



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAN

IAA reference: IAA17/02970

Date and time of decision: 16 October 2017 09:25:00

Belinda Mericourt, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an Iranian national. [In] August 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). In a decision dated [in] June 2017 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.

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).
3. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - The applicant is agnostic and a lapsed Shia Muslim. He was once caught drinking water during Ramadan, taken to Basij headquarters and verbally abused but then released. He fears harm for contravening Islamic principles, norms and values.
 - He has been stopped when driving his car on numerous occasions by the Basij, Sepah and police at checkpoints. He suspects that sometimes they were trying to elicit bribes and has had to attend the police station about [number] times after being pulled over.
 - On another occasion when he was pulled over his friends who were in the car were taken away because they had been drinking alcohol.
 - On one occasion when he was pulled over he refused to give the Basij his driving licence as he was worried they may keep it so he gave them his national identity card instead. They kept it for about [number] months. He attended the police station to get it back when he decided to leave Iran and needed his ID card to obtain a passport.
 - On one occasion the authorities tried to stop his car when he had a girl who was not a relative in the car with him. He was able to drive away and avoid punishment.
 - He was once arrested for drinking alcohol and spent [number] days in remand before paying a fine to be released.
 - He is concerned his exemption for military service (as the [number] son) will be lifted and he will be forced to do military service.
 - He fears he will be persecuted as a failed asylum seeker in a Western country who has been involuntarily returned. He fears that the government, Basij, Sepah, criminals or violent civilians will consider him a traitor for claiming asylum in a Western country.
 - He fears he will be targeted by violent people who might think he is wealthy and try to obtain money for him.
 - He fears that his tattoos will be forcibly removed and he wants to have more.

Factual findings

5. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in Farsi and has submitted copies and translations of his national birth certificate, driver's licence and military exemption. 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: s.36(3)
6. I accept that the applicant departed Iran lawfully by plane to [country] using his own genuine passport and he had no difficulty doing so.

Refugee assessment

7. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

8. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. I note that at his entry interview the applicant stated that he came to Australia as he wanted better job opportunities, a better life and Australia is a safe country with a good life and there is interesting wildlife. At both his entry and SHEV interviews he said he had wanted to come to Australia for [number] years before he departed Iran. He attempted to study hard to gain high scores and hopefully enter Australia that way but discovered he could not do so. When asked what he thought would happen to him if he returned he stated "I'll never return". This suggests that the applicant has had a goal for some time of migrating to Australia for reasons that are not specifically related to a fear he personally would suffer serious or significant harm in Iran.

10. In his written statement of claims dated [in] August 2016 and at his SHEV interview in June 2017, the applicant provided a picture of himself as a young man who is a non-practicing Muslim, who had been stopped at checkpoints several times in his car for no particular reason and felt harassed by the authorities, who chafed under the restrictions of Islam as it is practiced in Iran and who wished to have more freedom in his personal life to do things like drink alcohol, have tattoos, and associate more freely with women who were not his relatives. He also now fears returning to Iran as a person who has applied for asylum in a Western country. I have addressed each of his claims individually and cumulatively.

Claims relating to being a non-practicing Muslim/agnostic

11. The official religion of Iran is Shia Islam and this is the religion indicated on the applicant's birth registration provided to the Department.

12. The applicant has claimed that he is a non-practicing Muslim. The only incident he described relating to this claim is that once he was caught drinking water during Ramadan, taken to Basij headquarters and verbally abused but then released. He has not claimed that he publicly renounced Islam or has been accused of apostasy. He stated that he believes in God but does not have any religious belief.

13. DFAT considers it highly unlikely that the government would monitor religious observance by Iranians – for example, whether or not a person regularly attends mosque or participates in religious occasions such as Ashura or Muharram – and thus it would generally be unlikely that it would become known that a person was no longer faithful to Shia Islam. Perceived apostates are only likely to come to the attention of Iranian authorities through public manifestations of their new faith, attempts at proselytization, attendance at a house church or via informants.¹ In this matter the applicant has not claimed to have converted to Christianity or any other religion. Other sources indicate that many people in Iran do not regularly attend mosque with many young people identifying themselves as secular and agnostic² and that there has not been any backlash against people who fail to attend a mosque or perform their daily prayers.³

14. I am satisfied that the applicant is not religious and does not adhere to the outward practices of Islam in Iran. I accept that on one occasion he was detained for a brief period for drinking water and not fasting during Ramadan. Sources indicate that as long as eating, drinking and smoking does not occur in public the Government does not enforce strict adherence to fasting.⁴

15. I am satisfied that the applicant has not been detained or harassed by the Basij or any Iranian authorities specifically for being an apostate. Based on his evidence I am satisfied the applicant has not publicly declared or promoted his non-belief in Islam prior to his departure and that he will not do so on return to Iran. I am satisfied he not will not do so due to lack of interest rather than fear of persecution. I am not satisfied that the applicant's non-belief in Islam has, or there is a real chance that it will, come to the adverse attention of the Iranian authorities or community on return to Iran such that he will face a real chance of serious harm. I am not satisfied the applicant faces a real chance of serious harm on return to Iran for reasons of his non-belief in Islam and/or disagreement with the way Islam is practiced in Iran.

¹ DFAT, "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677, p.14

² Danish Immigration Service, 'Update on the Situation for Christian Converts in Iran', June 2014, CIS28931, p.12; 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", 1 September 2015, CISEC96CF13622

³ Swiss Refugee Council, "Christians in Iran", 18 October 2005, CX153188: IRAN

⁴ Guardian (Unlimited) (UK), "Tehran during Ramadan: 'Nobody is really in the spirit'", 27 July 2013, CX312197: IRAN

Claims based on the applicant's fear of having his military exemption revoked if he returns to Iran now or in the foreseeable future due to a possible change in government policy

16. The applicant provided his military exemption certificate to the Department and I accept that the reason for his exemption is that he is the [number] son and his [other] brothers have completed their compulsory military service.
17. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.⁵
18. Whilst I am satisfied that there is a policy of mandatory military service in Iran, there is no indication in the country information before me that it is likely or even remotely likely that the exemption that the applicant has been granted would be withdrawn. I accept the applicant does not want to do military service as he does not like guns or war. However, I am not satisfied that there is a real chance (as distinct from a remote chance) that his military exemption would be withdrawn, or, even in the very unlikely possibility it was withdrawn at some time in the future, that there is a real chance he would suffer serious harm as a result of undertaking military service.

Claims related to persecution as a result of being a member of a particular social group, that is, young persons having tattoos, engaging in non-conformist behaviours such as drinking alcohol and associating with women who are not relatives

19. The applicant stated that he thinks he has had problems with the Iranian authorities since he was about [age] especially since he has been driving a car. He stated that he has frequently been pulled over at checkpoints while driving his car for no particular reason, and feels harassed.
20. The applicant believes that many of the times he was pulled over or stopped at checkpoints the Basij or police were simply trying to illicit bribes from him.
21. The applicant described one occasion when friends to whom he had given a lift were taken away by police because they had been drinking. He was not detained as he had not been drinking himself. He did not know what happened to them. He described another occasion during Ramadan when he took a sip of water while driving his car and two Basij pulled him over and took him to their headquarters where he was abused verbally. He was detained until sunset and then released after he was warned not to do it again. He described a [another] occasion when he and his friends were arrested after leaving a wedding where they had been drinking. They were held in remand for [number] days until his father paid a fine of [amount] tomans (about \$[amount] according to the applicant).
22. Finally the applicant described one occasion when he was driving with his girlfriend and some Basij tried to catch him. However, he managed to drive away from them and avoid any punishment.
23. Based on the applicant's evidence I am satisfied that he is a young man who chafes under what he experiences as frequent scrutiny and harassment by the police, Basij and Iranian authorities in general. I accept he has been pulled over at checkpoints on several occasions while driving and on one occasion held in remand for drinking alcohol until he paid a fine. I accept that he has never been formally charged, detained or prosecuted. Nor has he been physically harmed by the authorities on the occasions he was pulled over or kept in remand. I accept that he likes to drink alcohol in the privacy of people's homes. He acknowledged that some freedom to do

⁵ *Chan v MIEA*, (1989) 169 CLR 379 at 389.

things in Iran had increased but he would prefer to live in a society where there is no restriction on such behaviours.

24. Article 265 of the new Islamic Penal Code clearly states that the punishment for alcohol consumption is 80 lashes, regardless of whether consumption caused drunkenness or not.⁶ The applicant stated that on the occasion members of the Basij detained him for suspected consumption of alcohol he was not formally charged with drinking alcohol, nor was he flogged. He was held in remand until his father paid a relatively small fine and warned not to drink alcohol again.
25. DFAT reports that the consumption of alcohol remains relatively widespread in Iran. Iranians who wish to obtain alcohol can do so relatively easily and alcohol smuggling is widespread.⁷ In 2014 and 2015 the Health Ministry launched a number of alcohol treatment and rehabilitation centres throughout the country which suggests some acknowledgement of reasonably widespread consumption of alcohol in society. Whilst the applicant may have come to the adverse attention of authorities because he smelt of alcohol on one occasion and subsequently held in remand and fined, I am satisfied he does not have a recorded criminal history of use of alcohol as he has never been formally charged, prosecuted or imprisoned for alcohol use. Whilst the applicant has expressed disagreement with the law related to the non-consumption of alcohol in Iran and dissatisfaction with being confined to private homes if he wanted to drink alcohol he has not claimed to have suffered serious harm as a result of doing so. I am not satisfied that there is a real chance that he will suffer serious harm now or in the foreseeable future as a result of any of his continued consumption of alcohol in private settings.
26. The applicant has also stated he fears that his tattoos may be forcibly and painfully removed if he returns to Iran.
27. DFAT has reported that authorities can take a heavy-handed approach when they periodically enforce standards of Islamic conduct in the community, including Islamic dress and public displays of affection with non-family members of the opposite sex.⁸ At the same time, Western clothing is legally available for purchase and Western style dress is tolerated, particularly for men.
28. Tattoos are not illegal in Iran⁹. They are usually done by 'underground' tattoo and sources indicate that tattoos have become increasingly common in Iran, particularly amongst youth.¹⁰ Members of the Iranian national football team have had tattoos including one member who has a full 'sleeve' tattoo. He has received little more than chastisement for not covering his tattoos.¹¹ DFAT is unaware of any recent, specific report of people being targeted by security forces **solely** (*my emphasis*) for having a tattoo, but states

"it is possible that a person with a visible tattoo could come to the attention of security forces and result in low-level harassment. While DFAT is not aware of specific penalties that could be imposed for having a tattoo, it is likely that such penalties would be similar to those imposed for dress or hairstyles that are deemed 'improper'. In these

⁶ Iran Human Rights Documentation Centre, "IHRDC Translation of the New Islamic Penal Code of the Islamic Republic of Iran – Books One and Two", 8 April 2014

⁷ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Iran April 2016", 21 April 2016, 3.85, CIS38A8012677

⁸ Ibid, 3.74

⁹ IranWire, 'Authorities call for Ban on Tattoos' 28 April 2015, CXBD6A0DE5338

¹⁰ Radio Zamaneh, "Tattooing, a lucrative business in Iran", 30 June 2014, CX322591; Al Monitor, 'Tattooed in Tehran', 9 December 2013, CX322591

¹¹ Radio Zamaneh, 'Explanations demanded for football players' tattoos', 7 September 2015, CXBD6A0DE13224

circumstances, the usual penalty is a warning or fine. DFAT believes it unlikely that authorities would maintain an interest in someone who had previously come to their attention for having a tattoo, unless the tattoo gave evidence of another crime (e.g. related to national security)."¹²

29. DFAT assesses *"it is difficult to make an overall assessment of the treatment of what are sometimes labelled 'Westernised' Iranians. This term is very limited usefulness in a society where up to one third of the people, middle-class and above, mostly in urban areas, aspire to and try to live what could be called a modern lifestyle. However, youth in particular can 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. It is important to note the significance of the sizable youth population in Iran in this regard. Enforcement can be unpredictable and related to the prevailing political atmosphere of the time"*.¹³
30. Having regard to the instances of serious harm in s.5J(5) I consider that the cumulative effect of the applicant's youth and his having tattoos which may from time to time be perceived as nonconformist and behaviours such as drinking alcohol in private settings, that there is a low level of risk that he will occasionally be perceived by the authorities to be not conforming to appropriate and acceptable Islamic standards. Consequently he may be harassed, possibly detained for several hours and possibly fined during the periods in which the authorities in Iran periodically enforce standards of Islamic conduct. I accept that it is possible he may have to sign an undertaking to cover up his tattoos or an undertaking not to consume alcohol and otherwise behave appropriately. However, having regard to the relevant country information about "Westernised" Iranians who may have tattoos and have a "Westernised" appearance and who drink in the privacy of people's homes, I am satisfied there is only a remote risk that he would actually be arrested and charged with an offence that would result in serious harm such as lashing, flogging, significant physical ill-treatment [s5J(5)(c)], significant physical harassment [s5J(5)(b)], or threats to his life or liberty [s5J(5)(c)] or any other treatment that may be regarded as serious harm.

Claims related to being a returned failed asylum seeker who has resided in Australia for some time

31. The applicant claims he fears harm or that he would be killed by the government, police, Basij, Sepah or by criminal or violent civilians because they would see him as a 'traitor' and be very suspicious of him as he was an asylum seeker. He told the delegate at his interview that as they would know he had been out of the country for five years and they are 'clever' they would 'hear things' and they can do anything. In his written statement he stated that he thought they will know he had spoken against the regime when he sought asylum. He also stated he thought they would think he is wealthy and may try to obtain money from him by force.
32. I have accepted that the applicant departed Iran legally with his own genuine passport. I accept that his passport was removed from him by the people smugglers when boarding the boat from [country]. I am therefore satisfied there is a real chance that he may be returned to Iran on a temporary travel document. In 2013, the International Organisation for Migration (IOM) stated that Iranians who have left the country on their passports and are returned on a *Laissez-passer* will be questioned by the Immigration Police at the airport for a few hours.¹⁴ In 2016 DFAT stated that where temporary travel documents have been issued by Iranian diplomatic representatives overseas, authorities at the airport will be forewarned about a person's return because of Iran's sophisticated government systems. Irrespective of whether a

¹² DFAT, "DFAT Country Information Report Iran April 2016", 21 April 2016, 3.77 CIS38A8012677

¹³ Ibid 3.80

¹⁴ UK Home Office, "Country Information and Guidance - Iran: Illegal Exit", 20 July 2016, OGD7C848D28

returnee is travelling on a temporary travel document or their ordinary passport, credible sources have told DFAT that they will generally only be questioned if they had done something to attract the specific attention of the authorities. The vast majority of people questioned would be released after an hour or two.¹⁵ A report issued by a Swiss refugee agency quotes an unnamed judge as saying that asylum seekers are interrogated on return to Iran, whether or not they have been political activists in Iran or abroad. If they have tried to conduct propaganda against Iran, then they are culpable and are detained until a judge decides the sentence. Returnees will therefore be held for a few days until it is clear to the police, that they have not been involved in political activity. This report followed an article written by a former Supreme Court judge which appeared in Iran government newspaper on 17 February 2011 which stated that failed asylum-seekers could be prosecuted for making up accounts of alleged persecution.¹⁶ However, DFAT has commented that it consider it unlikely that authorities would prosecute someone solely for claiming asylum overseas, largely because most asylum seekers leave Iran legally as the applicant did¹⁷. However, it is possible that a known dissident would be prosecuted in this way.¹⁸ In 2013 Mr Hossein Abdy, Head of the Iranian Passport and Visa Department, also stated that it is not a criminal offence in Iran for any Iranian to ask for asylum in another country.¹⁹ I have also considered a relatively small number of reports before the delegate of student activists, journalists and political activists, some of whom were returning as failed asylum seekers, being arrested on return to Iran at the airport. I consider that the applicant does not fall into any of these categories.

33. Considering all the country information before me I am not satisfied the Iranian authorities impute failed asylum seekers from Western countries or people who have resided in Western countries as holding an anti-regime, Western sympathiser or anti-government opinion in Iran or seek to prosecute or otherwise harm them for reasons of having made a claim for asylum. I am satisfied the applicant had no difficulty departing Iran using his own passport which suggests he was not on any official black lists where he may have prevented from departing.
34. I accept that the applicant will be likely to be questioned on return to Iran by the Iranian authorities, however, I am not satisfied this amounts to serious harm having regard to the extensive examples provided in s.5J(5) of the Act. I am not satisfied the applicant faces a real chance of serious harm on return to Iran on the basis of being a failed asylum seeker from Australia and/or because he resided in a Western country for a period of five years or more.
35. There is no independent evidence before me that there is a real chance an asylum seeker will suffer serious harm from violent or criminal civilians on return to Iran after seeking asylum in a Western country. I am not satisfied that there is more than an extremely remote chance that violent or criminal civilians would discover he was an asylum seeker or that, even if they discovered he had applied for asylum that they would see him as a traitor and then seriously harm him. There is also no independent evidence before me that there is a real chance returned failed asylum seekers will face serious harm from civilians or criminals who assume returnees have wealth or money and use force to obtain money from them or that there is any more chance of suffering serious harm as a result of a criminal assault or robbery than any other citizen. I am therefore not satisfied that there is a real chance the applicant will suffer serious harm for this reason.

¹⁵ DFAT, "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677, 5.34

¹⁶ Amnesty International, "We are ordered to crush you' Expanding Repression of Dissent in Iran", 28 February 2012, CIS22610, p.56

¹⁷ DFAT, "DFAT Country Information Report Iran", 21 April 2016, CIS38A8012677, 5.33

¹⁸ DFAT, "Response to IRN 11738 Iran - Article on returned asylum seekers and people exiting Iran with false documents", 19 April 2011, CX263145

¹⁹ UK Home Office, "Country Information and Guidance - Iran: Illegal Exit", 16 December 2015, OG8F59D8D34, p.11

Refugee: conclusion

36. I have considered the applicant's claims both individually and cumulatively. As discussed above, whilst I am satisfied that the applicant is a non-practising Muslim/agnostic, who may be perceived as Westernised due to his appearance, tattoos and some of his behaviours, I am not satisfied that the combination of these factors means there is a real chance that the applicant will suffer serious harm, having regard to the instances of serious harm in s.5(J)(5) of the Act. I have found that the applicant has not publicly renounced his religion or converted to a new religion. I accept that there is a real chance that the applicant will occasionally attract the adverse attention of the authorities due to his "Westernised" appearance and tattoos, and possibly drinking alcohol in private homes. However, based on the available country information, I am satisfied that as a consequence there is only a very remote chance he will suffer serious harm, and that the harm he may suffer (being fined, threatened with imprisonment, warned to behave/dress appropriately) does not meet the standard of serious harm having regard to the instances of serious harm in s.5J(5). I am not satisfied that there is a real chance of serious harm on return to Iran on the basis of being a failed asylum seeker from Australia and/or because he resided in a Western country. I am not satisfied that there is a real chance the applicant will suffer serious harm from criminal individuals, whether civilian or government for reasons related to the applicant's perceived wealth. Accordingly, I am not satisfied that there is a real chance the applicant will suffer serious harm as a result of the cumulative effect of any of these factors.

37. 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

38. 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

39. 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.

40. Real chance and real risk involve the same standard.²⁰

41. As discussed above, I am satisfied that the applicant is a non-practising Muslim and does not like the way Islam is practiced in Iran. I accept that on one occasion he was detained briefly and

²⁰ *MIAC v SZQRB* (2013) 210 FCR 505

threatened as a result of not observing the Ramadan fast, but that there have been no other occasions when he came to the adverse attention of the authorities for reasons of his not practising Islam as required. He has not claimed that he publicly renounced his faith, proclaimed that he is a non-practising Muslim or converted to another religion. As stated previously, I have found he was not of adverse interest to the authorities when he departed Iran. I am satisfied the applicant will not publicly declare or promote his non-belief or disagreements with Islam as it is practiced in Iran due to lack of interest rather than fear of significant harm. I am therefore satisfied that there is no real risk that the applicant will suffer significant harm for reasons of his religious beliefs, failure to engage in Islamic religious practices or because he is perceived to be an apostate.

42. I accept that the applicant is a young man who chafes against the restrictions of Islam as practiced in Iran. He may be perceived to have a 'Westernised' appearance, particularly as the result of having tattoos. I have accepted that he has been pulled over in his car on several occasions for no particular reason and he experiences this as harassment from the authorities. I have accepted that he occasionally drinks alcohol with friends in private homes, (which is unlawful in Iran) and that he has been detained, fined and warned against this behaviour on one previous occasion. I am satisfied that as a result of his appearance and behaviours there is a risk that he may be detained, harassed and threatened by the authorities in Iran at times when they decide to enforce Islamic codes of behaviour and appearance. However, I am not satisfied that this meets the standard of **significant** harm having regard to the definition of significant harm in s.36(2A) of the Act.
43. I am satisfied that the applicant is likely to be questioned for a few hours on his return to Iran as the holder of a *Laissez-passer* document. On the basis of the country information before me I am not satisfied the Iranian authorities impute failed asylum seekers from Western countries or people who have resided in Western countries as holding an anti-regime, Western sympathiser or anti-government opinion in Iran or otherwise take an adverse interest in such persons and I am satisfied that any questioning the applicant may undergo does not meet the definition of significant harm, having regard to the definition of significant harm in s.36(2A) of the Act. I am also satisfied that there is no real risk that violent or criminal civilians will inflict significant harm on the applicant even if they were to discover that he had applied for asylum in a Western country or because they thought for some reason he had acquired some money during the period he was in Australia.
44. Considering the applicant's claims both individually and cumulatively, I am not satisfied there is a real risk the applicant will suffer significant harm.

Complementary protection: conclusion

45. 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.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.