his father was from [a city], which is considered to be both Turk and Kurd, and that some people regard the applicant as Turkish and others as Kurdish. The delegate pressed the applicant for a more precise answer and the applicant confirmed that he is Turkish. The applicant was provided with a number of opportunities to advance his claims in his SHEV application, SHEV interview and through post-interview submissions. The applicant was also represented during each stage of the process by a registered migration agent. At no point in the process did the applicant raise a claim, either directly or indirectly, to fear harm on the basis of his ethnicity, nor did his representative, and I am satisfied that no such claim arises from the material before me.

Religious beliefs and background

10. Since his arrival in Australia, the applicant consistently claimed to have no religion. The statement of claims in support of his SHEV application provided a detailed account of his upbringing in a strict Muslim family, where he suffered abuse and neglect at the hands of his mother as a result of her strict religious practices. He claimed that he started to experiment with alcohol ('araq') at the age of 13 and would often go to school drunk; that he openly challenged his brother and friends and sometimes attended mosque intoxicated with their knowledge; that he was called a devil ('sheitan') by his mother and deviant or corrupt ('monafegh') by his uncles and the community; and that he left home as a result of the criticism and pressure his father faced from the community to harm the applicant as a result of his anti-Islamic behaviour.

11. During the SHEV interview, the applicant was not particularly forthcoming and provided little elaboration on these initial claims. Having listened to the SHEV interview, I am not satisfied as to the extent to which the applicant described his family's devotion to Islam in his written statement. When the delegate questioned the applicant regarding his family's religious practices, the applicant merely confirmed that his mother was strict as she wore a burqa, and that his father took a more moderate approach. Other than mentioning that he was beaten at home for drinking alcohol and failing to say his prayers, the applicant did not offer any further information to support his initial claims of abuse, neglect or threats at the hands of his mother, extended family or the community, or any other criticism or pressure faced by his father as a result of the applicant's behaviour. There was a stark contrast between his written statement and subsequent oral evidence suggesting the applicant has exaggerated his claims. Of themselves, these claims do not reflect the applicant's alleged hatred for Islam, particularly to the extent claimed in his written statement. He certainly did not express a strong rejection of Islam or any religious-based hatred in the SHEV interview.
12. Country information before the delegate supports the applicant's claim that he has no religion. The information indicates a growing trend of secularism in Iran at the time the applicant departed Iran, particularly amongst the younger generation of Iranians who increasingly push the boundaries of accepted religious behaviour, due to a rejection of the type of Islam pushed by Iran's theocratic leaders.¹ I am prepared to accept that the applicant developed a dislike for Islam at a young age, that his behaviour may have contradicted religious practices imposed on him as a child as he grew older, and that this may have led to disciplinary action by his mother. I am also willing to accept that the applicant was a non-practising Muslim when he left Iran and that he does not currently identify with any religion. However, in my view the applicant has exaggerated his religious background and opposition to Islam in his written statement, casting doubt on these being motivating factors in relation to his follow-on claims: that he openly challenged his brother and friends; engaged in arguments and conversations critical of Islam; attended mosque intoxicated or that his service was extended as a result of non-compliance with his prayer obligations in the military. Apart from expressing a general reluctance to, and dislike of daily prayer rituals, none of these follow-on claims were raised by the applicant during the SHEV interview. When the delegate questioned the applicant in relation to his religious practices in Iran, the applicant indicated that he did not like saying prayers, and that he was "into girls and drinking". He did not raise or discuss any incidents of directly or openly challenging anyone with respect to their religious beliefs, nor did he suggest or demonstrate a tendency or occasion in which he engaged in arguments or conversations critical of Islam. In my view, the applicant's oral evidence completely failed to substantiate his initial claims concerning any overt expression of opposition towards Islam. I am not satisfied these incidents occurred as claimed.
13. The applicant made claims with respect to his encounters with the authorities for reasons of his clothing, car, alcohol consumption and association with girls (social behaviour). In the arrival interview he stated that he was detained for one to two days for drinking alcohol, and that his daily life was impacted due to his "t-shirt, car, girlfriend". In his written statement, he claimed that he was beaten by the Basij for "wearing a t-shirt they didn't like" and "being out with a girl". The applicant did not mention any interactions with the authorities as a direct consequence of consuming alcohol in his written statement. In the SHEV interview, the applicant indicated that he was caught trying to pick up girls in Moharam (Islamic month), and that he encountered the authorities on two occasions due to alcohol. The first incident

¹ "The Revival of Nationalism and Secularism in Modern Iran", LSE Middle East Centre (United Kingdom), November 2015, p. 11, CISEC96CF14725; "Iran's Other Religion", Boston Review (United States), 1 June 2003, CX82EDE9415499; "Young Iranians affected by the embargo, tired of political Islam", Asia News IT, 1 April 2015, CXBD6A0DE4714.

occurred at the age of 16 or 17, when he paid money to the authorities and signed an undertaking prior to being released. On this occasion his hair was also cut and he had to sweep the floor. The second incident occurred at the age of 20 or 21, where he was beaten in addition to making payment and signing an undertaking. The delegate asked the applicant whether there were any other issues resulting from the two incidents, to which the applicant responded “no other particular incidents, but I was going through a hard time”. The applicant’s oral evidence did not include encounters with the authorities as a result of his dress, car or association with girls.

14. There are obvious discrepancies in the applicant’s evidence regarding the enforcement measures taken against him as a result of his social behaviour. I have considered the applicant’s inability to provide consistent information with respect to alleged beatings by the authorities, which casts serious doubt on this particular aspect of his claims. However, given the overall consistent theme and ease with which the applicant provided oral evidence in the SHEV interview, I am prepared to accept the applicant had some degree of interaction with the authorities in the past as a result of his social behaviour. I consider the applicant’s evidence supported by country information on the situation of ‘Westernised’ Iranians and ‘immoral behaviour’ at the time of his departure from Iran. The information suggests that authorities could take a heavy-handed and unpredictable approach in enforcing standards of Islamic conduct in the community, including Islamic dress and public appearances with non-family members of the opposite sex.² The information also indicates that it was relatively common for youth that do not wear traditional Islamic dress to experience some form of low-level harassment from security authorities, such as being subjected to searches, car checks and verbal warnings for dress or behaviour.³ Though rarely demonstrated or spoken of openly, pre-marital and extra-marital relations were also common in Iran.⁴ In light of the above, I am prepared to accept that the applicant engaged in undesired social behaviour which may have caused him to suffer low-level harassment from the authorities but nothing more.
15. In the absence of any evidence which indicate credible instances of behaviour that may be regarded critical of Islam, I do not accept that he obtained an adverse profile from the authorities as suggested. Whilst I am prepared to accept that the applicant had a degree of interaction with the authorities as a result of his social behaviour, based on his evidence overall, I am not satisfied that these encounters were anything other than minor. I am not satisfied that the applicant created any significant impression with the authorities as a result of his behaviour and as such, I do not accept that he was identified as a ‘troublemaker’, or person of interest, or that he had any particular profile with the authorities as a result of his anti-Islamic behaviour or membership of a particular social group as claimed. That he was subsequently able to obtain a passport without any apparent difficulties further supports this finding.
16. I find the applicant was not a person of interest to the Iranian authorities when he left Iran. There is no information before me which indicates that he has been involved in any activities since arriving in Australia, either online or in public, which would bring him to the adverse attention of the Iranian authorities. I do not accept that there is a real chance that the applicant will face any harm from the authorities upon return to Iran for any of the above reasons.

² Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Iran”, 29 November 2013, CIS26780, 3.60.

³ Ibid.

⁴ DFAT, “DFAT Country Information Report Iran”, 29 November 2013, CIS26780, 3.66.

17. I do not accept that there is a real chance that the applicant will face any harm from the authorities upon return to Iran for reasons of being considered an apostate or imputed with an adverse political or religious opinion. Country information before the delegate indicates that abstaining from Muslim rituals such as not attending mosque would not necessarily arouse suspicion, as many Iranians do not regularly attend mosques.⁵ Non-practicing Muslims form a large part of the cities and generally lead normal daily lives without being pressured to observe Muslim precepts.⁶ DFAT also reported at this time that it was highly unlikely that the government would monitor religious observance by Iranians and thus it would generally be unlikely that it would become known that a person was no longer faithful to Shia Islam.⁷ There is no recent evidence before me which suggests the situation has changed.
18. DFAT advises that a Muslim who leaves their Islamic faith can be considered an apostate and charged accordingly.⁸ Apostasy is not codified in Iran's Penal Code, but provisions in the Constitution allow judges to apply sharia if Iranian law is silent about an issue. While DFAT considers it unlikely that individuals will be prosecuted on charges of apostasy, authorities continue to use religiously-based charges (such as 'insulting Islam') against a diverse group of individuals such as Shi'a members of the reform movement, Muslim-born converts to Christianity, Baha'i, Muslims who challenge the prevailing interpretation of Islam (particularly Sufis), and others who espouse unconventional religious beliefs (including members of recognised religious groups).⁹ Religious-based cases usually have clear political overtones or are connected to proselytisation.¹⁰ I do not accept that the applicant fits any of these categories or conduct described above, or that he has any interest in espousing anti-religious views.
19. I also do not consider that the applicant's social behaviour would be perceived to be overt expressions of anti-Islamic sentiment. Based on country information, I consider such behaviour consistent with the growing 'westernised' youth culture in Iran, particularly those from middle-class areas, who aspire to live a more progressive and modern lifestyle.¹¹ I note the applicant is from Karaj, a major city in Iran, and by his own admission his family is "well off".
20. DFAT reports it is aware that some men have claimed to have been discriminated against on the basis of their dress although it is common to see young men with 'Western-style' clothing in larger cities.¹² DFAT has also reported that where there have been incidents of harassment, it is likely to have been the result of over-zealous enforcement of dress code standards by individual security authorities in particular locations (particularly outside of major cities), or because the individual has come to the attention of authorities for separate activities (ie political activists).¹³ The applicant does not fit this profile.
21. DFAT has also confirmed the prevalence of unmarried couples appearing together in public, particularly among the middle and upper classes, and the widespread use of alcohol across

⁵ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), "Iran: Freedom of Religion; Treatment of Religious and Ethnic Minorities COI Compilation September 2015", Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), 1 September 2015, CISEC96CF13622, p 31.

⁶ Ibid.

⁷ DFAT, "Country Information Report – Iran", 21 April 2016, CIS38A8012677, 3.55.

⁸ DFAT, "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226, 3.41.

⁹ Ibid at 3.43.

¹⁰ Ibid.

¹¹ DFAT, "Country Information Report – Iran", 21 April 2016, CIS38A8012677, 3.75 – 3.80.

¹² DFAT, "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226, 3.85.

¹³ Ibid.

Iranian society.¹⁴ The country information indicates that unconventional clothing, pre-marital relations and alcohol consumption are not uncommon especially in Iran's major cities. The information further indicates that prosecutions for alcohol consumption is not common, and that authorities do not actively investigate or entrap individuals consuming alcohol in their own homes. The applicant has not expressed a desire or intention to drink alcohol in public upon return to Iran and while I note his representative's statement at the start of the SHEV interview that he still drinks quite a lot when he is not working, there is no evidence which demonstrates that he is suffering from a diagnosed medical condition involving the consumption of alcohol. I consider the requirement to observe Islamic norms in Iran, such as not consuming alcohol, does not ordinarily constitute persecution because it applies to all Iranian citizens, and there is no country information before me to indicate it is discriminatory on its face or in its application.¹⁵ Overall, I consider any future encounters the applicant may have with the Iranian authorities as a result of alcohol consumption to be a consequence of a law of general application and not persecution within the meaning of s.5J(4) of the Act.

22. Whilst I am satisfied that the applicant may be subjected to low-level harassment such as searches, checks, fines or warnings on account of his social behaviour, I do not consider that these actions, either alone or cumulatively, amount to serious harm. I am not satisfied that there is a real chance the applicant will suffer persecution amounting to serious harm or systematic and discriminatory conduct on any of these bases.
23. For the reasons stated above, I do not accept that the applicant has a well-founded fear of persecution from the authorities upon return to Iran.

Incidents involving relationship with [M]

24. The applicant claimed that he was in a relationship with [M] for approximately one year before he departed Iran. He claimed that they were in love and spent most of their time together, but that he did not want to get married. The applicant and [M] obtained a temporary marriage certificate ('sigheh') from a sheik to legalise their relationship.
25. The applicant claimed the following:
 - They could not produce evidence of their temporary marriage when they were stopped and questioned by Basij on their way home from Karaj one night;
 - They were separated and taken to a Basij station. The applicant was questioned and released after paying a bribe. [M] was raped (incident with Basij);
 - Shortly after the incident with the Basij, the applicant attempted suicide when he found out what happened to [M]. He was in hospital for three days and started to drink heavily about a week later;
 - Around two to three weeks following the incident with Basij, the applicant became intoxicated, attacked a sheik with a piece of wood and caused damage to a mosque (mosque incident);
 - The applicant's brother was arrested, beaten and imprisoned for his involvement in the mosque incident.

¹⁴ DFAT, "Country Information Report – Iran", 21 April 2016, CIS38A8012677, 3.87-3.88; DFAT, "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226, 3.85, 2.24.

¹⁵ *Chen Shi Hai v MIMA (2001) CLR 293*.

26. On the evidence he provided during the SHEV interview, I have serious doubts over the extent of the applicant's relationship with [M] and whether a temporary marriage arrangement existed. The crux of the applicant's claims stem from this relationship, but based on his oral evidence in response to the delegate's questions, I find that the applicant significantly overstated the closeness of his relationship with [M]. He demonstrated a very limited knowledge of [M] – he was unable to recall her age, the names of her family members, or what her father did for a living – and provided inconsistent evidence throughout the application process with respect to the duration of their relationship. The applicant's initial answers to the delegate's questions around [M]'s daily activities were also evasive, before he made a general statement about women in Iran. I accept that memories are affected by the passage of time and that relationships can manifest in different ways, but the applicant's general lack of familiarity with [M] is, I consider, at odds with his initial claims that they were in love and spent most of their time together over the course of a year. I note at the start of the interview the delegate raised immediate concerns in relation to the applicant's inability to recall any dates. The applicant's representative raised the applicant's history with alcohol as a contributing factor. In the absence of any evidence to suggest that the applicant has been diagnosed with a medical condition or pursued any professional treatment for alcohol abuse, I do not accept that the applicant is suffering from a medical condition which hampers his ability to recall evidence to support his claims for protection.
27. The country information cited above indicates a trend of public appearances with non-family members of the opposite sex amongst younger Iranians, and that pre-marital and extra-marital relations were common in Iran at the time the applicant departed the country.¹⁶ On the evidence I am prepared to accept that [M] and the applicant may have been stopped and questioned by Basij, that they were taken to a Basij station and that [M] may have been raped during this incident. However, having listened to the SHEV interview, I find the description of the underlying relationship between [M] and the applicant and the circumstances that led to the incident in the mosque to be highly superficial. Though I am prepared to accept the existence of some sort of relationship between [M] and the applicant, and that the incident with Basij may have occurred as claimed, my underlying concerns about the nature of their relationship cast serious doubt over the events that are claimed to have transpired as a consequence of this relationship and incident with the Basij. That these two factors caused the applicant to attempt suicide, physically attack a sheik and damage a mosque building was not convincing on the evidence he provided during the SHEV interview. I find the applicant's account of beating four or five people with a sick, including a sheik/mullah, and escaping the scene with relative ease, far-fetched to say the least. There also appears to be a significant lack of evidence pointing to the applicant being pursued by the authorities during the intervening period between the mosque incident and when he claims his brother was arrested, or that there has been any repercussions to the applicant personally prior to departing Iran or since being in Australia, as a result of the claimed incident in the mosque.
28. In light of the above, I am not satisfied that the applicant was in a meaningful relationship with [M] as claimed or that he attempted suicide, physically attacked a sheik and damaged a mosque building. I seriously question the credibility of these claims and in the absence of any corroborative evidence (ie supporting statement from [M], medical reports, or any documents relating to his brother's arrest/imprisonment) I do not accept that these incidents occurred. I do not accept that the applicant was ever pursued by authorities or that his brother was imprisoned as a result of the mosque incident.

¹⁶DFAT, "DFAT Country Information Report Iran", 29 November 2013, CIS26780, 3.60, 3.66.

29. I am not satisfied that the applicant was ever a person of interest in relation to any claimed incidents involving his relationship with [M] or any subsequent events, or that he faces a real chance of any harm on this basis.

Failed asylum seeker

30. The delegate considered whether the applicant would suffer harm for reasons of being a failed asylum seeker from a Western country. He dismissed the applicant's 'data breach' claim on the basis that the applicant was released from detention [in] 2013, [number] months prior to the 'data breach' incident. I accept the applicant was not affected by the data breach as claimed. I also accept that the applicant departed Iran lawfully on his own passport and that he is no longer in possession of it.
31. Historically Iran has refused to issue travel documents to allow the involuntary return of its citizens from abroad, although by a Memorandum of Understanding signed in March 2018 Iran has agreed to facilitate the return of Iranians who arrived in Australia after that time who have no legal right to remain in Australia.¹⁷ The applicant did not arrive after the relevant date and on the information before me I am satisfied that if he was to return to Iran, it would only be as a voluntary returnee on a temporary travel document or *laissez-passer*. In these circumstances, I accept that the applicant would return to Iran as a failed asylum seeker from Australia, and this may be apparent to the Iranian authorities.
32. According to international observers, Iranian authorities pay little attention to failed asylum seekers on their return to Iran.¹⁸ Iranians have left the country in large numbers since the 1979 revolution, and authorities accept that many will seek to live and work overseas for economic reasons. In 2018 DFAT advised that Iranian authorities have little interest in prosecuting failed asylum seekers for activities conducted outside Iran, including in relation to protection claims.¹⁹ Authorities will usually question a voluntary returnee on return only if they have already come to official attention, such as by committing a crime in Iran before departing. Those with an existing high profile may face a higher risk of coming to official attention on return to Iran, particularly political activists.²⁰ The applicant does not fit this profile and I have found that he was of no interest to the Iranian authorities when he departed Iran.
33. In light of the above, I am not satisfied the applicant faces a real chance of harm of any kind on return to Iran because he might be identified at the airport as a person who is travelling on a temporary travel document, is returning after an absence overseas from Australia and who may be identified, for those or any other claimed reasons combined, as a failed asylum seeker. I am satisfied that applying for asylum is not considered to be a crime, nor does it, of itself, cause a person to be imputed with an adverse profile that would result in a real chance of harm.
34. The applicant does not have a well-founded fear of persecution.

¹⁷ DFAT, "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226, 5.23.

¹⁸ Ibid at 5.25

¹⁹ DFAT, "Country Information Report – Iran", 21 April 2016, CIS38A8012677, 5.33; DFAT, "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226, 5.25.

²⁰ DFAT, "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226, 5.25.

Refugee: conclusion

35. 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

36. 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

37. 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.
38. Whilst I have found that the applicant may be subjected to low-level harassment such as searches, checks, fines or warnings for reasons of his social behaviour should he return to Iran, I am not satisfied that such treatment amounts to significant harm as defined in s.36(2A). I am not satisfied that there is a real risk he will be subject to the death penalty, will be arbitrarily deprived of his life or be subject to torture. I am not satisfied that the treatment he may face amounts to severe pain or suffering, pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or extreme humiliation.
39. I have found that the applicant does not face a real chance of harm upon return to Iran for any of the other reasons claimed above, or because of his status as a failed asylum-seeker returning from a Western country. For the same reasons, and as 'real risk' involves the same standard as 'real chance',²¹ I also find that the applicant would not face a real risk of significant harm if returned to Iran in relation to these matters.

Complementary protection: conclusion

40. 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.

²¹ *MIAC v SZQRB* [203] 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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...

91WB Application for protection visa by member of same family unit

- (1) This section applies to a non-citizen in Australia (the **family applicant**):
 - (a) who applies for a protection visa; and
 - (b) who is a member of the same family unit as a person (the **family visa holder**) who has been granted a protection visa.
- (2) Despite anything else in this Act, the Minister must not grant the protection visa to the family applicant on the basis of a criterion mentioned in paragraph 36(2)(b) or (c) unless the family applicant applies for the protection visa before the family visa holder is granted a protection visa.