



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00258

Date and time of decision: 13 July 2016 12:17:43
Urvi Bhatt, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Hindu, Tamil from [District 1], Northern Province, Sri Lanka. He arrived in Australia [in] September 2012. In August 2013, the applicant lodged an invalid application for a Protection visa (Subclass 866). He lodged a valid application for a Safe Haven Enterprise Visa (SHEV) [in] December 2015. This visa was refused [in] June 2016.
2. The delegate found it not credible that: the applicant was a former combatant for the LTTE; the applicant had any association to the LTTE through his [three specified relatives] all being former LTTE members; and the applicant has ever been questioned or stopped by the Sri Lankan authorities for having a real or perceived association to the LTTE. The delegate accepted the applicant would be returning to Sri Lanka as a failed Tamil asylum seeker who departed illegally but found the applicant would not face a real chance of serious harm or a real risk of significant harm on this basis.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 29 June 2016, the IAA received a submission and statutory declaration from the applicant. The entirety of the submission and statutory declaration contained discussion on why the applicant did not agree with the delegate's decision. I do not consider this to be 'new information,' and have had regard to it.
5. The applicant also submitted photos of his [Relative A] who currently resides in Sri Lanka. These photographs were not before the delegate at the time of decision and I consider this to be 'new information.' He claims that she was also a former LTTE member who was injured during the final stages of the conflict. The photos submitted are of a young female who has visible injuries. The photographs are undated. During the SHEV interview the applicant was asked if he wished to provide any further information, to which he responded he did not. The applicant's registered migration agent, who was present during the SHEV interview, indicated that he would be providing a submission to the delegate, which was submitted [in] March 2016. The photographs were not included. In the submission to the IAA, the applicant has not provided any reason as to why these photos were not and could not have been provided to the delegate prior to the decision being made or why they may be considered credible personal information. I am not satisfied s.473DD(b) is met. I am also not satisfied that there are exceptional circumstances to justify considering this information.
6. The applicant submitted his educational results from [his] College, dated [in] September 2012. This certificate was not before the delegate at the time of decision and I consider it to be new information. During the SHEV interview the delegate put forward some concerns in relation to the inconsistent evidence provided by the applicant in respect to his educational history. He was also provided the opportunity to provide additional documentation in relation to his educational history, which he submitted to the delegate [in] March 2016, however this certificate was not provided. This certificate pre dates the delegate's decision. The applicant has not provided any reasons as to why it was not or could not have been provided to the delegate or why it may be considered credible personal information. I am not satisfied that

s.473DD(b) is met. Nor am I satisfied that there are exceptional circumstances to justify considering this information.

Applicant's claims for protection

7. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:
- He has previously been unable to express his claims for protection and apologises for being untruthful. Other Tamils advised him not to tell the truth upon arriving in Australia and he listened to them, but now he understands the importance of telling the truth.
 - His family is originally from [District 1] and have always resided in the Northern Province.
 - His [Relative B] was a senior member of the LTTE. His name was [Leader A].
 - The applicant's [Relative C] also joined the LTTE in 1990 to 2002. His [Relative A] joined the LTTE in 2006 until she was injured in January 2009.
 - In July 2008 the applicant was recruited to the LTTE. He was only [age] years old at the time. His role was to [task] and look after injured fighters, but after [number] days of training he also fought when he was ordered to do so. He also acted as an informant for the LTTE, advising them of other Tamils who attempted to leave the LTTE. He would forcibly bring back former LTTE members who had run away.
 - In December 2008, his family were displaced to [a specified town]. [In] January 2009 his [Relative A] was injured due to a shelling attack. His family then moved to [Town 1]. In March 2009, his [Relative C] and brother were killed in a shelling attack. The applicant continued to work for the LTTE but in March 2009 [Town 1] was captured by the Sri Lankan army and his family moved to [a different town].
 - Once the civil conflict ended he and his family moved to a refugee camp in [Town 2]. At that time the Sri Lankan authorities were calling upon all those who had engaged with the LTTE to hand themselves in. He chose not to disclose the fact that he was a former LTTE member to the authorities.
 - In December 2009, the applicant and his brother moved to Jaffna to complete their education. The applicant's mother and [Relative A] resettled in [District 1]. In late 2011, while the applicant was still living in Jaffna, the Criminal Investigation Department (CID) went to the home of the applicant's mother. The CID enquired about their family connection to the LTTE. The CID returned regularly to make further enquiries.
 - In May 2012, the applicant returned from Jaffna to [District 1] as he completed school. One week later, he was coming home from work and some Sri Lankan Army officers stopped the applicant. They yelled at him, hit him and abused him for being a former LTTE member. He was released after three hours and returned home.
 - In June 2012, the CID visited the applicant's home and questioned the applicant about his [Relative C's] involvement with the LTTE and his [Relative B] who was a [Leader] in the LTTE. They again accused the applicant of also being a former LTTE member. The CID advised the applicant to report to their office the next day, but he did not attend. He went into hiding in his [Relative B's] [property]. As he did not attend, the CID went to his home again and questioned his mother about the applicant's whereabouts. His mother told them that the applicant disappeared.

- He remained in hiding for 40 to 50 days as he feared being kidnapped or seriously harmed. His neighbour was shot by armed officers during this period as he was also accused of being a LTTE member.
- The applicant decided to leave Sri Lanka. Since his departure, the CID have questioned his mother.
- He fears returning as he will be arrested, detained and possibly killed because he was a LTTE member.
- He also fears the local authorities and paramilitary groups in his home village.
- He fears returning to Sri Lanka as he departed illegally and will be returning as a failed asylum seeker.

Factual findings

Identity

8. The applicant claims to be a Hindu, Tamil from [District 1], Northern Province, Sri Lanka. The applicant has provided Sri Lankan identity documentation in order to support his claims, including his national identity card and Sri Lankan birth certificate. I accept the applicant is a Hindu, Tamil from [District 1], Northern Province and that Sri Lanka is the receiving country for the purposes of this assessment.

Association to the LTTE

9. In his Arrival interview and invalid Protection visa application, the applicant stated that he fears returning to Sri Lanka as the CID had approached his family home asking if anyone in his family was part of the LTTE movement. He declared that he had never participated in armed conflict nor had he received any training for conflict. He feared harm on the basis of being a Tamil and because the CID and Sri Lankan authorities would suspect him of being associated to the LTTE as he is from a former LTTE stronghold.
10. In his SHEV application, the applicant provided a similar account in relation to the CID questioning his family's association to the LTTE. However, the applicant added that the CID had questioned his family because he was a former combatant with the LTTE. He claimed to have joined the LTTE in June 2008 and fought until the end of the civil conflict in May 2009. The applicant also stated that his [Relative C] worked for the LTTE between 1990 and 2002 when he suffered a [medical condition] and was dismissed. His [Relative A] was a member of the LTTE between 2006 and 2009 and his [Relative B] was a senior member of the LTTE.
11. During the SHEV interview, the applicant was asked why he did not declare his association with the LTTE in his earlier interviews or applications which were before the department. He stated that when he arrived in Australia he had been told by other Tamils to conceal his association with the LTTE as he will be kept in detention for a longer period of time or forcibly returned to Sri Lanka. He was fearful of these consequences so did not provide the truth.
12. During the SHEV interview the applicant stated that he joined the LTTE in July 2008 as he could not refuse. He was forcibly recruited but after some time he voluntarily undertook weapons training and participated in combat. He claimed to have initially worked in [a section] before becoming a combatant and an informer for the LTTE. He used to identify LTTE members who deserted the movement and bring them back to fight. Subsequent to the conflict ending, he

was never questioned by the authorities until 2012. During the SHEV interview, it was put to the applicant that this seemed inconsistent with country information and that most former combatants with the LTTE were identified at the end of the conflict or while they were in displacement camps by other former LTTE members and that once identified they were sent to rehabilitation centres. The applicant stated that he was sent to a displacement camp with his mother, brother and [Relative A] and his [Relative A] was seriously injured and he just looked after her while they were there. His brother was also young so the applicant took care of him. He did not let the authorities know that he was a former LTTE member and at that time they did not suspect him of being associated to the LTTE.

13. The applicant claimed that in late 2011 the CID visited his home in [District 1] and questioned the applicant's mother. The applicant and his brother were studying in Jaffna at the time and his mother was home alone with his [Relative A]. The CID asked about the family's association to the LTTE including the applicant's [Relative C's] role. The CID made regular enquiries and in May 2012 the applicant returned to [District 1] from Jaffna as he had completed his studies. One week later the CID questioned the applicant and detained him for three hours and accused him of being a LTTE member. In June 2012 they questioned the applicant again about his [Relative C] and [Relative B] and ordered him to report to the CID the next day but he did not go. He went into hiding and then left for Australia.
14. The delegate had credibility concerns in respect to the applicant's claim to have been a former LTTE combatant, and his association to the LTTE through his [Relative C], [Relative A] and [Relative B]. The delegate found it not credible that the applicant was being truthful as he only raised these claims as part of his SHEV application lodged in 2015, despite having the opportunity to raise this earlier in his Arrival interview and/or in the invalid PV application. I, however, have made different credibility findings to the delegate, and find it to be plausible that the applicant was afraid of being held in long term detention in Australia on the basis of being a known LTTE combatant, who had received weapons training and shot firearms during his time with the LTTE. I accept as plausible the applicant thought that he would be considered a security risk to the Australian community and would be unable to remain in Australia. I accept as plausible the applicant's reasons as to why he did not raise this aspect of his material claims earlier.
15. I also accept the applicant's account of being recruited into the LTTE and that he is a former LTTE combatant. His account is consistent with country information.¹ I accept the applicant's [Relative A] was a LTTE member between 2006 and 2009 when she was injured and could no longer walk. I also accept the applicant's [Relative C] was a member of the LTTE between 1990 and 2002 when he suffered a [medical condition] and was discharged, and that the applicant's [Relative B], was a senior member of the LTTE. Country information indicates that [Leader A] was appointed as [leader] of the [specified district] in [year].²
16. The applicant's [Relative C] and brother were killed in a shelling attack in 2009. It is reported that 11,172 people were killed in 2009 at the height of the country's civil war. Kilinochi and Mullaitivu districts being the epicentres of the LTTE campaign.³ Given the location of the applicant's family in [nearby District 1] at the time of the final months of the conflict, I accept the applicant's [Relative C] and brother were killed in a random shelling attack during this time.
17. Country information in respect to the situation for former LTTE combatants states that at the end of the conflict, former LTTE leaders and combatants either surrendered or were identified

¹ [Deleted.]

² Ibid.

³ "8,000 killed in final phase of Sri Lanka's civil war Report", Press Trust of India (PTI), 25 February 2012, CX282263

during ongoing screening processes. They were usually taken away and held in various, often opaque systems of detention and rehabilitation and only gradually released.⁴ There were 11,696 individuals held for the purposes of rehabilitation who had varying degrees of involvement with the LTTE. Those detained at the end of the armed conflict were identified in a number of ways. Many responded to the repeated calls for anyone having even one day of service with the LTTE and voluntarily handed themselves over. Young women with cropped, short hair were easily identified as LTTE cadres. Young men were warned with questioning that if they did not admit involvement with LTTE they would suffer severe consequences.⁵ Screening took place in Mullaitivu and Omanthai where members of paramilitary groups or former LTTE cadres who had become informants assisted military intelligence officers in identifying former LTTE military cadres, members of the LTTE and LTTE in support functions.⁶ UNHCR reported that a total of over 11,000 individuals with alleged links to the LTTE, mostly former combatants, but also drivers, cooks and other aides, have undergone a rehabilitation process.⁷

18. Reports published in 2012, three years subsequent to the cessation of the conflict and the same year as the applicant claims to have been first questioned in relation to his LTTE association, state that the Northern Province continued to be under de facto military operations. It was reported that deepening militarisation of the province presented a threat to long term peace and stability, and that far in excess of any legitimate need to protect against an LTTE revival, the militarisation of the north was generating widespread fear and anger among Tamils.⁸ In 2012, the Sri Lankan authorities were still entering the selected houses detaining ex-LTTE members.⁹ The Sri Lankan authorities stated in 2012 that they were aware that not all former Tigers had surrendered.¹⁰ These suspects were detained under the 1979 Prevention of Terrorism Act (PTA) which remained in place to allow for detention of terrorism suspects without legal representations for an unlimited time.¹¹ In 2013 it was reported that military personnel still frequently intervene in civilian life.¹²
19. I share some of the delegate's concerns in respect to the applicant's ability to have resided in the Northern Province since the end of the conflict in May 2009, having lived in a displacement camp operated by the Sri Lankan authorities and having had encounters with the CID yet was never sent to a rehabilitation camp or even held in detention on the basis of being associated to the LTTE. However, based on the evidence before me it is possible that the applicant was able to reside in the Northern Province between the end of the conflict and 2012 without being sent to a rehabilitation camp or detained. As country information cited above outlines, the Sri Lankan authorities continued to question, detain and arrest former LTTE members in 2012. This is consistent with the applicant's account that his mother was first questioned about the family's association to the LTTE in late 2011 and the applicant was first questioned in 2012 when he returned to [District 1] from Jaffna. I accept the applicant was questioned by the CID on two occasions on suspicion of being a former LTTE combatant and on the basis of the association the applicant had to his [Relative C], [Relative B] and [Relative A], who were all

⁴ Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL)", 16 September 2015, CISEC96CF13358

⁵ Ibid.

⁶ Ibid.

⁷ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁸ International Crisis Group, "Sri Lanka's North I: the denial of minority rights", Asia Report No.219, 1 March 2012, CIS22742

⁹ "220 Tamils arrested in SLA combing in Trincomalee", Tamil net, 25 April 2012, CX285874; "Fears for Tamil detainees in Sri Lanka", British Broadcasting Corporation (BBC), 4 May 2012, CX286446

¹⁰ "Fears for Tamil detainees in Sri Lanka", BBC, 4 May 2012, CX286446

¹¹ "Countries at the Crossroads 2012 - Sri Lanka", Freedom House, 20 September 2012, CX296112

¹² "Human Rights Watch World Report Sri Lanka 2013", Human Rights Watch (HRW), 21 January 2013, CX310698

former members of the LTTE. I accept the applicant was of adverse concern to the Sri Lankan authorities during the time of his departure from Sri Lanka and that this was the basis of his illegal departure from Sri Lanka.

Failed Asylum Seeker/Illegal Departure

20. The applicant has consistently stated that he departed Sri Lanka illegally and that he fears harm from the Sri Lankan authorities on this basis. He also fears harm on the basis of returning to Sri Lanka as a failed asylum seeker. I accept the applicant departed Sri Lanka illegally and will be returning as a failed asylum seeker.

Refugee assessment

21. 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

22. 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.
23. I have accepted the applicant was a former combatant with the LTTE that his [Relative C], [Relative A] and [Relative B] were also members of the LTTE, and that he has been of interest to the Sri Lankan authorities on the basis of his involvement and connections to the LTTE. For the following reasons, I am satisfied there is a real chance the applicant will face being arrested and detained and possibly physically harmed upon returning to Sri Lanka on the basis of his real and imputed political opinion now and in the reasonably foreseeable future.
24. The applicant will be returning to Sri Lanka as someone who departed Sri Lanka illegally. On this basis, I find the applicant will have to undergo standard processing requirements conducted by the Department of Immigration and Emigration (DoIE), the State Intelligence

Service (SIS) and a unit of the CID based at the airport.¹³ While I do not consider that this in itself will give rise to any harm, country information indicates that during the processing of returnees, DoIE officers check travel document and identity information against the immigration database. SIS checks the returnee against intelligence databases. The CID verifies a person's identity to determine whether the person has any outstanding criminal matters.¹⁴

25. The applicant has never held a Sri Lankan passport and will be returning on some sort of temporary travel document. For these individuals, DFAT has reported that police undertake an investigative process to confirm the person's identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed home suburb or town police, contacting the person's claims neighbours and family and checking criminal and court records.¹⁵
26. I am satisfied that upon return to Sri Lanka, the applicant will be subject to questioning and checks which will reveal the applicant's association to the LTTE and the previous questioning which he and his mother faced with the CID prior to his departure from Sri Lanka in 2012.
27. The current UNHCR Eligibility Guidelines, published in 2012, identify persons suspected of certain links with the LTTE, including former LTTE combatants as well as persons with family links to such persons as potential risk profiles. Real or perceived links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need of international protection, depending on personal circumstances.¹⁶
28. Freedom from Torture, in 2012, noted 24 cases of Tamil returnees from the UK with a real or perceived LTTE affiliation who were targeted for detention and torture in Sri Lanka demonstrated that torture is ongoing despite the conclusion of the civil war. The fact that an individual did not face adverse consequences in the past because of their actual or perceived association with the LTTE is not decisive now in assessing risk on return.¹⁷ The Age, an Australian newspaper, also reported similarly in 2012 when Tamils who were sent home by the Australian authorities were arrested at the airport in Sri Lanka and accused of being members of the Tamil Tigers. Some of these men were held for up to 55 days without charge and tortured.¹⁸
29. I note that the UNHCR Guidelines, the Freedom from Torture report and the Age article are all somewhat dated. DFAT's latest report, published in 2015, assesses that monitoring and harassment of Tamils has decreased under the current Sirisena government and on a day to day basis, the Tamil community feels more confident to refuse or questions the motives or monitoring activities undertaken by authorities, if such activities occur.¹⁹ Nevertheless, DFAT also reports that while the majority of the low profile (low risk) former LTTE members have already been released following their detention, any other low-profile LTTE members who came to the attention of the Sri Lankan authorities would be detained and may be sent to the remaining rehabilitation centres. Following their release from rehabilitation centres, low-

¹³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 5.29

¹⁴ Ibid. 5.30

¹⁵ Ibid. 5.31

¹⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

¹⁷ Freedom from Torture, "Sri Lankan Tamils tortured on return from the UK", 1 September 2012, CIS24086

¹⁸ "Sent home to 'arrest, torture'", The Age Australia, 24 July 2012, CX302999

¹⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 3.9

profile former LTTE members may be monitored but generally are not prosecuted.²⁰ Even under the current government, DFAT assesses that Sri Lankan authorities may monitor any members of the Tamil diaspora returning to Sri Lanka, depending on their risk profile.²¹

30. DFAT also assesses that close relatives of the LTTE members, particularly high-profile members, who are wanted by Sri Lankan authorities are likely to be subject to monitoring.²² I note that the applicant's [Relative C] and [Relative B] have both passed away, however given their membership of the LTTE, particularly the applicant's [Relative B's] senior position, I am satisfied there is a real chance the applicant will be questioned in respect to the applicant's association with him.
31. At the time of the applicant's departure from Sri Lanka, the CID were actively pursuing him and his family in respect to their association to the LTTE. The applicant's mother has been questioned by the CID since the applicant's departure from Sri Lanka. While DFAT reports that the security situation in the north and east has greatly improved since the end of the conflict, military and security forces maintain a significant presence in the Northern Province, including [District 1] where the applicant is from.²³ DFAT also reports that while monitoring has decreased, Tamils in the north and east of Sri Lanka are still being questioned and observed.²⁴ I am satisfied there is a real chance the applicant will be of interest to the Sri Lankan authorities upon his return on the basis of his and his family association to the LTTE.
32. DFAT has reported that most former LTTE members experience at least some form of cohort specific official discrimination. Such adverse attention can include monitoring, harassment, arrest, detention or prosecution according to the former members risk profile.²⁵ DFAT has also highlighted reports of abuse and torture occurring in 2015 in Sri Lanka against those with links to the LTTE.²⁶
33. I am satisfied that upon return to Sri Lanka the applicant will come to the adverse attention of the Sri Lankan authorities given his links to the LTTE as well as to other members of the LTTE, including his [Relative C], [Relative B] and [Relative A]. While DFAT has reported an improvement to the situation under the current government of Sri Lanka, there is still evidence of abuse and mistreatment occurring towards those suspected of having a real or imputed association to the LTTE.²⁷ I am satisfied there is a real chance the applicant will undergo questioning, be held in detention and be subject to physical ill-treatment. I find that the detention and physical mistreatment the applicant may face from the Sri Lankan authorities is serious harm as defined by the Act and I am satisfied the conduct is systematic and discriminatory on the basis of his real and imputed political opinion arising from his association to the LTTE. I am satisfied this harm amounts to persecution within the meaning of s.5J(4).
34. I am satisfied the harm would be inflicted by the Sri Lankan authorities who control the entire country.²⁸ As the harm would be inflicted by the authorities, I find that effective protection measures are not available to the applicant and the harm relates to all areas of the receiving country. I am not satisfied the applicant is able to take reasonable steps to modify his

²⁰ Ibid. 3.43

²¹ Ibid. 3.47

²² Ibid. 3.53

²³ Ibid. 2.37

²⁴ Ibid. 2.39

²⁵ DFAT, "DFAT Thematic Report People with Links to the LTTE", 3 October 2014, CIS2F827D91260 3.1

²⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 4.18

²⁷ Ibid. 3.43, 3.47

²⁸ Ibid. 3.63

behaviour in order to avoid persecution as the harm feared is on the basis of innate characteristics which he is unable to modify such as previous association to the LTTE.

35. I am satisfied the applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

36. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

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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