



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/01625

Date and time of decision: 14 August 2017 12:06:00  
Natalie Becke, Reviewer

**Decision**

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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 a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil male from the Eastern Province of Sri Lanka. [In] September 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). [In] December 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this visa.

### Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 10 January 2017 the IAA received a submission on behalf of the applicant. The submission reiterates claims made to the delegate that are contained in the referred material. It also addresses issues before the delegate and to that extent may be regarded as argument rather than information.
4. I have obtained new information, specifically information on the treatment of Sri Lankans of Tamil ethnicity and citizens who have departed Sri Lanka illegally and sought asylum abroad from the most recent DFAT country report for Sri Lanka which was published on 24 January 2017.<sup>1</sup> The delegate relied on the then current 18 December 2015 DFAT report for Sri Lanka and the 2017 report was only published after the delegate's decision. I am satisfied that there are exceptional circumstances to justify considering this new information.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - In [year] the applicant was born in Trincomalee, Eastern Province.
  - One of the applicant's uncles, Uncle S, joined the Liberation Tigers of Tamil Eelam (LTTE) before the applicant was born and the applicant's family presumed he was dead.
  - Between 1990 and 1997 the applicant and his family resided in India as refugees.
  - In January 2006 the applicant was at shop in [Town 1] with a friend when a roadside bomb exploded nearby. Soldiers from the Sri Lankan Army (SLA) entered the shop, detained the applicant and his friend, assaulted them and threatened them. Two other men who were present were shot. The soldiers took the applicant's photo and recorded all his details.
  - The next day the authorities conducted a 'round-up' in the applicant's home area and took the applicant and several others to the nearby SLA camp. The applicant was held for [number] days, during which he was interrogated about the explosion, accused of assisting the LTTE, tortured and sexually abused. The applicant's mother secured his release through a bribe.
  - The CID continued to interrogate the applicant about his suspected LTTE links and beat him, whenever they encountered him.

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

- In August 2010 a family arrived at the applicant's house, where he lived with his grandmother, claiming to be relatives of Uncle S's wife. They advised the applicant and his family that Uncle S was being held in a camp for former LTTE combatants in [Town 2]. The visitors stayed for one week and then left. After the visitors left the applicant's grandmother (Uncle S's mother) went to the camp in [Town 2] and asked to see her son, however the authorities denied there was anyone there of that name. They asked for her details and she gave them the applicant's mobile number and their home address.
- [Number] days later the SLA, Criminal Investigation Department (CID) and police came to the applicant's house, interrogated him about the visitors, and ordered him to phone them. When the applicant was unable to contact them, the authorities took him to the SLA camp where he was held for several days. The applicant was tortured and interrogated about Uncle S, the 2006 explosion and whether he knew any former LTTE members in the area.
- The applicant was released with a warning he would need to present himself when required and to get prior permission before leaving the district. Later the applicant found out his mother had paid a bribe for his release.
- Over the course of the next year the applicant continued to be detained frequently. He was usually held for several hours at a time, but sometimes overnight, interrogated about his suspected LTTE links, physically abused and then given the next date he needed to report to the camp. Sometimes the applicant was caught in general round-ups and taken to the camp.
- Fearing for his life, the applicant obtained a passport and [a] visa for [Country 1] and [in] January 2011 departed Sri Lanka for [Country 1] by plane. His next date to report to the SLA camp was [in] January 2011.
- After the applicant's departure the authorities came to his parent's house on several occasions asking for him, and his parents informed them he had gone overseas. They assaulted the applicant's father, verbally abused his mother and detained his brother. His brother was only released after the applicant's mother promised to produce the applicant as soon as he returned to Sri Lanka.
- In 2012 the applicant learnt his friend, who had also been detained in 2006 after the explosion, had disappeared and is presumed dead.
- In August 2012 the applicant departed [Country 1] for [another country] by boat, and in October 2012 departed [for] Australia by boat.
- The applicant fears the Sri Lankan authorities, or associated paramilitaries, will detain, interrogate, torture or kill him because: he is a Tamil from a former LTTE area; he is suspected of LTTE links because of the 2006 explosion and Uncle S's LTTE involvement; he breached his reporting requirement when he departed Sri Lanka; and his potential status a returning asylum seeker.

## Refugee assessment

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6. 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**

7. 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.
8. The applicant has been consistent in stating his identity since his arrival in Australia. In support, he provided a copy of his Sri Lankan national identity card and a certified copy of his Sri Lankan birth certificate with an English translation. I am satisfied the applicant's identity is as claimed and that Sri Lanka is the receiving country for the purposes of this assessment.
9. The applicant has presented his claims for protection in a consistent and detailed manner since his arrival in Australia, without any major discrepancies. The applicant provided spontaneous responses to the delegate's questions during the SHEV interview and elaborated on the details about his life in Sri Lanka beyond those contained in the written statement. I am satisfied the applicant's claims are credible and I accept those claims.

### *Young Tamil Male from the East – Real and Imputed pro-LTTE Political Opinion*

10. The applicant and his family are from [Town 1], Eastern Province which was an area where the LTTE were active, despite a heavy Sri Lankan military presence. Historically many Tamils, particularly in the north and east of Sri Lanka, reported being monitored, harassed, arrested and detained by security forces under the former Rajapaksa government.<sup>2</sup>
11. I accept in January 2006 the applicant and his friend were inside a [certain] shop in [Town 1], when a bomb exploded nearby. The applicant explained to the delegate everyone else on the street fled, but the shopkeeper shut the door and pulled down the shutters, meaning the applicant and his friend could not leave. I accept the presence of the applicant and his friend in the shop made them appear as though they were involved with the bomb blast when the SLA arrived shortly afterwards. I accept the applicant and his friend were forced to kneel on ground and beaten while their details were recorded, and that another [number] men who attempted to leave the area were shot.
12. I accept that the Red Cross persuaded the SLA to release the applicant and his friend because they had student identification cards, however the next day there was a round-up in the

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<sup>2</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

applicant's home area and the SLA detained him again. I accept that the applicant came to the attention of the SLA because of the incident the day before, and that he and his friend were held at the [name] SLA camp for several days and extensively tortured. I found the applicant's evidence at SHEV interview regarding the treatment he received and the SLA's accusations that he had assisted the LTTE to detonate the bomb, to be detailed and credible.

13. I accept the applicant was able to leave the camp after several days because his mother paid a bribe to the authorities. The applicant provided credible evidence as to how the authorities continued to target and mistreat him after his release. The applicant described to the delegate how he continued with his studies but that the SLA and CID would frequently stop him on his way to tuition classes or school, interrogate him about any LTTE activity in the area and assault him.
14. I have had regard to country information before the delegate regarding the strategic significance of [Town 1], as a [military site] and designated [Security] Zone during the civil war, as well the relative insecurity in the area due to the LTTE's ongoing operations. I accept the authorities would have regarded young Tamil males, such as the applicant, with suspicion given their potential to have LTTE involvement. I accept the applicant's claims that he was frequently detained in roundups of the general population, which then led to further adverse attention from the authorities due to his previous interactions with them.
15. I accept the applicant's evidence that Uncle S, who he has never met, joined the LTTE. I accept in 2010 an unknown family of [number] people arrived at the house which the applicant shared with his grandmother, claiming to be relatives of Uncle S and his wife. I accept the applicant and his family were not aware Uncle S was still alive and had married, and that the visitors showed them photos of Uncle S and his family as evidence. I accept the visitors stayed with the applicant and his family for a week, during which the applicant took them to see sights around [Town 1], before they left for Colombo.
16. I accept that the applicant's grandmother, Uncle S's mother, travelled to [Town 2] with the intention of locating her son, using the details the visitors had given her. While the applicant was not able to tell the delegate the name of the camp where Uncle S was being held, only that it was in [Town 2], I found his evidence to be otherwise detailed. I accept the authorities at the camp told the applicant's grandmother that Uncle S was not there, and that they would contact her if they had any further information. I accept that the applicant's grandmother didn't own a mobile phone and gave his name, mobile number and their address to the authorities.
17. I accept [number] days later, when the applicant was getting ready to leave his house to attend classes, the authorities arrived and began to interrogate him as to the identity of the visitors and the tourist sites he had taken them to see in [Town 1]; and then ordered him to ring them. When the applicant could not contact the visitors on the number they had left, the authorities took him to the [name] SLA camp, where he was detained for several days and tortured. I accept the applicant's evidence that that the SLA were by then aware of Uncle S's involvement, accused the applicant of assisting the LTTE and raised the 2006 incident again.
18. I accept the applicant's evidence that his mother paid another bribe for him to be released, but that he was then caught in subsequent round ups in his area, and also that the CID would spot him in the street, and then take him back to the SLA camp for interrogation. The applicant claimed that he was usually held for several hours but sometimes up to several days. The applicant claimed to the delegate he could not estimate how many times he was detained, because it was so frequent, but that each time he was detained he was beaten. I accept the

applicant was not required to report on a regular or formal basis, but that on at least [number] occasions he was given a future date to attend the camp, and that he was told he was not allowed to leave the area without permission.

19. The applicant further claimed that around this time there was an increase in the number of Tamils being abducted and murdered, purportedly by the authorities, and that the soldiers at the camp had started indirectly threatening to kill him. I accept the applicant began to make arrangements to depart Sri Lanka. I accept the applicant's mother located an agent and the applicant then went to Colombo, gave the agent money and a passport photo and returned to [Town 1] the same day.
20. I accept in January 2011 the agent advised the applicant his passport, with a visa for [Country 1], was ready. Around this time the soldiers to whom the applicant reported at the SLA camp were due to go on leave because of a festival and his next reporting date was [in] January 2011. I accept [in] January 2011 the applicant departed Sri Lanka by plane without incident.
21. The delegate asked the applicant if his passport was genuine and he responded that he didn't know but that it contained his own name and details. The applicant claimed that the agent gave him specific instructions on which immigration counters to approach in both Colombo airport and [Country 1] airport. The applicant further stated that upon arrival in [Country 1] he had to wait in the bathrooms for some time until the person at the counter was ready for him, but that his passport was stamped in both locations without any questions being asked.
22. On the evidence, I consider that the applicant legally departed Sri Lanka on a genuine passport issued in his own name. Country information before the delegate indicates airline passengers departing from Colombo have their passports checked against a centralised Department of Immigration and Emigration database, and that in the years after the civil war ended the Sri Lankan authorities remained focused on finding and detaining LTTE cadres and sympathisers.
23. As such, I find it somewhat unlikely that the applicant would have been able to depart Sri Lanka legally if he was of a person of interest to the SLA in [Town 1]. However, I have given weight to the applicant's evidence that specific soldiers at the [name] SLA camp in [Town 1] had been enforcing his reporting regime on an adhoc basis and that he had been complying with these arrangements up until the date of his departure. I have also had regard to the applicant's evidence that he had never had been charged or taken to court in relation to the 2006 explosion, and did not have a criminal record. As such I am prepared to accept that the applicant managed to depart Sri Lanka legally, despite being of adverse to the SLA in [Town 1]; and that by doing so he breached his local reporting regime.
24. The delegate asked the applicant what had happened to his family after his departure in 2011 and he responded that the SLA interrogated and assaulted his father, verbally abused his mother, and demanded they present the applicant's brother in his place. The applicant's brother, who was a [occupation] for the Sri Lankan government, was beaten at the SLA camp and lost his job. Following this, the applicant's mother, worried for the safety of the applicant's brother, pressured him to leave Sri Lanka for [another country], where he was still residing at the time of the SHEV interview. The applicant further stated that the authorities still harass his parents on account of the applicant and his brother, and that as a result his mother has suffered [medical events].
25. Overall, having had regard to the applicant's detailed oral evidence at SHEV interview, I am satisfied he was recounting a genuine personal recollection of his family's experience following his departure. Although the applicant's evidence regarding the ongoing harassment he claims

his parents have received after his brother's departure was not as detailed, and he did not provide any recent examples, I consider this does not detract from his claim that he would attract the adverse interest of the authorities upon return. I consider the [Town 1] authorities' treatment of the applicant's family, as the result of his failure to report as required, is consistent with his claim to be a person of adverse interest to them. I also consider that the applicant's legal departure from Sri Lanka is not adverse to the credibility of his claims.

26. The United Nations High Commissioner for Refugees (UNHCR) 2012 Guidelines on Sri Lanka stated that at that time certain individuals with previous links to the LTTE, including familial links, may be exposed to harm in Sri Lanka, and may require international protection.<sup>3</sup> More recent reports indicate that low-level cadres, and even Tamils with tenuous links to the LTTE, continue to be targeted in Sri Lanka, including under the Sirisena government.<sup>4</sup>
27. During the SHEV interview the applicant also gave evidence that he attended pro-Tamil demonstrations as a [student], that he had helped deliver [certain objects] and other items to the LTTE during the civil war, and that while he was not an LTTE member, he believed in their ideological objectives. Country information before the delegate indicates that this type of low level LTTE support was common amongst the Tamil communities in the north and east of Sri Lanka during the civil war. However, I have given weight to the applicant's evidence regarding the frequency and severity with which the authorities mistreated him as the result of his perceived involvement with the 2006 explosion, followed by the visit of Uncle S's relatives in 2010. Overall I am satisfied the Sri Lankan authorities imputed the applicant with LTTE involvement on account of these events, then targeted and seriously harmed him accordingly.
28. I have had regard to the applicant's claim that his friend, who was also detained and tortured following the 2006 explosion, went missing in 2012 and is presumed dead. Country information before the delegate indicates there was a high level of insecurity and violence in [Town 1] in the immediate years, related to both the end of the conflict, as well as criminal activity. I am not satisfied that the disappearance of the applicant's friend was linked to any adverse profile with the authorities arising from the 2006 incident.
29. I accept that, should the applicant return to Sri Lanka, he may be considered by the authorities to be a returning asylum seeker. While the applicant departed Sri Lanka legally, using his own genuine passport, I accept he may be returned involuntarily to Sri Lanka. As the delegate noted, upon arrival in Sri Lanka involuntary returnees, including those on charter flights from Australia, are processed by different agencies who check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters.<sup>5</sup> The applicant's background will be checked against intelligence databases and contact made with the authorities in his home town.<sup>6</sup>
30. For those returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person's identity, to address whether someone was trying to conceal their identity due to a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours

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<sup>3</sup> United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>4</sup> UK Home Office "Country Information and Guidance Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17

<sup>5</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>6</sup> Ibid.

and family and checking criminal and court records.<sup>7</sup> I acknowledge that six years have now passed since the applicant's departure and the mistreatment of the applicant's family, and that there are no outstanding court orders or arrest warrants against his name. However, I nonetheless consider there is a small, but real, chance that his failure to adhere to his reporting regime would come to light upon his return, by virtue of the procedures outlined above.

31. Country information before the delegate contains examples of LTTE suspects being detained on return to Sri Lanka. While DFAT report they have 'no information' on the overall incidence of torture among people with suspected links to the LTTE, other reports indicate returnees with such profiles interrogated, detained for long periods, sent to rehabilitation, and/or physically mistreated.<sup>8</sup> I note this includes returnees with suspected LTTE links who departed Sri Lanka legally, like the applicant did in 2011.<sup>9</sup>
32. There are credible reports of the mistreatment of Tamils with real or suspected LTTE connections while in police or military custody, including after returning to Sri Lanka from overseas, that support a finding that the applicant would be at risk of significant physical mistreatment during any extended period of detention on return to Sri Lanka. I find that this constitutes serious harm as defined in s.5J(5) of the Act. I find that the conduct of the authorities in inflicting such harm is systematic and discriminatory, as the country information demonstrates that such mistreatment is routinely inflicted by the Sri Lankan authorities on actual or suspected LTTE members. Such mistreatment constitutes persecution. It would be directed against the applicant for the essential and significant reason of his political opinion.
33. DFAT advises that Sri Lankan authorities, including their security forces, retain effective territorial control throughout Sri Lanka.<sup>10</sup> In these circumstances, I am satisfied that the real chance of harm the applicant faces relates to all areas of Sri Lanka and that effective protection measures would not be available to the applicant. As the harm arises as the result of the applicant's previous interactions with the Sri Lankan authorities, I am satisfied s.5J(3) does not apply.

#### **Refugee: conclusion**

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

#### **Decision**

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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*

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<sup>7</sup> Ibid.

<sup>8</sup> UK Home Office, "Country Information and Guidance Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17

<sup>9</sup> UK Home Office, "Country Information and Guidance Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17; Tamil Net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065

<sup>10</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

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***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.

...