



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/04058

Date and time of decision: 31 January 2018 10:24:00
Jane Bishop, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) is a [age] year old man that claims to be a national of Sri Lanka and identifies himself as a Muslim Tamil. He arrived in Australia by boat [in] June 2013. [In] August 2017 the applicant applied for a Safe Haven Enterprise Visa (SHEV).
2. [In] December 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the applicant's visa. The delegate was not satisfied the applicant had provided sufficient documentation to establish his identity but, for the purposes of his decision, accepted that the applicant is a Sunni Muslim Tamil born in a refugee camp in [Country 1] in [year] and a national of Sri Lanka. Likewise, the delegate accepted that the applicant travelled freely from Sri Lanka to [Country 1] on his passport, that he left Sri Lanka legally and that he did not experience personal harm. The delegate did not accept that the applicant's [relative] ([Mr A]) and [Mr A]'s parents were arrested for their connections with the Liberation Tigers of Tamil Eelam (LTTE), that the applicant's mother had been reporting to the Sri Lankan authorities each month for 11 years, that the applicant's father had been detained and that the applicant's mother did not tell the applicant his father was not missing but safe at home for more than three years. The delegate accepted that the applicant would be returning to Sri Lanka as a failed asylum seeker.
3. The delegate determined that the applicant does not have a profile of interest with the Sri Lankan authorities and that he does not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Sri Lanka. Likewise the delegate determined that the applicant does not have a criminal background and was not of interest to the authorities when he left Sri Lanka. The delegate was satisfied that the applicant does not hold a well-founded fear of persecution on account of being a failed Tamil asylum seeker from an area controlled by the LTTE in the past.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. No additional information was provided to the IAA and I did not obtain further information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is a national of Sri Lanka and a Sunni Muslim Tamil. He was born in [a refugee] camp in [Country 1]. His father worked in [occupation] and his mother worked as a [occupation].
 - His [relative] [Mr A] was a member of the LTTE. In 2006, [Mr A] was arrested because of his connections to the LTTE and the applicant's mother posted bail. Upon his release, [Mr A] and [Mr A]'s parents fled Sri Lanka and obtained asylum in [country].
 - His father fled Sri Lanka in 2013 and attempted to come to Australia via a plane. He was intercepted and detained at a [Country 2] airport and deported back to [Country 1]. When he returned to Sri Lanka he was arrested, detained and tortured for [a number

of] months. His father disclosed to the Sri Lanka authorities details of the applicant's mother's links to the LTTE through her family and the applicant's whereabouts.

- He cannot return to Sri Lanka because the Central Intelligence Department (CID) would detain, torture or kill him because of the information his father provided during his detention, because of his relationship to his father and because the CID would know that he attempted to seek asylum in another country.
- He cannot return to Sri Lanka because his relative [Mr A], [Mr A]'s parents, his [Relative 1] and [Mr B] ([Relative 2]) were members, or were suspected of being members, of the LTTE.
- He cannot return to Sri Lanka because of riots and Muslims are discriminated against.
- He cannot obtain protection from the Sri Lankan government because the perpetrators are connected to the Sri Lankan army and police.
- He cannot live in another part of Sri Lanka because he would be found.

Factual findings

7. In the applicant's statutory declaration dated [in] August 2017 and during his SHEV interview, he stated he was born in a refugee camp in [Country 1] and - when he returned to Sri Lanka - his parents obtained a birth certificate. The delegate asked the applicant why his birth certificate indicated that he was born in [a] district of Sri Lanka and the applicant responded that, when he and his parents returned to Sri Lanka in 2000, his parents registered his birth. The most plausible reason for the applicant's birth certificate indicating that he was born in the [name] district of Sri Lanka is because he was born there. I therefore find that the applicant was born in [birth year] in [a particular] district, Sri Lanka. He identifies himself as a Muslim Tamil.
8. In the applicant's arrival interview he said that, when he was in [a particular grade], the Sri Lankan police (SLP) started coming to his home [a number of times] a week and would sometimes take his mother away for questioning. He said 'the case' (presumably about [Mr A] and [Mr A]'s parents being granted bail) had recently been opened and the SLP came after his mother. He would find his mother crying at night and his studies were being affected. His mother made the decision that the whole family would go to [Country 1]. The applicant said that if he returned to Sri Lanka, then the visits to his home from the SLP would increase. However in the applicant's statutory declaration he said that his [relative] ([Mr A]) and [Mr A]'s parents were arrested on suspicion of links to the LTTE in 2006 and his mother bailed them out. Soon after being bailed, [Mr A] and [Mr A]'s parents fled Sri Lanka and in 2009/2010 were granted protection in [a country]. [Mr A] was a member of the LTTE. He stated that, since his mother bailed out [Mr A] and [Mr A]'s parents, she must attend [a] police station each month to report her residence. He said that - at the time he travelled to Australia - he did not know that the SLP were coming to his house and questioning his mother about the location of [Mr A] and [Mr A]'s parents.
9. During the SHEV interview, the applicant confirmed that his mother has continued to report each month since 2006 and that the SLP have come to his home. The delegate asked the applicant why his mother was still reporting to the SLP and the applicant responded that his mother was a Hindu before converting to Islam to marry his father. All of his mother's family have links with - or support - the LTTE and his mother is the only one of her family remaining in Sri Lanka. His mother has never been arrested or experienced adverse treatment from the Sri Lankan authorities. The delegate asked the applicant if he had ever been arrested, detained or

questioned. The applicant responded that, in 2012/2013, when he was [travelling] to his [Relative 3]'s house [at a particular time], the Sri Lankan authorities stopped and questioned him [a number of] times. The delegate put to the applicant that he had said his mother was the only one of her family left in Sri Lanka and the applicant responded that his mother's mother and [sibling] are also in Sri Lanka. He said that those in his mother's family that supported the LTTE have left Sri Lanka and the others [have] stayed. His [sibling] is living with [Relative 3] and is in hiding. [The sibling] is [age] and was born in Sri Lanka. His [sibling] has not been to school since 2013 because his mother is afraid for [the sibling's] safety. When the delegate asked where his [Relative 3] lived, he responded a bit far away in [location].

10. I find it implausible that if, as the applicant asserts, the SLP continue to be interested in his mother because she bailed out [Mr A] and [Mr A]'s parents some 11 years ago that [Mr A] and/or [Mr A]'s parents would have ever been released on bail in 2006 in the first place. I note that, under Regulation 22 of Sri Lanka's Emergency Regulations 2005 (repealed in 2011), administrative detention in rehabilitation centres or elsewhere was possible for up to two years without judicial review or access to legal representation. Several elements of the emergency regulations remain in force under the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA), including the ability to detain individuals without charge. Sri Lankan law prohibits arbitrary arrest and detention, but the PTA allows authorities to detain suspects without charge for up to 72 hours. Following this, a suspect must either be produced before a Magistrate or can be held without charge under detention orders for three-month periods not exceeding 18 months. Suspects can be held in irregular places of detention, as well as at police stations, detention centres or prisons. DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring.¹
11. The applicant has given inconsistent evidence about whether he knew or did not know the SLP were coming to his home to question his mother before he left Sri Lanka or whether his mother was or was not the only member of her family remaining in Sri Lanka. Likewise, in the applicant's arrival interview he made no mention of his mother having to report to the SLP each month for the past 11 years. In the context of inconsistent and implausible evidence I do not accept that [Mr A] was a member of the LTTE, that [Mr A] and/or [Mr A]'s parents were arrested on suspicion of links to the LTTE, that the applicant's mother bailed [Mr A] and/or [Mr A]'s parents out, that the applicant's mother has been reporting to the SLP since 2006 each month and continues to do so, that the SLP ever visited the applicant's home to question his mother, that the applicant was stopped and questioned by the SLP while [travelling] to his [Relative 3]'s home, that the applicant's [sibling] has not attended school since 2013 and that the applicant's [sibling] lives with [Relative 3] because of fears for [safety].
12. The applicant said in his arrival interview that he, his parents, [and siblings] were all in [Country 1] when he got on the boat heading to Australia. There was not enough money for the whole family to go and the applicant's father returned to Sri Lanka to sell some [goods]. His father was arrested by the Sri Lankan police (SLP) on his return to Sri Lanka – about [number] days after the applicant got on the boat. His father is still missing and unable to be contacted. His mother had returned to Sri Lanka to look for him. In the applicant's statutory declaration dated [in] August 2017, the applicant stated that his father and [sibling] attempted to come to Australia via a plane but were detained at a [Country 2] airport. They were deported back to Sri Lanka and returned home to live with their family. However, [a number of] days later, the applicant's father went missing and remains so. The applicant stated that 'we' fear that the CID have taken his father and may have tortured or killed him because he tried to seek asylum in

¹ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105., 3.47 – 3.48.

another country. He stated that, when his father went missing, his [sibling] moved to live with [Relative 3] for [safety]. The applicant stated that his [sibling] does not attract the attention of the authorities because he fears the SLP will identify [sibling] as being related to his father.

13. During the SHEV interview, the applicant provided the delegate with a one page document about his father being detained. [In] January 2018, I asked the Department of Immigration and Border Protection for a copy of that document and, [in] January 2018, was informed that the document was only sighted during the SHEV interview. [In] January 2018 I requested, from the applicant, a copy of the document he presented to the delegate during his SHEV interview and he provided that document to the IAA on 29 January 2018.
14. The document provided was headed “[title]”. It was written in English and stated that the applicant’s father was [allegations related to support of the LTTE]. The document stated that the applicant’s father will be detained at the District Crime Detective Bureau – [town] for a [number of] months from the date of the order. The order was purportedly dated [in] 2013 and purportedly signed by [senior officials]. When the delegate asked why the document was not on letterhead the applicant stated it was a translation of the original. If, as the applicant asserts, the document was a translation of the original then there is no logical reason for it to bear a signature purportedly of the [senior officials]. The most plausible reason for it bearing a signature if it was a translation, or not being on letterhead if it was the original, is that the document is fraudulent. I find that the document provided as evidence of the applicant’s father being detained is fraudulent and I place no weight on it.
15. The applicant said during his SHEV interview that his father and [sibling] boarded a plane after he left Sri Lanka in a boat. They were detained in [Country 2] and deported back to [Country 1]. The applicant’s [sibling] returned to Sri Lanka with [sibling’s] mother and did not have any problems. However, the applicant’s father was arrested on his return to Sri Lanka and remained in jail for [a number of] months. His father was beaten and tortured until [a non-governmental organisation] intervened and he was released. He did not know how his father got from [Country 1] to Sri Lanka or the details of his arrest. His father was arrested before he could return home and - during his period of detention and torture - he disclosed to the Sri Lankan authorities where the applicant is and that the applicant’s [Relative 2] ([Mr B]) was an LTTE supporter.
16. When the delegate asked the applicant if he was sure about when his father was arrested he responded that he was. His mother told him that the first time she saw him on his return to Sri Lanka was after he had been arrested. When the delegate asked the applicant when his mother found out his father had been arrested, the applicant responded the day after his arrest. The delegate put to the applicant the information contained in his statutory declaration about his father being missing and asked why that information was different to the information provided during the SHEV interview. The applicant responded that he told the delegate at the beginning of the interview that he wanted to make some changes to his statutory declaration. The delegate put to the applicant that he had stated at the beginning of the interview that he wanted to make some changes to dates and names. The applicant said that, when he signed his statutory declaration, he believed the information was true. His mother did not want to tell him the truth about his father’s circumstances until after the applicant had finished his schooling. He finished his schooling about [period of time] ago and his mother told him the truth then. His father is so sick and it would have made the applicant upset and very sad. The delegate put to the applicant that it would be more upsetting to think that his father was missing and/or dead. The applicant responded that when he said his father was missing he thought he was away and would, at some point in time, come back to the

family. The applicant confirmed that he speaks to his mother once every week to two weeks and that he had not spoken to his father.

17. On the applicant's own evidence he is in regular contact with his mother in Sri Lanka. I do not accept that the applicant's mother failed to tell him that his father was no longer missing from October 2013 to after August 2017 (a period of nearly four years) and failed to tell him that his father was now living at home from about February 2014 to after August 2017 (a period of about three and a half years) because the applicant would be upset and sad that his father was so sick. In the applicant's SHEV application he indicates that, after arriving in Australia, he didn't commence studying until July 2014. That would have been some five months after his father had purportedly returned home. The most plausible reason for the applicant's inconsistent evidence about his father's circumstances – and the farfetched reasons for those inconsistencies - is that the information was fabricated. I do not accept that the applicant's father was ever missing, arrested or beaten. I do not accept that the applicant's father provided the Sri Lankan authorities with details about where the applicant is or that the applicant's [Relative 2] ([Mr B]) - or any other member of the applicant's mother's family – were in, or a supporter of, the LTTE.
18. During the SHEV interview, the delegate asked the applicant that, given he had experienced no harm, why he couldn't return to Sri Lanka. The delegate put to the applicant that he left Sri Lanka legally and had done nothing wrong. The applicant responded that his mother was worried about him and his education. His father didn't have contact with the LTTE and did nothing wrong but he was arrested, detained and tortured for [number] months. I accept that the applicant travelled a number of times to and from [Country 1] and Sri Lanka on his passport without incident. I accept that the applicant was never arrested, detained or harmed by the Sri Lankan authorities. I have found that the applicant's father was never missing, arrested or beaten.
19. The applicant also stated that his [Relative 2] lived in [Country 1] for a number of years because of the persecution he faced in Sri Lanka, that the applicant's [Relative 2] had been detained and sent to prison in [Country 1] because the [Country 1] Government suspected he had links to the LTTE and that the applicant's [Relative 1] was a member of the LTTE. I have found that the applicant has provided fabricated evidence and a fraudulent document. In the absence of corroborating evidence, I am not prepared to accept the applicant's assertions on their face. I am therefore not satisfied that the applicant's [Relative 2] or [Relative 1] or any of his mother's relatives were members of the LTTE or supporters of the LTTE, that his [Relative 2] lived in [Country 1] because of the persecution he faced in Sri Lanka or that the applicant's [Relative 2] was detained and sent to prison because of his suspected links to LTTE.

Refugee assessment

20. 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

21. 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.

Tamil and/or real or perceived links to the LTTE

22. I accept that the applicant is a Muslim Tamil from a North-West Province of Sri Lanka and that the area had been under the control of the LTTE during the civil war. The most recent DFAT report² states at paragraph 3.8 that:

...During the civil conflict more Tamils were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the conflict and the Rajapaksa Government. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity (see ‘Political Opinion’ below). Since 2015 the Sirisena Government has reviewed and released some PTA detainees, including Tamils. DFAT assesses that there are currently fewer individuals detained under the PTA than there were during the conflict.

DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. The Sri Lankan police are now responsible for civil affairs across Sri Lanka. While a sizeable (and largely idle) military presence remains in the north and east, armed forces personnel are generally restricted to their barracks. While some cases of monitoring continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities...

23. The UK Home Office Report³ on Tamil separatism states at paragraphs 3.1.2 and 3.1.3 that:

- A person being of Tamil ethnicity would not in itself warrant international protection.
- Neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they

² DFAT, “Country Information Report Sri Lanka”, 24 January 2017, CISED50AD105

³ UK Home Office, “Sri Lanka: Tamil separatism v 4”, 31 March 2017, CISED50AD3779

are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.

24. I did not accept that [Mr A] was a member of the LTTE, that [Mr A] and/or [Mr A]’s parents were arrested on suspicion of links to the LTTE, that the applicant’s mother bailed [Mr A] and [Mr A]’s parents out, that the applicant’s mother has been reporting to the SLP since 2006 each month and continues to do so, that the SLP ever visited the applicant’s home to question his mother, that the applicant was stopped and questioned by the SLP while [travelling] to his [Relative 3]’s home or that the applicant’s [sibling] has not attended school since 2013 and lives with [sibling’s] [Relative 3] because of fears for [sibling’s] safety. I do not accept that the applicant’s father was ever missing, arrested or beaten. I do not accept that the applicant’s father provided the Sri Lankan authorities with details about where the applicant is or that the applicant’s [Relative 2] - or any other member of the applicant’s mother’s family – were members or supporters of the LTTE. I was not satisfied that the applicant’s [Relative 2] or [Relative 1] or any of his mother’s relatives were members of the LTTE or supporters of the LTTE, that his [Relative 2] lived in [Country 1] because of the persecution he faced in Sri Lanka or that the applicant’s [Relative 2] was detained and sent to prison because of his suspected links to LTTE. I accept that the applicant travelled a number of times to and from [Country 1] and Sri Lanka on his passport without incident. I accept that the applicant was never arrested, detained or harmed by the Sri Lankan authorities.
25. Having regard to country information and given my findings I am not satisfied that the applicant’s profile – as a Muslim Tamil from a North East Province - would give rise to any adverse interest in him upon his return to Sri Lanka. I am satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm by the Sri Lankan authorities, the SLA, the CID or the SLP. There is no credible information to indicate that the applicant would be detained for any other reason. I am therefore satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm by the Sri Lankan authorities for this reason.

Muslim

26. I accept that the applicant is a Muslim. DFAT reports that there have been no large-scale incidents of tensions between Muslims and other religions in Sri Lanka since 2014. Likewise the number of verbal and/or physical attacks on Muslims reduced 60% from 2014 to 2015. “DFAT assesses that, given the size of the Muslim population in Sri Lanka and the relatively low number of incidents of violence, there is a low risk of political or religious violence for Muslims in Sri Lanka.” Likewise, DFAT assesses that, Muslims in Sri Lanka are not subject to official discrimination, are generally able to practise their faith freely and are able to exercise their political will to elect representatives of Muslim parties. In the context of a reduction in religious tensions and violence, DFAT assesses there is a low risk of societal discrimination against Muslim Sri Lankans⁴. The applicant has not claimed that he was personally discriminated against because he is a Muslim or personally been involved in riots – including religious riots. Based on the evidence before me, I find that the chance of the applicant facing harm because of his religion is remote. I find that the applicant does not face a real chance of persecution because of his Muslim faith.

Returning as a failed asylum seeker

27. I accept that the applicant left Sri Lanka legally in and around May 2013. I also accept that by the manner of his return, the Sri Lankan authorities may know or infer that he made a claim for

⁴ DFAT, “Country Information Report Sri Lanka”, at 3.16 – 3.21, 24 January 2017, CISED50AD105

protection in Australia, and that he will be subject to background checks on arrival. DFAT advises that a returnee like the applicant will be processed at the airport by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the Sri Lankan CID who check for identity and any outstanding criminal matters. DFAT is aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka but cannot verify these reports given that many allegations are made anonymously, often to third parties and sometimes long after the torture is alleged to have occurred. DFAT also reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, with relatively few allegations of torture or mistreatment. Although it does not routinely monitor the situation of returnees, DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce. In his SHEV application, the applicant stated that he had never been charged, convicted or wanted for an offence in Sri Lanka. I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the concern of the authorities. I am satisfied that the applicant would not be at risk of any harm during, or as a consequence of this routine investigation. The evidence before me does not suggest that asylum seekers, including Tamil asylum seekers face a real chance of harm for that reason. I am not satisfied, having regard to the applicant's profile, that he faces a real chance of any harm as a returning asylum seeker.

28. Having regard to all the material before me, I find that the applicant does not face a real chance of persecution on returning to Sri Lanka.

Refugee: conclusion

29. The applicant does not meet the requirements of the definition of refugee in s.5H (1). The applicant does not meet s.36 (2) (a).

Complementary protection assessment

30. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

Under s.36 (2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

31. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

Is there a real risk that the applicant will suffer significant harm?

32. I have considered the applicant's claims individually and cumulatively and found that the applicant does not face a real chance of serious harm if he returned to Sri Lanka for reason of his ethnicity, religion, relatives or having sought asylum in Australia. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear"⁵.

33. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is not a real risk that he will suffer significant harm now or in the foreseeable future.

Complementary protection: conclusion

34. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36 (2) (aa).

Decision

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

⁵ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

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.