



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA20/08527

SRI LANKA  
IAA reference: IAA20/08528

Date and time of decision: 17 July 2020 13:44:00  
N Becke, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

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

## Background to the review

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### Visa application

1. The applicant and applicant son claim to have been born in Sri Lanka and that they are citizens of that country. On 20 August 2017 the applicants lodged a combined application for Safe Haven Enterprise Visas (SHEVs). On 22 June 2020 a delegate of the Minister for Immigration ('the delegate') refused to grant visas to the applicants.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

### Applicants' claims for protection

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3. The applicants have lodged a joint SHEV application based primarily on the claims of the applicant which can be summarised as follows:
  - In [Year] he was born in Batticaloa District, Eastern Province, where his family owns farmland.
  - In approximately 1990 the Sri Lankan Army (SLA) shot and killed and killed his brother, and in 1992 shot and killed his father, as suspected members of the Liberation Tigers of Tamil Eelam (LTTE).
  - As Tamils from the East he and his family faced regular harassment, threats and discrimination during the civil war.
  - Between 1992 and 2005 he and his family were displaced on two occasions to [Town], Northern Province.
  - In 1996 he was detained at an SLA camp for two days and interrogated about his suspected LTTE involvement, along with other Tamil males from his home area.
  - In 2006 he was at his farm when the SLA conducted a round up in his village. When his wife said he was away for work the SLA accused her of lying and assaulted her and the applicant son.
  - When the war ended in May 2009 the SLA and Criminal Investigations Department (CID) began to threaten the applicant in an attempt to extort money from him because he was a wealthy landowner. They visited his home on average twice a month to demand money.
  - In August 2009 the SLA and CID came to his home and demanded [Amount] from his wife. They damaged the house and assaulted his wife and the applicant son. The applicant began to spend more time at the farm for his own safety.
  - In June 2010 he attempted to make a complaint to the United Nations High Commission for Refugees (UNHCR) but was told to report the matter to the police. He could not do so due to the connection between the police, and the CID and SLA.
  - In April 2012 he returned home to visit his family but saw the CID and SLA nearby and fled on his motorbike. The CID and SLA told his wife he must pay them money at their camp within two weeks or he would disappear.

- He decided it would be safer for his family if he left Sri Lanka and took the applicant son with him, as otherwise he would be targeted as the oldest child.
- In April 2013 the applicants departed Sri Lanka illegally by boat and arrived in Australia later that month.
- The applicant fears if he returns the Sri Lankan authorities, in particular the SLA and CID, and associated paramilitaries, will seriously harm or kill him because of: his Tamil ethnicity; his origins in the East; his and his family's previous interactions with them; his illegal departure and asylum application in Australia; his imputed LTTE association arising from these factors; and his status as a wealthy Tamil landowner.
- The applicant fears the applicant son will be targeted for the same reasons and because he is a young Tamil male.

## **Refugee assessment**

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### **Well-founded fear of persecution**

4. 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.
5. The applicants have been consistent in stating their identities and family relationship since their arrival in Australia. In support, the applicant has provided copies of his Sri Lankan national identity card (NIC) and his birth and marriage certificates, with English translations. The applicant son has also provided a copy of his own Sri Lankan birth certificate, with an English translation. The names of the parents listed on the applicant son's birth certificate are those of the applicant and the individual listed on his marriage certificate, who I accept is the applicant's wife and that she remains in Sri Lanka with their other three children. I am satisfied the applicants' identities are as claimed and that Sri Lanka is their receiving country for purpose of this assessment.
6. In [Year] the applicant was born in Batticaloa, Eastern Province, an area in which the LTTE were highly active during the civil war. DFAT indicates that during the war the security forces imputed many Tamils to be LTTE supporters, based on their ethnicity, and that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained

during this time.<sup>1</sup> I accept the applicant's evidence that as Tamils he and his family faced regular harassment, threats, and discrimination from security forces stationed in their area as claimed.

7. The applicant claims that in the early 1990s the SLA shot his brother and his father, suspecting they were LTTE members. During the SHEV interview the applicant explained that no one in his family supported the LTTE however his father was returning home from the farm at night with a mattock over his shoulder. The SLA mistook this for a weapon and shot him, which I accept as plausible. I also accept that on two occasions the conflict in Batticaloa forced the applicant and his family to relocate to a relative's home in [Town], Northern Province. I also accept that in 1996 the SLA conducted a round-up of Tamil males in the applicant's home area and he, along with others, were detained at a local SLA camp. During the SHEV interview the applicant explained that the Sri Lankan authorities interrogated him about any possible LTTE involvement, but did not harm him, and after two days he was released unconditionally. I accept that in 2006 another round-up took place in the applicant's home area but he was not home at that time. I accept the Sri Lankan authorities asked for the applicant at his family home and upon learning he was not there, assaulted his wife and the first applicant son who tried to defend her.
8. During the SHEV interview the delegate asked the applicant for further details regarding his sources of income in Sri Lanka. The applicant explained that prior to his departure from Sri Lanka he managed a relatively large operation on the farm, employing around 15 people at a time, and that he also worked as [an Occupation]. The applicant also advised the delegate that he had a lot of money at this time and was considered wealthy. When asked, the applicant confirmed that his family still own the land and that his brother manages the farming operation, albeit at a reduced capacity of approximately five acres. The applicant told the delegate that he sends money from Australia to his family each month as his daughter is studying [Subject] which is expensive. The applicant added that his brother also helps to support the applicant's family through income from the farm. I accept the applicant's evidence that he had money prior to his departure, but also that he would have to start again financially upon return, as he told the delegate. I accept that as a landowner the applicant may still be regarded as wealthy.
9. The applicant claims that following the end of the civil war in May 2009 the Sri Lankan authorities began to target Tamils they believed had money for extortion and that in his community people regularly spoke of who had money and how they had obtained it. While DFAT indicates that extortion and kidnapping for ransom was common during the war, particularly in the north and east, I consider the applicant's evidence regarding the specific attempts the Sri Lankan authorities made to target him were farfetched and I am not satisfied he was recalling evidence from his own personal experience. The applicant claims that in August 2009 the SLA came to his home and demanded his wife pay them [Amount], assaulted her and the applicant son, and damaged the house. The applicant claims this forced him to start spending more time at the farm, or his sister's house, for his safety. The SLA and CID continued to visit his home twice a month looking for him and demanding money. During the SHEV interview the applicant confirmed that his wife had access to his bank accounts, through a bank card, yet neither his wife, nor anyone else on his behalf, ever paid the Sri Lankan authorities the extortion money they were demanding, despite their threats and physical assaults. The applicant confirmed to the delegate that he had never been home on the

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

occasions the SLA and CID attempted to get money from him, and that he was never personally identified by them.

10. I consider it lacking in credibility that corrupt elements within the Sri Lankan authorities would not discover that the applicant's wife had access to his money if they were repeatedly coming to his home to threaten her, and on one occasion assaulted her and the applicant son. For the same reason I also consider it lacking in credibility that the Sri Lankan authorities would not obtain details of the applicant's whereabouts from his family during these visits, or that they would be unaware of how he had become wealthy and would not look for him at the farm which, like his family home, is also located within Batticaloa District. I also consider it striking that the Sri Lankan authorities have never threatened or extorted the applicant's brother, who currently farms the land.
11. The applicant claims that in April 2012 he came home to visit his family but noticed the SLA and CID were present and so left quickly on his motorbike. On this occasion the SLA and CID purportedly told the applicant's wife that if he did not deliver the money to their camp within two weeks they would make him disappear. I note however the applicant did not leave Sri Lanka for another year after this incident and his SHEV application indicates he continued working on the farm up until the time of his departure. I find it difficult to accept that there were no specific adverse consequences for the applicant, or his family, related to this particular incident. At the end of the SHEV interview the applicant claimed that several months after his departure from Sri Lanka the SLA and CID came to his house again searching for him. I also have significant concerns with the veracity of this claim, noting that it is not contained in his written SHEV statement.
12. Overall, I am prepared to accept that following the civil war corrupt elements within the Sri Lankan authorities were extorting money from other Tamils in the applicant's home area; however, given the evidence overall, I do not accept this ever occurred to the applicant. I do not accept the Sri Lankan authorities ever visited his home with the purpose of extorting money from him, or that in August 2009 they assaulted the applicant's wife and his son for the reasons claimed. I do not accept the applicant attempted to make a complaint with the UNHCR but was told to go to the police instead. I do not accept that the applicant was a person of adverse interest to the Sri Lankan authorities for any reason at the time of his departure from Sri Lanka in April 2013 or that they have ever visited his home looking for him since then.
13. The 2012 UNHCR Guidelines, issued the year prior to the applicants' departure from Sri Lanka, did not specify individuals of Tamil race as requiring protection for that reason alone. Furthermore, in the UNHCR's opinion, individuals originating from an area where the LTTE had been active, such as the east or the north, did not require protection solely on that basis unless there were additional, relevant factors which may have given rise to a profile of risk.<sup>2</sup> In this case the applicant has indicated that neither he nor anyone else in his family have ever been involved with the LTTE. I accept that during the civil war the Sri Lankan authorities killed the applicant's brother and father, and interrogated him, because of suspected LTTE links. While these events were tragic for the applicant and his family, the country information before me suggests that such experiences were unfortunately commonplace amongst the civilian Tamil community in the Eastern Province during the civil war. On the evidence before me, I am not satisfied the Sri Lankan authorities had any ongoing suspicion that the applicant or his family had LTTE involvement.

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<sup>2</sup> United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183E48

14. Eleven years have passed since the end of the civil war and eight since the publication of the UNHCR Guidelines and the country information before me indicates the situation for Tamils in Sri Lanka has continued to improve markedly. DFAT currently assesses that the monitoring and harassment of Tamils in the north and east of the country, while still occurring, has reduced significantly and is more likely to occur to Tamils associated with politically-sensitive issues related to the war, including missing persons, land release and memorial events which I am satisfied do not apply to the applicants before me.<sup>3</sup> While I accept the applicant son is still a 'young Tamil male', the country information before me does not indicate that the Sri Lankan authorities continue to view such persons with suspicion and, when asked, the applicant could not specify why he believes the applicant son would face harm in Sri Lanka for this reason. DFAT also currently assesses that while extortion is still known to occur, its incidence has decreased considerably in the post-war period. Where extortion for ransom does occur, the motive is usually business-related. Overall DFAT assesses that wealthy Sri Lankans face a low risk of extortion and points to a number of anti-corruption measures which the Sri Lankan government has put in place since the end of the civil war to combat official corruption.<sup>4</sup>
15. In his written SHEV statement the applicant also claims that paramilitaries such as the Karuna Group will come searching for him upon return and abduct him because they are concerned that returnees such as the applicant have LTTE affiliations. However DFAT indicates that former Tamil paramilitary groups who were aligned with the previous government during the war, like the Tamil Makkal Viduthalai Pulikal (TMVP, formerly the Karuna Group), have disarmed, are engaged in politics, and pose a low threat of violence and intimidation to members of the Tamil community.<sup>5</sup> Moreover, the country information cited below, in relation to Tamil asylum seekers returning from countries such as Australia, does not suggest that they are imputed to hold a pro-LTTE political opinion and I do not accept this is the case.
16. DFAT currently assesses that all Sri Lankans face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment, and housing.<sup>6</sup> Some members of the Tamil community report discrimination in employment, particularly in relation to government jobs; however DFAT assesses that the under-representation of Tamils in the public sector is due to language constraints and disrupted education during the war, rather than official discrimination on the basis of ethnicity. Despite government incentives, the number of Tamil-speaking police officers and military personnel in the north and east remains small, and monolingual Tamil speakers can have difficulty communicating with authorities.<sup>7</sup> I do not consider that such language constraints amount to discrimination.
17. During the SHEV interview the applicant told the delegate that he can speak Sinhala as well as Tamil but that the applicant son, who was almost [Age] at the time of his departure from Sri Lanka, cannot read or write much Tamil. I note however that the applicant son attended [number] years of primary school and [number] years of secondary school in Batticaloa prior to their departure and that he has completed one year of English language study, and at least three years of secondary school, in Australia. While it is plausible that the applicant son's Tamil language literacy may not be equivalent to those of his peers in Sri Lanka, I consider the chance that he would face harm for this reason is remote. Based on the evidence before me I am also satisfied that the applicant son has had significant opportunity to enhance his English language literacy skills during his time in Australia. Under the 2012 'Trilingual Policy' Sri Lankans have the right to communicate throughout Sri Lanka in either Sinhala or Tamil (the two official

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<sup>3</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

languages) or English (a recognised link language).<sup>8</sup> On the evidence before me I consider the chance the applicants would face discrimination in Sri Lanka on account of their Tamil ethnicity, or that the applicant son would face any type of harm because of his Tamil literacy skills, to be remote.

18. Given the evidence before me overall, I am satisfied that the applicant faces a no more than remote chance of harm in Sri Lanka as a wealthy Tamil landowner from the East, whose father and brother were killed by the Sri Lankan authorities, or because of those of his previous interactions with the Sri Lankan authorities which I have accepted occurred. For the same reasons, I am satisfied the applicant son, a young Tamil male from the East, faces no more than a remote chance of harm upon return.

#### *Returning Asylum Seekers*

19. I accept the applicants departed Sri Lanka illegally by boat in April 2013 and travelled to Australia, where they have sought asylum. As returnees to Sri Lanka without passports, I accept the applicants would require temporary travel documents issued by the Sri Lankan authorities in Australia prior to their departure. Upon arrival the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times, the TID (Terrorist Investigation Division) check travel documents and identity information of returnees against the immigration and intelligence databases, as well as determine whether a returnee has any outstanding criminal matters.<sup>9</sup> With reference to the applicants' particular circumstances, I am not satisfied they were wanted in relation to a crime, were subject to arrest warrants, or any other judicial process at the time of their departure.
20. Persons who depart Sri Lanka illegally ('illegal departees') can be charged under the Immigrants and Emigrants Act (I&E Act) upon return, and may remain in police custody at the airport for a short period after arrival, and should a magistrate not be available before this time – for example, because of a weekend or public holiday – may be held in an airport holding cell. DFAT indicates that returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed, although they are free to go to the bathroom and to talk to one another during this time.<sup>10</sup> There is no evidence before me to suggest that illegal returnees are subject to any sort of mistreatment during processing.
21. DFAT assess that the Sri Lankan authorities differentiate between fare-paying passengers and the facilitators or organisers of irregular migration. DFAT advise that if an individual pleads guilty, they will be fined and are then free to go. In most cases if they plead not guilty, they will be granted bail on their own personal surety immediately by the magistrate, or may be required to have a family member act as guarantor. Bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country.<sup>11</sup>
22. The Sri Lankan Attorney-General's Department has directed that all passengers of people smuggling ventures, not only those suspected of facilitating or organising irregular migration, be charged under the I&E Act and appear in court. DFAT suggests that the requirement to appear in court also applies to those who have already pleaded guilty and paid a fine. Those charged are required to appear in court in the location where the offence occurred, which involves legal and transport costs, and those who have had to travel long distances have found

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

this disruptive to their livelihoods. The Attorney-General's Department claims no fare-paying passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally (as distinct from facilitators or organisers).<sup>12</sup>

23. I accept there is a real chance the applicants will be questioned and held briefly as part of the re-entry process, and that if they plead guilty they will be fined, or if they plead not guilty they will be granted bail on the basis of personal surety, or on guarantee by a family member (in which case they would need to wait until that person arrives). However, the applicants have not claimed, and there is no other evidence in the material before me to indicate, that they would not be granted bail on their own personal surety, or that they would be unable to pay the fine upon their return.
24. I have found the applicant was not of interest to the authorities at the time of his departure from Sri Lanka in 2013 and nor was the applicant son, who was aged [Age] at that time. As paying passengers of a people smuggling venture I am not satisfied that the applicants would face greater scrutiny or penalty upon return than other ordinary illegal departees or that there is a real chance they will be detained at the airport beyond a short period.<sup>13</sup> I am not satisfied that being detained for a short period, the payment of a fine, or the requirement to report to the police (as part of bail conditions), or a court (for all those charged), cumulatively amounts to serious harm for the applicants.
25. Furthermore, the country information before the delegate indicates the I&E Act is not discriminatory on its face or in its application or enforcement. I am not satisfied that it amounts to systematic and discriminatory conduct.<sup>14</sup> As such I find the treatment and penalties faced in this case as a consequence of the application of the I&E Act is not persecution within the meaning of s.5J(4) of the Act.
26. DFAT is not aware of returnees, including failed asylum seekers returning after an extended stay in Australia, being treated in such a way that endangers their safety and security, and indicate that most are not subjected to monitoring by the Sri Lankan authorities after they leave Colombo airport. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.<sup>15</sup> Nor does the country information before me suggest that returning asylum seekers are imputed to be LTTE sympathisers as the applicant claims.
27. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to the sale of their belongings to fund irregular ventures overseas, but generally do not experience societal discrimination for seeking asylum elsewhere. However, some refugees and failed asylum seekers reported social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers.<sup>16</sup>
28. Many returnees also have difficulty finding suitable employment and reliable housing on return and a lack of documentation for some returnees inhibits access to social welfare schemes, the ability to open bank accounts, find employment, or enrol in educational institutions. Those who

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> *Chen Shi Hai v MIMA* (2001) CLR 293

<sup>15</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

<sup>16</sup> Ibid.



have skills that are in high demand in the labour market are best placed to find well-paid employment.<sup>17</sup> The applicant has described himself as a (formerly) wealthy farmer and [Occupation] prior to his departure from Sri Lanka and has confirmed that his family still own their farmland. The information before me also indicates the applicant has also worked [in] Australia. The applicant has copies of his and the applicant son's Sri Lankan birth certificates as well as copies of his own NIC, driver's licence, and other personal documents issued to him in Sri Lanka. The applicant's wife, three other children, and his five living adult siblings are all residing in Sri Lanka. On the evidence before me I am satisfied the applicants would not face undue challenges with accommodation, employment, or reintegration generally, upon return, even considering the applicant son's Tamil literacy proficiency. While I accept the applicants may face social stigma or societal discrimination within the local community due to their profiles as returnee asylum seekers from Australia, given their personal circumstances, I am not satisfied that they would face treatment that would constitute serious harm.

29. I am not satisfied the applicants have a well-founded fear of persecution for any of the reasons claimed.

#### **Refugee: conclusion**

30. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

31. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

#### **Real risk of significant harm**

32. 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.
33. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act
34. I have accepted the applicants would be returning to Sri Lanka as asylum seekers who left the country illegally, and will be subject to processes and penalties under the I&E Act. I am not satisfied there is a real risk of arbitrary deprivation of life, or the death penalty or torture as

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<sup>17</sup> Ibid.

defined. Nor am I satisfied there is an intention to inflict to inflict pain or suffering that can reasonably be regarded as cruel or inhuman in nature, severe pain or suffering or extreme humiliation. I am not satisfied there is a real risk of cruel, inhuman or degrading treatment or punishment. I am also not satisfied that the applicants face a real risk of a custodial sentence.

35. I have accepted that the applicants may face some level of societal discrimination as asylum seekers returning from Australia after an extended period. Given the applicants' own circumstances, and evidence discussed above, I am not there is a real risk of arbitrary deprivation of life or the death penalty or torture. Nor am I satisfied it amounts to pain or suffering that is cruel or inhuman in nature, or severe pain or suffering or extreme humiliation. I am not satisfied that this amounts to significant harm as defined, even when considered in conjunction with the I&E process the applicants will undergo upon arrival and I find there is not a real risk of significant harm on this basis.
36. I have otherwise concluded that the applicants do not face a real chance of harm for any reason. Based on the same information, I am not satisfied that the applicants have a real risk of suffering significant harm.
37. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Sri Lanka, there is a real risk that they will suffer significant harm.

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

38. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

#### **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

#### **Applicable law**

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##### ***Migration Act 1958***

##### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
  - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
  - (c) for the purpose of intimidating or coercing the person or a third person; or
  - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
  - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

## 5H Meaning of refugee

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:
  - (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
  - (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

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

...

## 5J Meaning of well-founded fear of persecution

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

Note: For membership of a particular social group, see sections 5K and 5L.

- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.

- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or

- (b) conceal an innate or immutable characteristic of the person; or
- (c) without limiting paragraph (a) or (b), require the person to do any of the following:
  - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
  - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
  - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
  - (iv) conceal a physical, psychological or intellectual disability;
  - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
  - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

#### **5K Membership of a particular social group consisting of family**

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

### 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.