



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

NEPAL

IAA reference: IAA17/03048

Date and time of decision: 21 March 2018 13:16:00

Suhad Kamand, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (applicant) claims to be a national of Nepal. He applied for a Protection visa on 9 December 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant that visa in a decision dated 30 June 2017.

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 additional information has been provided or obtained.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows¹:
 - a. he is a national of Nepal born in [a]Village, Arghakhanchi District Lumbini Zone, Nepal
 - b. he is of the Brahmin ethnicity/caste and Hindu faith
 - c. Maoists in Nepal repeatedly threatened to kill him as he was against them
 - d. Maoists captured his assets (lands) and did not allow him to live in his home district
 - e. he moved to Kathmandu but it was not safe there either. Despite this he tried to start a small business there but the Maoists still gave him trouble. He had to give donations to them and his life was threatened when donations were not given
 - f. he went to the police but the police were scared of the Maoists and did not assist
 - g. he was also a member of the Nepali Congress Party (NCP) and because of this he was targeted by Maoists
 - h. the Maoists asked him to join them many times but he refused. 'Due to this reason, they seized all my lands. They warned me that if I stay in my home district, they will kill me.' In his Protection visa application form he adds that they tried to kill him several times but 'I was able to save my life somehow'²
 - i. he tried to live in Kathmandu but he had no financial support and was afraid for his life. He could not live there
 - j. the Maoist party is in government and there is still danger. 'The political situation of Nepal is too relaxed and the safety management is also too loose. Therefore, going to my country is to lose my life' as the Maoists have targeted him and they are in the government.

¹ as detailed in the applicant's 2017 Statement

² Protection visa application, question 91

5. In submissions from the applicant's registered migration agent (RMA) dated 8 December 2016 (2016 Submissions) it is stated that the applicant requires refugee protection in relation to his political opinion in favour of the NCP and against the Maoists. It is submitted that 'the Maoist are currently ruling the country'³. It is also claimed that, for the same reasons the applicant faces a real risk of significant harm in Nepal. The balance of the 2016 Submissions generally restate the claims made by the applicant, as summarised above.
6. In support of his application the applicant submitted a range of documents including
 - a. Australian and Nepali identity documentation
 - b. evidence of his education in Nepal
 - c. evidence of his marriage registration in Nepal in November 2003
 - d. an English translation of a purported letter from the NCP central office in [a location in] Nepal, dated [in] August 2013, stating that the applicant 'is an activist of the Nepali Congress Party and has actively participated in the democratic movements of Nepal launched by the party. Because of his active participation... the cadres of Nepal Communist Party (Maoist) had threatened and compelled him to be displaced from his original hometown address. Any humanitarian support provided to him will be highly appreciated'.

Identity and Nationality

7. The applicant has been consistent in his evidence regarding his identity. While he claimed in his arrival interview on 18 July 2013 (Arrival Interview), and in his Protection Visa application form signed and dated 9 December 2012 that he was born on [date], he subsequently submitted a 'Certificate of Nepali Citizenship' and an English translation of his birth certificate which reflected the details he had given regarding his name, place of birth and parents details, but identified his date of birth being [date]. During his Protection interview held on 19 June 2017 (Protection Interview) he showed the delegate his original birth certificate. He explained that he had lost his original citizenship certificate before travelling from Nepal to India in 2013. Based on the identity documents provided I accept that the applicant is [name] born in Nepal on [date].
8. The applicant has consistently claimed that he was born in Arghakhanchi District, Nepal, and that, prior to commencing his journey to Australia in 2013 he had lived entirely in Nepal. He has claimed that he is a national of Nepal only and that he has never been a national of any other country. He has identified both his mother and his father as citizens of Nepal. He detailed with specificity his addresses and education in Nepal, including the names of the schools he has attended. He identified his preferred language as Nepali, and in all of his recorded interviews with the Department he communicated with the assistance of an interpreter in the Nepali and English languages. On the evidence before me I am satisfied that the applicant is a national of Nepal and of no other country. I am satisfied that Nepal is the receiving country for the purposes of the Act.

Consideration of facts – credibility

9. The applicant has had multiple opportunities to put forward to Australian authorities his reasons for leaving Nepal, his fears should he return to Nepal, and his reasons for seeking

³ 2016 Submission,

Australia's protection. He participated in an Arrival Interview in 2013 and a Protection interview on 19 June 2017 (Protection Interview), and submitted a Protection visa application form prepared with the assistance of RMA, signed on 9 December 2016, together with a NAATI accredited English translation of a statement dated 13 February 2017 detailing the applicant's claimed circumstances (2017 Statement). The 2016 Submissions accompanied the application, and supporting documentation referred to throughout this decision record was submitted to the delegate.

General Concerns

10. The claims made by the applicant regarding his adverse targeting by Maoists in Nepal are general in nature. Specific timelines of adverse events/experiences are not given in the written material or supporting documentation he submitted.
11. However, he was specific in his written material regarding timelines of other events in his life, such as his education and his residential movements in Nepal. For instance, in his Protection visa application he indicated that he resided at one address in Arghakhanchi District from his birth [until] April 1991; in [Town 1] between 1991 to 1994, and then at one address in Kathmandu from 1994 until departing Nepal to commence his journey to Australia in May 2013.
12. Regarding his education, he indicates in his application form that he completed secondary school in Arghakhanchi in 1991; he completed year 12 between [year] and [year] in [Town 1]; and he completed a [his higher education] at [a university] between [year] and [year]. This corresponds generally with the timelines given regarding his residential movements in Nepal. However, that education history does not accord with that recorded as being given by the applicant in his Arrival Interview in which he did not identify any education beyond his completion of year 12 in [year]. While he provided a purported academic transcript from [a] University indicating that he passed [a course] in 1999, this does not accord with his claim that he completed that course in 2003. I note also that the Australian Department of Foreign Affairs has recently reported a high prevalence of fraud in official documentation from Nepal⁴ and I cannot rule out that this document may be fraudulent. I do not consider the academic transcript to be probative evidence and I give it no weight in evidencing the applicant's education. I consider the evidence he has given regarding his education to be problematic for the reasons given above.
13. Regarding his employment in Nepal he indicates in his Protection visa application that prior to 1996 he was unemployed and a full-time student and supported by his father; from April 1996 to November 1997 he was [an Occupation 1] in a business the name of which he cannot recall in Kathmandu; from December 1998 until May 2010 he was the owner/manager of a 'private' business [at] [an address in] Kathmandu. Notably, this is the same address he has given for his home in Kathmandu between 1994 and 2013. He also states in his Protection visa application form that he was unemployed from June 2010 until departing Nepal in May 2013, and that he was 'being supported by funds saved from my previous business'⁵. The above employment history corresponds generally with that recorded as being given by the applicant during his Arrival Interview.
14. From the information given in his Protection visa application and summarised above, the applicant had ceased residing in his birth village in Arghackanchi District in 1994 and had only

⁴ DFAT 'DFAT Country Information Report, Nepal' 21 April 2016

⁵ Protection visa application, question 84

one address in Kathmandu from that time until he departed Nepal for Australia in May 2013. According to the oral evidence he gave in his Protection Interview, his wife and two young children continue to live at that same address in Kathmandu, with no suggestion that they have been harmed or adversely approached at any time or for any reason, including in respect of the applicant's claimed profile in Nepal.

15. Similarly, the applicant's evidence during his Protection Interview was that his elderly father continues to live in Arghakhanchi District with the applicant's brother. Again, there is no suggestion on any of the evidence advanced that the applicant's father or siblings in Arghakhanchi have been harmed or adversely approached by anyone in Nepal for any reason, including in respect of the applicant's claimed profile.

Targeting by Maoists

16. The applicant's central claim is that Maoists have repeatedly threatened and tried to kill him because he was against them, and because he was involved with the NCP. He claims that they captured all of his land and did not allow him to live in his birth district of Arghakhanchi; he moved to Kathmandu but he was not safe there either. He claims that he continues to face a real chance of serious and/or significant harm from the Maoists who he claims are still in power.
17. As noted above, the timeframes of significant aspects of his claims such as when his land was captured by Maoists and/or when Maoists tried to kill the applicant are not detailed in the applicant's written claims. However, these issues and more were explored in detail during the applicant's Protection Interview, revealing multiple irreconcilable inconsistencies and concerns which are not overcome by the totality of the evidence before me.
18. A significant concern on the face of the claims made is that the applicant continues to be a target for harm by 'Maoist party who is in the Government'⁶. His RMA's 2016 Submissions also argue that 'the Maoists are currently ruling the country'. However this is not consistent with reliable country information which indicates that the Maoists have not been in power in Nepal since at least the time of the Constituent Assembly elections in November 2013, having suffered a significant defeat in those elections which saw the Nepali Congress Party (NCP) and Community Party of Nepal (Unified Marxist Leninist) win an almost two thirds majority in the Assembly, with Maoists securing only 80 of the 575 directly elected seats⁷. The country information indicates that the party with which the applicant claims to have been involved, ie, the NCP, holds power in the current coalition government in Nepal⁸.
19. The applicant has claimed that he was targeted for harm by Maoists in Nepal in large part for reason of his involvement and profile linked with the NCP. However his oral evidence regarding that involvement, as presented during his Protection Interview, was at best general and lacking in detail. In his Protection visa application the applicant described himself as a 'local leader of my village' with political inclinations towards the NCP. During his Protection Interview he said that he became involved with the NCP in around 2046 in the Nepali calendar (ie around 1990) when living in his home district (Arghakhanchi). The applicant would have been aged around [age] at the time. He said the majority of his village supported the NCP at that time. He said he was a member and not just a supporter of the NCP.

⁶ 2017 Statement

⁷ DFAT 'DFAT Country Information Report, Nepal' 21 April 2016

⁸ *ibid*

20. Regarding why he chose to become involved with the NCP he told the delegate that he liked the party and how they thought about the country. However, when asked about the NCP's ideology and policies the applicant had difficulty responding, offering only that they wanted to develop the country. When asked to be more specific he said that they go to every part of the country and construct better roads and villages. When asked if there is anything more he said they also construct bridges. He identified the party symbol as a tree and named its current president as Sher Bahadur Deuba. However he could not name the current secretary. Regarding the number of seats the NCP currently holds in parliament he offered that it is '200 and something' but he forgets the exact number. His evidence did not demonstrate him to have a level of understanding or interest in the NCP consistent with his claimed involvement with the party, detailed further below.
21. When asked by the delegate to discuss his role in the party the applicant responded 'how to develop the village'. When asked what he means he responded 'roads and electricity'. When asked again to detail his specific role in the NCP and how that role changed over time he offered 'how can I get a budget from the government to spend on these things'. When asked what initiatives he took part in he responded 'constructing roads in the village, maintaining contact in the village about where we should focus, things like that'. When asked to elaborate on his involvement in 'constructing roads' he said he maintained the budget by 'bringing up the budget from the government and collect from some businessmen', however he did not explain what this involved, despite being asked by the delegate.
22. Regarding the duration of his involvement with the NCP he said that it spanned 2046 in the Nepali calendar (around 1990) 'until now'. However, when asked to discuss his current involvement he corrected his evidence, stating that he has had no involvement with the NCP since coming to Australia in 2013. When asked again to explain how his role changed over time he responded that his role increased over time; he involved himself in social work as well and became known to the main party office. When asked to tell the delegate more about this he responded 'what more should I say?' The delegate put to him that if he is unable to talk about what he did this will raise doubts about the truth of his claimed involvement with the NCP. The applicant then responded generally by stating that he collaborated with party members and participated in meetings about how to develop the district. He did not elaborate on the 'social work' he claimed to be involved in.
23. Regarding whether he had any involvement with the NCP after leaving his home district in 1994 he said he did not. However, he contradicted this when asked later about whether he was involved with the NCP after moving to Kathmandu, to which he responded 'yes'. When asked what he did for the party in Kathmandu he said that he would meet with the main leaders of the NCP and talk about 'what's happening in the party and how we can develop the country'. When asked about the frequency of this involvement in Kathmandu he said it was once a week. When asked to provide further detail about his role in the party in Kathmandu he said he did not have a high position and was more involved at the village level. However, this does not appear consistent with the evidence he gave moments earlier to the effect that he met on a weekly basis with leaders of the NCP in Kathmandu.
24. Regarding the purported letter he submitted to the delegate from the NCP, he said he obtained it by going into the party office in Kathmandu. When asked if he went to the party office in person he changed his evidence, saying that he asked a friend to go there, but he personally phoned the party office. He said he did that around three years ago, after he arrived in Australia and while he was on Christmas Island. When asked who issued the letter he said he does not know, despite a name and signature appearing on that letter. When asked whether the person who issued the letter knows him personally he responded 'yes'. When asked how

he knows that given that he does not know who issued the letter he responded generally that he was involved with the NCP and was a member in his village and that the letter was issued by the party office in Kathmandu but he is not sure by whom. However, as noted by the delegate during the Protection Interview, the letter was not issued in Kathmandu but in [another location]. When this was put to the applicant he responded 'maybe'. On the evidence advanced, including the above evidence given during the applicant's Protection Interview, I am not satisfied that the purported letter from the NCP is a genuine letter issued by an NCP office holder who knew/knows the applicant or who could comment on his role or activities, if any, with the NCP. I do not consider that letter to be probative evidence and I do not give it any weight in assessing the applicant's claims.

25. Noting the totality of the evidence advanced regarding the applicant's involvement with the NCP in Nepal, and the cumulative concerns detailed above, I have significant doubts about the truth of the applicant's claim to have ever been involved with the NCP, and to have been perceived to be involved. This in turn casts doubt on the truth of his claim that he was targeted by Maoists for reason of his NCP involvement.
26. Regarding his fears of harm from Maoists, the applicant's written claim is that he was threatened with harm by Maoists repeatedly in Nepal, and that Maoists also made attempts to kill him. However, in all of the evidence he advanced, both orally and in writing, he has not referred to any specific instances in which an attempt to harm him is detailed, other than when he claims the Maoists took his land in Arghakhanchi District and threatened to harm or kill him if he did not leave the area.
27. During his Protection Interview the applicant was asked to describe his adverse experiences with the Maoists. Again, he demonstrated difficulty providing detail. He said that when you are a member of a party and involved in social development you are targeted by the Maoists. He added that they took all of his property by force, as well as taking the property of many others in his village. When asked how they took his property he said they came and put their flag down and chased him out. He said they took his house and farm and told him that he has to leave or they would kill him. He said that this occurred during the civil war with the Maoists in around 2051 of the Nepali calendar (around 1995), causing him to have to leave his village and live in Kathmandu. Notably, as put to the applicant by the delegate, the civil war in Nepal did not commence until 1996, however I am mindful that exact dates are difficult to recall and that the 2051 was close to the commencement of the Nepali civil war. However, when the concern was put to the applicant he changed his evidence, stating that his land was taken by Maoists in 2061 of the Nepali calendar (around 2005), and after that he moved to Kathmandu. However, earlier he had told the delegate that he moved to Kathmandu for his studies in 2052 (1996/7) and had not returned to live in his home district after that, except for a short stay of six months in around 2054 (around 1998). Those timelines also do not accord with the residential movements set out in his Protection visa application form, indicating that he had moved to Kathmandu in 1994 and retained the same address there from 1994 until departing Nepal for Australia in 2013. This does not support his claim that he fled his village due to Maoist threats or their take-over of his claimed land.
28. The applicant has not submitted any documentary evidence of ever owning property in Nepal. When asked about the current status of his property in his home district he said that a 'former Maoist' from the lower caste is living there. When asked if he has tried to reclaim his land he said that he went to the police many times but they could not do anything, however he also said that he has not returned to his home district since his land was taken by Maoists. He did not elaborate on the steps he has taken to reclaim his property from the Maoists. He did not identify the time-frames in which he claims to have sought police assistance nor provide any

documentary evidence or police reports in support of those claims. He did not refer to taking any other steps to reclaim his property from Maoists despite the NCP holding a majority in the coalition government of Nepal since November 2013 and despite his claimed contact with the NCP office in Kathmandu to request the letter considered above.

29. He was asked whether he experienced any harm in Kathmandu, where his Protection visa application indicates he resided at the same address for around [number of years], spanning 1994 to 2013. He responded that he was not really harmed but, as a business owner he had to make donations to the Maoists and they threatened to kill him if the donations were not made. He said he made donations every six months but he could not continue to do that as it was too difficult so he decided to sell the business he had established in Kathmandu.
30. His evidence regarding his business in Kathmandu, however, is also problematic. Firstly, on the evidence he has provided, he was approached by Maoists at that business but he was never harmed by them, despite his claims that they had networks connected with Maoists in his home district who were and remain intent on killing him for failing to support them and for his links with the NCP. Secondly, the address he gave for his claimed business in Kathmandu was exactly the same as that given for his home, suggesting that any [business] he owned/ ran was located at his home address. Despite this, his evidence does not reveal the applicant to have been targeted for harm at his home at any time. Nor does his evidence refer to his wife and children who have remained at that address since the applicant's departure in 2013, being adversely approached by anyone in his absence.
31. Regarding his claims to have had a business in Kathmandu, the applicant said during his Protection Interview that he opened his [business] in around 2061 (around 2005) in the Nepali calendar; he owned the store; it was a registered business; he ran that shop for around 10 years. However, the timeframes he gave during his Protection interview are problematic. Firstly, if he ran the shop for ten years from around 2005, he would have run it until 2015, some two years after he departed Nepal. However he told the delegate that he sold the shop before he departed Nepal in 2013. Further, according to the employment timeline set out in his Protection visa application he began running that store in December 1998 and stopped running it in May 2010.
32. The delegate asked the applicant to describe the process for registering his claimed business in Nepal. His response was again very general, to the effect that you go to the authority saying you want to start a business and they register you. When asked what documents he had to provide he referred only to his citizenship certificate. When asked to describe the operation of his business he said that he received materials from companies and sold them. Those materials comprised [certain products]. He would order them by phone and they would be delivered. He identified his average monthly income is around [amount of money].
33. When asked if he has any evidence that he owned or ran a shop he said that he had a registration paper which is in Nepal, and he will need to ask for it to be sent. Notably, he said that during his interview on 19 June 2017, however there is no evidence before me that he has provided any such document or that he has taken any steps to obtain it, despite his evidence that his wife, his three siblings and his father continue to live in Nepal. The only evidence before me that the applicant has ever owned or ran a business is his own unsupported assertions.
34. The delegate asked the applicant why he did not attempt to source other work linked to his [qualifications]. Again the applicant responded generally that whatever work he did he would have had to make donations. He did not explain why he chose to run a [business] from his

home address for ten years given the opportunities which would have been available to him as a claimed a university graduate holding a [degree]. These factors together, in the context of the cumulative concerns identified in the balance of this decision, cast doubt on the truth of multiple aspects of his claims, including his claim to have attained the tertiary qualifications identified, and his claims to have owned/run a business in Kathmandu.

35. Notably the applicant claims that he sold his shop in Kathmandu in 2010. He did not elaborate on how he sold that business or how much he sold it for. After selling that business he did not depart Nepal for another three years, in May 2013. When asked to identify what triggered his decision to depart Nepal in May 2013 he referred only to a friend advising him and he felt it was better to die in Australia than Nepal. He did not identify any specific incidents or ongoing threats which informed his decision at that time, and on the evidence advanced he did not refer to being targeted by Maoists at any time since he left his home district in 1994, other than being asked for donations.
36. When asked why he thinks the Maoists would continue to have an interest in harming him now he responded that he was not involved with their party they have had him as a target for a long time. However, this is not supported by the totality of his evidence which indicates that he lived his entire life in Nepal until commencing his journey to Australia in 2013 without ever having been harmed by anyone, including the Maoists; despite his father and brother continuing to reside in his home district of Arghakhanchi and his wife and children living at the same address the applicant shared with them in Kathmandu since 1994, his evidence does not identify any of his families being so much as approached or questioned by anyone in respect of the applicant's claimed profile. These factors, in the context of the cumulative concerns detailed in the balance of this decision do not satisfy me that the applicant has ever had a profile of adverse interest to the Maoists or anyone else in Nepal.
37. The concerns detailed in the cumulative considerations above go to extensive aspects of the applicant's claimed circumstances in Nepal, and beyond his claims to be at risk of harm from Maoists. They go to the reliability of the evidence he has provided regarding his circumstances more generally, including in respect of his education and his employment. The concerns are such that I cannot be satisfied on the evidence before me of the truth of his claimed education and employment in Nepal, or of his financial circumstances at the time he departed Nepal or should he return there. They are such that I also cannot be satisfied, and am not satisfied, of the truth of his claim that he was unable to support himself financially for any period in Nepal/Kathmandu.

Findings of Fact

38. Having considered the totality of the evidence advanced by the applicant, I consider multiple aspects of his claims to be problematic, inconsistent, vague, unconvincing and lacking in credibility. I am not satisfied on the evidence before me of the truth of multiple aspects of the applicant's claimed circumstances, including that the applicant:
 - a. personally had land or assets in Nepal which were taken over by Maoists
 - b. had or has any actual or perceived profile as a member, supporter or advocate of the NCP or as an opponent of the Maoists
 - c. has any particular political opinions he wishes to express
 - d. owned or ran a business in Kathmandu

- e. was a businessman in Nepal
- f. has completed a [degree]
- g. was targeted by Maoists for forced donations as the owner/operator of a business or otherwise
- h. was personally threatened by Maoists for any reason
- i. experienced any attempts by Maoists to harm or kill him at any time in Nepal
- j. was or will be unable to support himself or his family financially in Nepal

39. I am not satisfied that the applicant had, at the time he departed Nepal, or has currently, an adverse profile giving rise to a real chance of harm to the applicant in Nepal in the reasonably foreseeable future. Nor am I satisfied that he faces a real chance of economic hardship or a denial of capacity to earn a livelihood or similar which threatens his capacity to subsist in Nepal.

Refugee assessment

40. 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

41. 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.

42. Based on the findings of fact above, I am not satisfied that the applicant faces, in Nepal, a real chance of harm in the reasonably foreseeable future for any of the reasons claimed or arising on the evidence. It follows that I am not satisfied that the applicant has a well-founded fear of persecution in Nepal.

Refugee: conclusion

43. 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

44. 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

45. 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.

46. Based on the findings of fact above, I am not satisfied that the applicant faces, in Nepal, a real risk of harm, including significant harm as contemplated by the relevant law, in the reasonably foreseeable future for any of the reasons claimed or arising on the evidence.

Complementary protection: conclusion

47. 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.

91W Evidence of identity and bogus documents

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

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

...

91WA Providing bogus documents or destroying identity documents

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

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