



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00739

Date and time of decision: 15 December 2016 09:20:00
Rosie Mathlin, 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 is a Tamil Hindu in his early thirties from the [town 1] area in Eastern Province, Sri Lanka.
2. He arrived in Australia by boat, undocumented, [in] October 2012.
3. [In] March 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV) claiming that he faced harm on return to Sri Lanka as a young Tamil male from Eastern Province who would be imputed to support the LTTE, and because he had departed illegally. He also claimed that he faced harm because he had supported the Tamil National Alliance (TNA) in the 2012 provincial elections.
4. [In] August 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

Information before the IAA

5. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
6. [In] September 2016 the applicant provided submissions to the IAA which address aspects of the delegate's decision, in particular the findings made under the complementary protection criterion. He stated that he would be detained on arrival and investigated, during which his previous arrest and detention and suspected links with the LTTE will be discovered. He will undergo additional questioning and may be subjected to harm. He will be prosecuted for illegal departure and will be detained until he is bailed. There is no one in Colombo to vouch for him or bail him. These claims were also made before the delegate and are not new information. I have considered the submissions. Also [in] September 2016 the applicant provided the IAA with DFAT reports which were in the referred material and are not new information.
7. [In] September 2016 the applicant provided a copy of a document purported to be an acknowledgement by the Human Right (sic) Commission of Sri Lanka of a complaint lodged by the applicant [in] June 2007 in relation to "fearful by unknown arm person" (sic); and a "Detention Attestation" letter [in] September 2007 from the International Committee of the Red Cross stating that the applicant was visited by ICRC delegates [in] June 2007. It stated that he "was searching by unknown arm group, Unknown Arm person often called by the phone, He is pathetic situation in Sri Lanka anywhere" (sic). In a covering letter the applicant reiterated claims made before the delegate about inquiries made in relation to his trip to Australia, stating that the CID had apprehended him buying items at the pharmacy and had taken his identity details and warned him to advise them if he knew of anyone traveling to Australia by boat. I have considered the information in the covering letter as it is not new information. I have not considered the documents. They date from 2007 and therefore pre-date the delegate's decision. No explanation has been given as to why they could not have been provided before the decision was made. The applicant was legally represented when he lodged his [protection visa] application and I consider that he and his representative would have been aware of the importance of these documents. I am not satisfied that they could not have been provided to the delegate before the decision was made. The documents are in vague terms and it is not entirely clear which incidents of harm reported by the applicant they refer to. In

any case, the delegate accepted that the applicant was detained in 2007, as do I. Given the nature of the documents and my acceptance that the applicant came to the adverse attention of armed groups in 2007, I do not consider that there are exceptional circumstances which justify consideration of the documents.

Applicant's claims for protection

8. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:

- Until 2007 the applicant lived with his family in an LTTE controlled area. In 2005 the LTTE took his father's vehicle for their own use.
- In 2007 the Sri Lankan [government officials] found the vehicle in LTTE territory and detained the applicant and his father for three days, accusing them of helping the LTTE. During this detention they were beaten and as a result the applicant's father suffers ongoing deafness.
- From 2007 until 2009 the applicant lived in another area with his [relative]. While not entirely clear, it appears that he did not experience further problems while living with his [relative]. During this time he was studying for a [qualification] by distance education.
- In 2009 the applicant returned to his usual place of residence. Armed groups wearing civilian dress who the applicant thinks may have been the TMVP continued to come to his home and investigate him. At the [protection visa] interview he indicated that they continued to take him to their camp.
- In 2012 the applicant helped with the election campaign of the local TNA candidate who offered him protection if he did so. The applicant put up posters for the candidate, but he later told the applicant that he could not even protect himself, and suggested that the applicant leave the country.
- Because of his work for the TNA he had problems with a group who he believes was the TMVP.¹ [In] August 2012 they pushed him up against a fence and told him not to support the TNA any more. A few days before the election they came to his home and made threats, but he was not there at the time. After the election they came to his home again and after that he did not return home.
- The applicant fears that he will be killed if he returns. He will be arrested and investigated at the airport and they will get reports from his home area. They will find that the applicant had problems in the past because he was and was suspected of supporting the LTTE.
- He claims that while buying items for the trip to Australia he was questioned by the police or the CID who asked if he was planning to go to Australia and asked if he knew anyone else who was. He said that people asked about his whereabouts after he left Sri Lanka. A friend said that he had gone to Australia and the friend was told to tell the applicant to go to the police station or the CID when he returned.

¹ A paramilitary group and later political party led by the former LTTE commander in Eastern Province who changed sides in 2004 and supported the government: International Crisis Group, Sri Lanka's North I: the denial of minority rights, Asia Report No.219, 16 March 2012, CIS22742

Refugee assessment

9. 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

10. 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.

Identity and nationality

11. There is no issue as to the applicant's identity. I accept that he is a national of Sri Lanka and that Sri Lanka is the receiving country for the purposes of the Act.

Imputed political opinion – LTTE links and Tamil ethnicity

12. The applicant claims to fear harm from the security authorities because of an imputed connection to the LTTE. I accept that the applicant is a Tamil male from an area formerly under LTTE control; and I accept that because he departed Sri Lanka unlawfully in 2012 to come to Australia where he unsuccessfully sought asylum he will receive a degree of scrutiny at the airport on return as part of routine processing; he may also face prosecution. I have considered the cumulative impact of these factors when assessing how the applicant might be viewed by the authorities on return. UNHCR's most recent (2012) Guidelines for assessing the eligibility of Sri Lankans for asylum² state that there is no longer a presumption of a requirement for protection simply for reason of being of Tamil ethnicity and a prior resident of areas of the country previously under the control of the LTTE, namely the Northern and Eastern Provinces. The Guidelines state that persons suspected of having certain LTTE profiles, or who have family links to people with these profiles, may be in need of international refugee protection, depending on their individual circumstances. Such profiles include, relevantly, former

² UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

supporters who were involved in sheltering or transporting personnel or providing funding or other support to the LTTE.

13. I accept that in 2005 the applicant's father was forced to lend his vehicle to the LTTE. I accept that the applicant and his father were detained and beaten for three days when the vehicle was subsequently discovered in the possession of the LTTE. I consider the fact that they were released indicates that the authorities were satisfied that they did not have any additional involvement with the LTTE, and in particular that they were not fighters or members of the organisation. Indeed, DFAT and UNHCR advise that everyone who lived in LTTE controlled areas would have had contact of a similar nature with the organisation.³ Beyond this, the applicant does not claim that he or any other member of his family was involved with the LTTE in any way.
14. I accept that after the detention in 2007 the applicant continued to be monitored by the authorities, though his evidence about this was somewhat vague and inconsistent. It appears that when he lived with his [relative] in another area from 2007 until 2009 he did not experience any difficulties, but he claims that when he returned to his home in 2007, armed groups came "continuously" and made inquiries about him and he was sometimes taken to the nearby camp. I accept that unidentified armed groups, most likely paramilitaries who at that time were working with the Sri Lankan government, continued to inquire after him and that he may have been taken to the camp on occasions but his evidence does not suggest that he was thereby subjected to serious harm. I consider that this ongoing interest in the applicant occurred in the context of the routine monitoring of the Tamil population which continued after the war, and I am satisfied that it does not indicate that the authorities had any particular ongoing suspicion or concerns about what the applicant's involvement with the LTTE during the war actually was. I consider that had they done so, he would have been subject to more intensive and focussed investigation than his evidence suggests.
15. Country information indicates that while the Sri Lankan security authorities continue to monitor Tamil populations in the Northern and Eastern Provinces which are still heavily militarised, the highly oppressive monitoring and registration regime in place just after the war is being eased.⁴ The purpose of the ongoing monitoring seems now to be less concerned with seeking out those people who were previously involved with the LTTE than with ensuring that the organisation does not re-emerge, and with eliminating dissent.⁵ I accept that some people who had certain links with the LTTE may continue to be at risk of harm, and that there continue to be security crackdowns.⁶ However, given the applicant's minimal past connection with the LTTE, and the nature of his past interactions with the security forces, I do not consider that he is or would be of concern to the security forces as a person suspected of seeking to revive the LTTE or of engaging in anti-government activity. It does not appear from this evidence that there are outstanding questions about the level of his involvement with the LTTE during the war, or that the authorities would have any interest in continuing to investigate him. The available information does not indicate that there is a real chance that the applicant would be subjected to a new level of scrutiny or monitoring or investigation should he return to Sri Lanka.

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143

⁵ Ibid

⁶ Ibid; see also UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

16. Having regard to the country information and to the individual circumstances of the applicant, I am not satisfied that there is a real chance that he faces serious harm amounting to persecution on return to Sri Lanka because he is suspected of actual or imputed LTTE connections for any reason, including his Tamil ethnicity; his place of residence in a formerly LTTE controlled area; because his father provided equipment to the LTTE in 2005; or for any other reason arising from the credible evidence about his background. While I accept that some Tamils continue to be at risk of serious human rights abuses that would constitute persecution, in view of the country information and the applicant's credible evidence about his own circumstances, I am not satisfied, given his particular profile, that there is a real chance that he would be harmed on return to Sri Lanka now or in the reasonably foreseeable future because of actual or imputed support for the LTTE for any reason now or in the reasonably foreseeable future.

Political opinion - TNA

17. I accept that the applicant did low level electioneering for the local TNA candidate in the 2012 provincial elections. I accept that he was threatened and one occasion subjected to a minor assault by opposition members, most likely the TMVP, as the applicant suggests. These claims are consistent with country information considered by the delegate, which reports electoral fraud and voter intimidation in those elections. However, there is no independent evidence to suggest that low level TNA supporters continue to be at real risk of serious harm many years after elections.

18. Country information considered by the delegate indicates that the political situation has changed considerably since the 2012 elections. Presidential and parliamentary elections were held in 2015 and were generally considered free and fair despite some fairly low level harassment of party workers and voting malpractice. The TNA currently has 16 members of parliament. The TNA leader is leader of the Opposition, and the TNA has a strong co-operative relationship with the government. Country information considered by the delegate indicates that the TMVP contested the 2015 elections as part of the government coalition, but has no representation in parliament and prominent figures associated with the TMVP have been investigated in relation to serious politically motivated crimes.⁷ The TMVP currently holds no political power, is no longer supported by the government, and no longer acts in a paramilitary capacity, although some information suggests that it might still be engaged in criminal activity.⁸

19. Given the minor level of the applicant's past activity; the length of time that has elapsed since the events of 2012; and the political changes that have taken place since then, which have seen a decline in the influence of the TMVP and a greater role in mainstream national politics for the TNA, I consider that the applicant's work with the TNA in the 2012 provincial elections would not result in a real chance of serious harm if he returned to Sri Lanka. There is no independent evidence to suggest that low level TNA workers, as I am satisfied the applicant is, continue to be at real risk of serious harm many years after elections. I accept that if the applicant were to continue to assist the TNA in future elections he may be subject to low level harassment, in the context of the documented, generally low level political violence that accompanies election campaigns in Sri Lanka, but I am not satisfied that this would rise to the

⁷ 'TMVP, UPFA agree on seat for Pillayan', Colombo Gazette, 3 August 2015, CXBD6A0DE18019; 'Waiting in a Quagmire', *Daily News*, 6 November 2015, CXBD6A0DE18023; 'Ex-Eastern Province CM Pillayan, who rebelled against LTTE, arrested in murder case', *The Hindu*, 13 October 2015, CXBD6A0DE14564 – all cited in "CI160226081402908 – Karuna Group – TMVP – Batticaloa, 11 March 2016".

⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143

level of serious harm amounting to persecution, particularly given the changed political climate since the 2012 elections as evidenced in the country information considered by the delegate.

CID inquiries about departure

20. The applicant has given slightly different versions of the incident when he claims he was questioned by either police or CID when purchasing pharmacy items for the voyage to Australia. In any case, the applicant's account does not indicate that he was of interest to the authorities because of his history or suspected past connections with the LTTE or because he was under ongoing investigation into those matters at the time of his departure. His evidence, rather, indicates that the inquiries were being made in the context of investigations into illegal boat departures. For reasons set out below, I am not satisfied that the applicant faces a real chance of persecution or significant harm on return, for having left Sri Lanka illegally and travelled by boat to Australia.

Fear of harm as a failed asylum seeker who departed illegally

21. I accept that the applicant left Sri Lanka illegally. Country information indicates that on return he will undergo a routine investigation at the airport because of the circumstances of his departure, and he may be prosecuted under the Immigrants and Emigrants Act 1949 (I&EAct). The applicant claims that he is at risk of harm under this process because he will be investigated in relation to suspected LTTE links. As discussed above, however, the applicant does not claim to have ever been involved with the LTTE, and I find that he has no relevant profile as a person suspected of links with the LTTE, taking into account that his father is known to have provided goods to the LTTE in 2005, that he and the applicant were detained because of this in 2007, and the applicant was subjected to some level of ongoing monitoring which I have found does not indicate that he was actually suspected of relevant LTTE connections.
22. DFAT advises⁹ that a returnee such as the applicant will be processed at the airport by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the Sri Lankan CID. Immigration officers check travel documents and identity information against the immigration database. SIS checks the returnee against intelligence databases. The CID verifies a person's identity to determine whether they have any outstanding criminal matters; this might involve making inquiries of neighbours or the police in the person's village. I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the concern of the authorities. I have found that the applicant has no relevant profile as a person with actual or suspected links to the LTTE and I do not accept that there is a real chance that he will face harm during, or as a consequence of this routine investigation. I find that the authorities will quickly establish that neither he nor any family members were involved with the LTTE during the conflict, and have no current involvement with the LTTE. While his past detention may come to light, I am satisfied that the fact that he was released indicates that the authorities were not concerned by what they knew about him at the time, and I am satisfied that they would not be concerned about his father's past wartime interaction with the LTTE now. I do not consider that the fact that he campaigned for the TNA in 2012 would cause him to be at risk of harm on return.
23. Because he departed illegally the applicant may be arrested and charged under the I&E Act. DFAT advises that he might then remain in police custody at the CID Airport Office for up to 24

⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143

hours before being transported by police to the closest Magistrates Court at the first available opportunity. If a magistrate is not available he might be held on remand at a nearby prison, but DFAT advises that this would be for a few days at most.

24. When brought before a court, a person who pleads guilty will most likely be fined and discharged. While penalties can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees (SLR), DFAT advises that no returnee who was merely a passenger on a people smuggling venture has ever been given a custodial sentence for departing Sri Lanka illegally. Fines are imposed on a discretionary basis, are generally between 5 and 50 thousand SLR, and may be paid by instalment. As he was not involved in organising or facilitating people smuggling, I find that there is no real chance that the applicant will be given a custodial sentence. I am not satisfied that the imposition of a fine on the applicant would constitute serious harm.
25. Based on DFAT's advice I find that if the applicant were to plead not guilty, he would either be immediately granted bail on personal surety; or he might have to wait to be collected by a family member if required to have a family member act as guarantor. I acknowledge that the applicant's family do not live close to Negombo, where he would most likely be taken, but I am satisfied that if they were required to make the journey from their home area this would not cause a prolonged detention. DFAT advises that if bail is granted there are rarely any conditions. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to police or police stations between hearings. The applicant has not suggested that the imposition of any fine, surety or guarantee would of itself constitute serious harm. As DFAT advises that there are usually no reporting requirements attached to the grant of bail, I do not consider that the applicant would be required to report regularly to local police in his village and I am satisfied that he is not at risk of harm in those circumstances.
26. I accept that on return the applicant may be detained for a short period during investigation and while waiting to be taken before a court, and possibly while waiting for family members to post bail. Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, the High Court has confirmed that whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.¹⁰ I have considered whether a detention of several days would constitute serious harm given the particular circumstances of this applicant. While I accept that conditions in Sri Lankan prisons are poor due to a lack of resources, overcrowding and poor sanitation,¹¹ in my view, a brief period of detention, even taking the prison conditions into account, does not rise to the level of a threat to life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm for the purposes of the Act. I consider that even considered cumulatively, the totality of the treatment that the applicant is likely to experience on return, including being detained for up to 24 hours at the airport, then potentially being detained on remand for up to several days in overcrowded and unsanitary conditions, and having to pay a fine, does not amount to serious harm.
27. In any event, I find that the procedures under which the applicant as a returnee would be dealt with, and any penalties to which he may be subjected, will be applied on a non-discriminatory

¹⁰ *MIBP v WZAPN; WZARV v MIBP* [2015] 320 ALR 467; see also *SZTEQ v MIBP* (2015) 321 ALR 44 where the Full Federal Court held that that a threat to 'liberty' is not synonymous with the possibility of a person being held briefly on remand or detained for a short time for questioning.

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, at p.27.

basis under a law of general application, and therefore do not constitute persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

28. While there are reports of failed Tamil asylum seekers or other Tamils returning to Sri Lanka being detained on arrival at the airport or after returning to their villages, and then being mistreated and subjected to torture particularly if they are detained for prolonged periods, the country information, considered as a whole, suggests that the key risk factor is whether a Tamil has certain actual or perceived links to the LTTE; merely being a Tamil, or a Tamil from the north or the east, or being a failed asylum seeker is not enough, in my view, to give rise to a real chance of harm on return. While I accept that the applicant and his father were investigated in relation to suspected links with the LTTE in 2007, I do not accept that the applicant remained under suspicion after that time, nor do I accept that there is a real chance that the past investigation would result in the applicant being subjected to serious harm now or in the reasonably foreseeable future. I do not accept that the applicant will be imputed with pro-LTTE or anti-government dissident beliefs by the authorities because of his family background, or for any other reason, and I find that the applicant does not face a real chance of persecution on returning to Sri Lanka.

Refugee: conclusion

29. 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

30. 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

31. 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.

32. As set out above, I have found that there is not a real chance that the applicant faces serious harm because of his actual or imputed LTTE connections for any reason including his ethnicity, or because of his support for the TNA in the 2012 elections. Based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

33. As to his treatment under the criminal justice system as a person who departed illegally and/or a failed asylum seeker, as set out above I accept that he will be detained at the airport for

questioning and security and character checks. He may be charged with an offence under the I&E Act because he departed Sri Lanka illegally. He may be remanded in custody for a short period either at the airport or at a prison, while waiting to be brought before a magistrate who will most likely quickly grant bail. For reasons discussed above, I do not accept that there are any particular aspects of the applicant's profile that would result in his being detained for a longer period or subjected to more intensive interrogation that might give rise to significant harm. I do not accept that the process outlined above amounts to significant harm; or that the applicant would be exposed to significant harm during this process. Nor does the penalty likely to be imposed on the applicant, or the remand conditions he would most likely face, amount to any form of significant harm. I find that, to date, a custodial sentence has never been imposed on illegal returnees such as the applicant and I am not satisfied that there is a real risk that this applicant faces a custodial sentence. I am not satisfied that there is a real risk that the applicant will face torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, including as a result of conditions he may face during a short period in custody, taking into account that he may have to wait for a family member to arrive from Batticaloa to post bail.

34. I accept that conditions in prison or detention may be poor, but the evidence does not suggest that the applicant faces the death penalty or arbitrary deprivation of his life. The definition of "cruel or inhuman treatment or punishment" in s.5(1) of the Act requires that any pain or suffering be intentionally inflicted on a person. Similarly, "degrading treatment or punishment" is defined to mean an act or omission that causes and is intended to cause extreme humiliation. I am not satisfied that any pain or suffering caused to the applicant by overcrowding and poor and insanitary conditions in prison or on remand would be intentionally inflicted, as required. Nor do I accept that severe overcrowding and poor conditions are intended to cause extreme humiliation.
35. For the reasons discussed above, I do not consider that the applicant faces significant harm for any of the reasons put forward, should he return to Sri Lanka. In so finding, I have considered his claims singly and cumulatively but am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to a receiving country, namely Sri Lanka, that there is a real risk he will suffer significant harm. Accordingly, I find that the applicant does not satisfy the requirements of s.36(2)(aa) of the Act.

Complementary protection: conclusion

36. 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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