



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

ETHIOPIA

IAA reference: IAA17/02497

Date and time of decision: 18 July 2017 15:09:00

Rosie Mathlin, 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 an ethnic Oromo from Ethiopia. He arrived in Australia by boat, undocumented, [in] May 2013.
2. [In] August 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV).
3. [In] April 2017 a delegate of the Minister for Immigration and Ethnic Affairs (the delegate) refused the grant of the visa.

Information before the IAA

4. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant has submitted a large amount of material to the IAA with the assistance of his newly appointed representative. This comprises a submission, a statutory declaration made by the applicant on 19 May 2017, an membership certificate dated 2014 for the Oromo Liberation Front (OLF), letters of support from Oromo political and community organisations in Australia, photographs and [social media] screenshots evidencing the applicant's online and protest activity, and country information. Much of the material was not before the delegate when he made the decision and is relevant to the applicant's protection claims in two ways: it clarifies and elaborates on the applicant's claims that were made before the delegate but which, it is argued, were not properly explained or explored, and were often misunderstood; and it concerns political activity undertaken by the applicant outside Ethiopia which was not raised before the delegate.
6. In the representative's submission dated 23 May 2017 and in the applicant's statutory declaration, it is argued that the applicant was not able to properly present his claims before the delegate. Firstly, he had no legal advice or representation at any stage prior to the delegate's decision, including in relation to the preparation of his SHEV application. Secondly, he was not assisted by an interpreter at either the entry interview or the SHEV interview. The applicant was afraid to use an Ethiopian interpreter because he was concerned about confidentiality and safety. He speaks reasonable English and thought that his English ability would be sufficient, but in fact it was not. He was unable to express his claims properly and realised after the SHEV interview that much of what he said had been misunderstood. Most importantly, he did not understand the significance of his involvement in political activity outside Ethiopia, in that it might give rise to a "sur place" claim, and did not mention this: he answered only the questions asked of him in the SHEV application and at the interview, and he was not asked about political activity outside Ethiopia. It is submitted that these constitute exceptional circumstances for the purposes of s.473DD(a) of the Act.
7. The material given to the IAA about the applicant's political activities outside Ethiopia, in both [Country 1] and Australia, is new information. I accept that all of it is credible personal information which relates to the applicant's political activities and involvement with certain political organisations that could, if known, have affected the delegate's consideration of the application by establishing sur place claims to protection. I am also satisfied that there are exceptional circumstances which permit this new information to be considered. Firstly, the concept of sur place claims is highly technical and there are no questions in the SHEV

application form which seek to elicit information about political or other activity undertaken outside the country of origin. The delegate considered whether the applicant might face harm on return to Ethiopia as a failed asylum seeker and referred in the Primary Decision Record to country information indicating that returnees perceived as being political activists face a high risk of monitoring, detention and arrest, citing DFAT's assessment that people who openly criticise the Ethiopian government outside the country face a high risk that the government would be aware of these activities and may take action against them on return. He also made findings that the applicant had not been politically active in [Country 1] or Australia, nor had he published material on open source internet or social media that was critical of the Ethiopian government. However, the delegate did not ask the applicant at the SHEV interview whether he had engaged in any political activities outside Ethiopia. Nor did he put the country information about the treatment of returnees and people who are politically active outside Ethiopia to the applicant for comment; if he had, it might have elicited the information about the applicant's activities outside Ethiopia. Secondly, the delegate concluded that the applicant did not have a profile in Ethiopia as a political activist, but in my view it was not appropriate for him to reach this conclusion on the basis of the information he obtained at the SHEV interview where it was evident that the applicant's capacity to properly express his claims was severely hampered by the absence of an interpreter. In my view, it was clear that the applicant was not sufficiently proficient in English, and that the interview should not have proceeded without an interpreter.¹ Had the applicant been able to properly and fully explain his claims about his political activities in Ethiopia, the delegate may have been more inclined to ask him about his activities overseas: his failure to do so appears to have been partly due to the view he formed as to the applicant's lack of political profile within Ethiopia, based on the inadequate information he obtained at the interview. The information now provided to the IAA about the applicant's activities outside Ethiopia is compelling, in my view. It is detailed, independently corroborated, and highly credible. Overall, I am satisfied that there are exceptional circumstances which justify considering the new information about the applicant's activities outside Ethiopia, and the country information which deals with surveillance of such activity by the Ethiopian government and the treatment of political activists on return.

8. Aside from the information about the applicant's activities since leaving Ethiopia, the material given to the IAA - in particular the applicant's statutory declaration and the representative's submission – responds to the delegate's decision by clarifying, explaining and elaborating on the information provided to the delegate. It is difficult to identify what is really new information, given that it is so difficult to make sense of what the applicant said at the SHEV interview, but to the extent that the statutory declaration and submission do contain new information I am satisfied that the requirements of s.473DD are met in respect of it. I am satisfied that it is credible personal information which, if known, could have affected the delegate's consideration of the application, and I am satisfied that there are exceptional circumstances which justify considering the information because I do not consider the applicant was given a fair and proper opportunity to provide his claims to the delegate at the SHEV without an interpreter, and I consider that it should have been evident to the delegate that an interpreter should have been used, even if the applicant had indicated that he did not want one.

Discussion of applicant's claims for protection

9. The applicant's claims are contained in the information referred and subsequently given to the IAA. They have been presented reasonably consistently and can be summarised as follows:

¹ While the delegate stated in the Primary Decision Record that the applicant spoke Amharic at the SHEV interview, in fact he did not: he spoke in English.

- He is an ethnic Oromo.
- In Ethiopia he worked as a [Occupation 1].
- To the extent that he was able, he expressed his political views about the oppression of Oromo people to [others at his workplace].
- [He] was subject to monitoring by cadres of the ruling party, and was put under pressure to join the EPRDF or the OPDO, a “pseudo-party” established by the government which purports to represent the Oromo people. Because he refused to do so and because of the way he expressed his political views to [others at his workplace], he was regarded with suspicion as a person opposed to the government. Because he was a very good [Occupation 1] and was popular and well respected, he was regarded as a particular threat. The applicant cited several example of discriminatory treatment he claims to have suffered because he was perceived as a political opponent of the government – he was demoted [at] least once, on one occasion he was suspended from his duties for [a number of] months, and he was denied transfers that he requested.
- He was detained on at least three occasions, in 1999, 2000 and 2005. In 2005, he was accused of organising [others at his workplace] to demonstrate against the government and detained for [a number of] weeks. This was because he came across [advertisements for] a protest and collected them himself so that [others at his workplace] would not get into trouble. The security authorities found the [advertisements] in his possession and accused him of being an organiser of the protest.
- After his release he lost his [job]. He moved to another city because he knew he would be subjected to close monitoring by the authorities.
- From 2006 until 2008 the applicant worked at [Organisation 1], which he said had more independence than other [similar workplaces], so he was subject to less scrutiny. Nonetheless, during 2007 he was accused of having been involved in [protests] that took place while he was out of town. [His superior] was able to convince the [officers] who were looking for him that the applicant had not been present at the time of the protests.
- Between 2008 and 2010 the applicant undertook a [degree] at [a university].
- In 2010 he returned to [Organisation 1] for one year and then had the opportunity to undertake a training programme in [Country 1] that was run by [an organisation]. The applicant’s candidacy was quickly approved by [Organisation 1] and the [other organisation]. It was also quickly approved by the [government]. The applicant later learned that the [government] had approved the application without referring his name to the local [work authority] for approval.
- After the applicant arrived in [Country 1] the authorities realised that he should not have been approved for the programme. They were concerned that he had anti-government tendencies and that he would not return to Ethiopia. The Ethiopian authorities requested the [organisation running the programme in Country 1] to take the applicant’s passport and have him sign a document undertaking not to discuss anything political.
- The applicant became concerned for his safety and registered with UNHCR hoping to be resettled in a third country. However, he decided to leave by boat and seek asylum. At that stage he had completed [a duration] of the [training course].
- In [Country 1] he was very active on social media. His profile name is [name deleted], which means [meaning deleted], but his user name, which is [visible], is his own name.

There is biographical information on the page about the applicant's place of residence and where he has studied. The applicant has provided screen shots of his [social media] which confirm these claims. It appears that the applicant was also active on [social media] in Ethiopia as he joined in [2011].

- As soon as he arrived in Australia he made contact with the Oromo Liberation Front (OLF). He was provided with training and became an official member in [2014]. He has attended many Oromo protests in [Australian City 1] and also one in [another Australian city]. The applicant has submitted a certificate of membership issued by the OLF and photographs of himself attending protests and dressed in an organiser's [attire]. He has submitted letters from [an Oromo organisation in Australia] and other Oromo community organisations in Australia confirming his involvement with them.
- The applicant stated that he was a founding member of [an organisation], which has been declared a terrorist organisation by the Ethiopian government for its work exposing human rights abuses against the Oromo. He provided a letter of support from the organisation which states, differently to his own claims, that he was a financial member from 2015, "the [Anniversary] of [the organisation] celebration in [Australian City 1]".
- The applicant stated that he increased his online activity once he left Ethiopia, joined the OLF and attends protests because he genuinely believes in the Oromo movement and he has taken advantage of the freedom to do so since he has left Ethiopia.
- The applicant claims that a number of his relatives have been detained and subjected to different forms of mistreatment since his departure, although he indicates that this is not because of their connection with him but because of their own activities in support of the Oromo cause.

Factual findings

10. In most respects, and given the language constraints, the applicant's claims about his circumstances in Ethiopia have been presented consistently since he arrived in Australia, and many are supported by documentary evidence. Notwithstanding the deficiencies in the information he provided at the SHEV interview due to his struggle to express himself in English, the overwhelming impression I formed from listening to the recording of the interview was that the applicant is genuinely committed to the Oromo cause and that he was speaking the truth about events in Ethiopia. His responses to questions were spontaneous and appeared to contain a high level of credible detail.
11. I consider that the applicant has provided a credible and plausible account of his circumstances in Ethiopia. I accept that he was a popular and well respected [professional] whose activities came under considerable scrutiny from government authorities because of his perceived ability to influence [others at his workplace]. I accept that he was careful in what he did and said because of the level of monitoring to which he was subjected and because he was concerned for his safety. I do not agree with the delegate's finding that the applicant was a low profile activist who did not speak out publicly in support of the Oromo cause or against the government. I consider that as [a member of his profession], any political opinion the applicant expressed, however, subtly, was in the public domain. The country information considered by the delegate indicates that [individuals at the applicant's workplace] are at the forefront of the Oromo protests and are particularly targeted by the government; and that [members of his profession] are also targeted because of their perceived ability to influence [others]. While I note that the applicant seems to have had a successful career despite his profile as an

opponent of the government, and noting country information which indicates that there are considerable restrictions on [professional] freedom in Ethiopia and that [members of his profession] may be denied promotions, for example, if they refuse to join the ruling party, I accept that the applicant was disadvantaged on a number of occasions because of his political views. I accept that he was denied government funding to complete a [degree], that he was not permitted to receive a [professional] award, that he was demoted on at least one occasion (though he appears to have been subsequently reinstated) and that he was on some occasions denied transfers to locations that he requested. While such treatment may not indicate that the applicant was regarded as a high profile activist or a significant threat to the government, I am satisfied that he was viewed as politically suspect by local government officials.

12. The delegate accepted that the applicant had been detained on three occasions, but not “many times”, as he stated in his SHEV application; it is not clear whether this apparent claim was an exaggeration or a mistake, but the applicant does not seem to have repeated it. The delegate accepted that the applicant was detained on “a couple of occasions” for “trivial matters”, but he does not appear to have directly considered the 2005 detention. Based on the applicant’s credible evidence, I accept that he was detained in 1999, 2000 and 2005, most significantly for a [number of weeks] period in 2005 when he was accused of organising a [protest].
13. Like the delegate I have some doubts about the applicant’s claim that he was approved to participate in the training course in [Country 1] given his adverse profile, but on the whole I consider that his account of how this came about is broadly plausible. I note that after the 2005 detention the applicant went to work in a different institution which I am prepared to accept was more independent of the government authorities and subject to less scrutiny, even though the reasons as to why this was so are not clear. The applicant also undertook a [degree] from 2008 until 2010 and I am satisfied that these two changes may have reduced his profile. Under these circumstances, I am prepared to accept that some lack of communication between the [government] and the local [work] authorities who were aware of the concerns about the applicant, meant that his application was approved, despite his own evidence which suggests that this would have been unlikely given his claimed profile and the authorities’ habit of granting and withholding professional benefits and privileges in order to exert political pressure. Accepting that he was permitted to travel to [Country 1], I consider it plausible that the Ethiopian authorities subsequently requested that his passport be seized, as he claims.
14. I accept all of the applicant’s claims about his political activity since his departure from Ethiopia. He has presented documentary evidence which supports his own claims. I accept that he has been active on [social media] since he was in [Country 1], and that it is possible that he could be identified from the information publicly available – although there is no information before me to suggest that any of his friends or followers in Ethiopia have been targeted because of their association with him, which may indicate that it is not highly likely that the applicant is being monitored or that the authorities would be aware of his activity. I accept that he is a member of the OLF in [Australian City 1] and that he has attended a number of public demonstrations against the Ethiopian government and in support of the Oromo cause. I accept that he is involved with [a] banned [organisation], and that he has been photographed with its founder and the photograph has appeared on the internet.
15. One of the reasons that the delegate had doubts about the applicant’s credibility was that country information indicates that relatives of political activists are frequently subjected to mistreatment in the absence of the main target. The applicant does not claim that his own relatives have experienced any such problems on account of their association with him. While he responded to the delegate’s decision by referring to a number of his relatives who have

disappeared, been detained or otherwise mistreated since he left Ethiopia, his evidence does not suggest that this is because of their association with him, but rather because of their own political activity. I agree with the delegate that if the applicant's claims about his situation were true one might expect that there would be some repercussions for his family. However, given that I find the majority of his claims and evidence highly credible, internally consistent and broadly consistent with country information, this apparent discrepancy on one issue between the applicant's claimed experience and what the country information might suggest is likely is not a sufficient basis to find that his entire account is not believable.

16. Overall, while I have some minor concerns about the credibility of some aspects of the applicant's claims, I accept without hesitation a large part of his account, and note that his key claims were raised in a reasonably detailed and plausible manner when he was first interviewed on arrival in Australia and he has maintained these claims with broad consistency since. Most of his claims are consistent with country information. Even if it is the case that the applicant has exaggerated or embellished some of his evidence, this is not a sufficient basis to dismiss his claims in their entirety, particularly given the obvious difficulty that the applicant had expressing his claims in English, which means that some of his evidence is not at all clear and adverse credibility findings on the basis of, for example, apparent inconsistencies or exaggerations should only be made with great caution. In particular, I am satisfied that the applicant's evidence about his political activity since his departure from Ethiopia is credible and independently corroborated, and I accept these claims without hesitation.

Refugee assessment

17. 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

18. 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.

19. There is no issue as to the applicant's identity and nationality. I accept that his identity as is claimed, and that he is a national of Ethiopia and of no other country. Ethiopia is the receiving country for the purposes of the Act.
20. Country information indicates that Ethiopia is an authoritarian state in which the government suppresses actual and perceived political opponents, journalists and activists, who are regularly harassed, detained and prosecuted. Some sources suggest that members of the Oromo ethnic group are specifically singled out² although DFAT says that Oromos are not so much targeted on the basis of their ethnicity, but because of relevant opposition political activity.³ DFAT assesses that the risk faced by Oromos is broadly consistent with that faced by people of other ethnicities who actively and openly oppose the ruling EPRDF, although the government does actively target Oromos with links—real or perceived—to the OLF. In 2014, 2015 and 2016 mass protests broke out in the Oromia region, initially in relation to land issues, but which also raised broader and long standing grievances. In a heavy handed response, protesters were killed and beaten, and a state of emergency was imposed, following which some eleven thousand arrests were made of peaceful protestors, journalist and opposition members and leaders.⁴ It is reported that students, teachers and persons previously suspected of criticising or opposing the government were particularly likely to be arrested.⁵ While obviously the applicant was not in Ethiopia when those demonstrations took place, I accept that he participated in protests at the same time, about the same issues and about the treatment of demonstrators in Ethiopia here in Australia.
21. Freedom of speech and the media are severely restricted. The authorities regularly arrest and detain journalists and bloggers who are perceived as critical of the government or supportive of opposition parties. The government operates a cyber-intelligence and security organisation whose role includes online surveillance and censorship, as well as preventing cyber-attacks. The government monitors social media sites including [social media] and frequently seeks to block or restrict access to them.⁶ The United States Department of State reports that the government monitors private online communications, telephone calls, text messages and emails, and arrests are made as a result of such surveillance.⁷ As noted above, I accept that the applicant has a significant online presence. I accept that his [social media], which has [a significant following] and which contains information which I am satisfied could cause the applicant to be identified, contains posts and material which is highly critical of the Ethiopian government. I also accept that as an active participant in protests and Oromo activities in Australia it is likely that images of him are online.
22. DFAT assesses that people who are returned to Ethiopia and who are perceived as being political activists opposed to the government face a high risk of being monitored, harassed, arrested and detained, particularly if they continue to engage in political activities upon their return and if they are associated with groups that have an armed militant component. DFAT also assesses that people who openly criticise the Ethiopian government while they are outside

² Freedom House, "Freedom in the World 2017 - Ethiopia", NG2A465F516, cited in submission to IAA

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Ethiopia", 1 April 2016, CIS38A8012568 at 3.9

⁴ UK Home Office, "Country Information and Guidance Note – Ethiopia: Oromos and the 'Oromo Protests'", 5 December 2016, OGD7C848D102; Amnesty International, "Amnesty International Report 2016-2017", NG2A465F54 (cited in IAA submission)

⁵ UK Home Office, "Country Information and Guidance Note – Ethiopia: Oromos and the 'Oromo Protests'", 5 December 2016, OGD7C848D102 at 2.210

⁶ DFAT "DFAT Country Information Report Ethiopia", 1 April 2016, CIS38A8012568 at 3.45 and 5.10

⁷ United States Department of State (USDOS), "Country Report on Human Rights Practices 2016 – Ethiopia", 3 March 2017, OGD95BE926895

Ethiopia face a high risk that the Ethiopian authorities will be aware of these activities and may take action against these people upon their return.⁸

23. I accept on the basis of the country information that real or perceived members of the OLF actively targeted.⁹ I accept that prior to his departure from Ethiopia the applicant had a profile as a suspected political opponent of the government, and I accept that he was detained in 2005 because he was suspected of having organised a [demonstration]. I accept that the applicant has in the past, been accused of supporting the OLF, consistently with the country information which says that this is an accusation frequently levelled against actual or perceived opponents of the government.¹⁰ The applicant has joined the OLF in Australia. While I note that the OLF is a designated terrorist organisation, there is no information before me to suggest that the applicant has ever engaged in or supported armed activities against the Ethiopian government. The applicant has attended demonstrations against the Ethiopian government in Australia and while it is not possible to find with certainty that the Ethiopian authorities would be aware that he has done so, given the information about its extensive intelligence apparatus and its capacity to monitor social and electronic media, I cannot conclude with confidence that the authorities are not aware of his participation.
24. Having regard to the applicant's history of being perceived as holding antigovernment views; that he was detained for [a number of] weeks in 2005 on suspicion of organising protests; given his position of influence as a [professional]; given that he would have come to the attention of the authorities when he failed to return from his [programme] in [Country 1]; and given that he has engaged in activities outside Ethiopia – expressing opposition views on his [social media], attending demonstrations in Australia, being a member of two banned organisations – of which I am satisfied there is a strong probability that at least some would have come to the attention of the Ethiopian authorities given the independent evidence about the monitoring of social media and the internet, and the evidence as to their concern about diaspora activities, I am satisfied that that the applicant's cumulative profile means that he faces a real chance of attracting the adverse attention of the authorities on return to Ethiopia. I am satisfied that, in these circumstances, there is a real chance that he would be subjected to serious harm, given the independent evidence about the Ethiopian government's treatment of those who express opposition views and particularly those viewed as members or supporters of the OLF. I am satisfied that such harm could include arrest and detention, and country information indicates that if the applicant were to be detained and questioned about his political activities or links, there is a real chance that he would face serious harm including torture. DFAT reports "widespread, consistent and plausible" reports of torture in police stations and prisons, with political prisoners particularly at risk. Torture is used to extract confessions and as punishment.¹¹ The United States Department of State 2016 Report on Ethiopia also reports the widespread use of torture by security forces, including against political prisoners and individuals critical of the government.¹²
25. I have considered whether the applicant's involvement in political activity in Australia – joining the OLF and [another Oromo organisation], attending and helping to organise demonstrations, and his online activity, is conduct engaged in for the sole purpose of strengthening his claims to

⁸ DFAT "DFAT Country Information Report Ethiopia", 1 April 2016, CIS38A8012568 at 5.17

⁹ DFAT "DFAT Country Information Report Ethiopia", 1 April 2016, CIS38A8012568 at 3.9

¹⁰ UK Home Office, "Country Information and Guidance Note – Ethiopia: Oromos and the 'Oromo Protests'", 5 December 2016, OGD7C848D102

¹¹ DFAT "DFAT Country Information Report - Ethiopia", 1 April 2016, CIS38A8012568 at 4.8-4.9

¹² United States Department of State, "Country Report on Human Rights Practices 2016 – Ethiopia", 3 March 2017, OGD95BE926895

refugee status. If it were, I would be obliged to disregard that conduct for the purpose of assessing whether he has a well-founded fear of persecution: section 5J(6) of the Act. However, I am satisfied that the applicant has engaged in this conduct as a genuine expression of long held political opinions, which he was not able to express in Ethiopia with the degree of freedom which he can here. I note too that the applicant has established that he was engaged in these political activities long before he applied for a SHEV, and the fact that he did not mention his involvement in political activity in Australia until he received legal advice about its significance long after the application was lodged, strongly indicates that the conduct was not undertaken for the purpose of strengthening the application.

26. I am satisfied that the applicant faces a real chance of persecution on return to Ethiopia. I am satisfied that arbitrary arrest and detention, torture and physical mistreatment constitutes serious harm which would be directed at the applicant for reason of his political opinion. I am satisfied that that this involves systematic and discriminatory conduct, as country information indicates that the Ethiopian authorities routinely use these means to suppress political opposition. I am satisfied that the real chance of persecution exists throughout the country because the perpetrators are the state authorities. I am satisfied that the applicant could not avoid the persecution by taking reasonable steps to modify any aspect of his behaviour because the harm feared in part arises from his past conduct, as well as from his ethnicity. I am therefore satisfied that the applicant meets the requirements of s.5J, and that he has a well-founded fear of persecution.

Refugee: conclusion

27. 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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