



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/05608

Date and time of decision: 27 September 2018 14:57:00  
D Corrigan, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan national. On 18 August 2017, he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. In a decision dated 28 August 2018, a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate found the chance that the applicant would face serious harm or significant harm on account of his Tamil race, his actual and perceived links to the Liberation Tigers of Tamil Eelam (LTTE), his [occupation], his Hindu religion and as a failed Tamil asylum seeker who departed illegally to be remote.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - He is a Tamil Hindu and [Occupation 1] from [City 1]. He was very supportive of the LTTE and during the conflict he [worked] for the LTTE and this was widely known.
  - In 2008, the Central Intelligence Division (CID) came to his brother's [workplace] and accused the applicant and his brother of [working] for the LTTE. His brother was arrested, detained and then released. The applicant fled to [Country 1] as a result and remained there until December 2009.
  - The CID forced him to [work] for them as [an Occupation 1]. In June 2012 he was going through a CID checkpoint. An officer knew that he was [an Occupation 1] and asked him to [work] for CID [members]. The CID member expected him to pay for the materials and when he said he could not do this he was hit with a helmet and hospitalised.
  - His house was visited three times by CID members who were threatening towards him and told his wife that he should report to camp. He was not at home during those visits.
  - The applicant boarded a boat to go to Australia but it was intercepted by the navy. The applicant and others were arrested, questioned and accused of involvement in the LTTE. He was held for [number] days before being released on bail with his wife acting as surety. After he illegally departed a second time in October 2012, a warrant was issued for his arrest. This was delivered to his brother's address.
  - His wife has informed him on [date] June 2018 that the police went to his house and spoke to her. She was told to report to the police on [date] June 2018. The authorities had gone to look for him on 4-5 occasions since he departed Sri Lanka

## Refugee assessment

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5. 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

6. 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.
7. The applicant has submitted copies of Sri Lankan passport, birth certificate and marriage certificate and has consistently maintained that he is a Sri Lankan national. I accept that he is a Sri Lankan national and I find that Sri Lanka is his receiving country.
8. I accept that in 1994 during the Sri Lankan conflict, the applicant’s house in [City 1] was aerially bombed and destroyed and the applicant and his family moved to [City 2]. I note however, this event occurred a very long time ago and the war ended in 2009<sup>1</sup> and I find the applicant does not face a real chance of facing any harm on account of it.
9. I accept that the applicant worked as [an Occupation 1] and that during the conflict he [worked] for the LTTE. I accept that in 2008 the CID came to his brother’s [workplace] and made accusations relating to [working] for the LTTE. I accept that his brother was arrested, detained and then released. I accept that the applicant then went to [Country 1] and remained there until December 2009. The applicant has been consistent about these claims and country information indicates that the provision of support for the LTTE by ordinary Tamils during the conflict was widespread.<sup>2</sup> I do not accept that the applicant was of any adverse interest to the authorities at the time of that incident as the applicant told the delegate that he had not been questioned at that time and he also gave evidence that he returned to Sri Lanka in 2009 via an airport without any difficulty and he did not claim that he was questioned or detained upon arrival.

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka”, 23 May 2018.

<sup>2</sup> Daily Mirror (Sri Lanka), “Tragic phenomenon of forcible recruitment of Tamil civilians by the LTTE”, 3 October 2015.

10. At the SHEV interview, the applicant was asked if anything had happened to him between his return to Sri Lanka in 2009 and the incident at the checkpoint in 2012. He said there were always problems but he could not remember the dates and they were always being harassed. I do not accept this. The applicant's oral evidence concerning these claimed problems and harassment was extremely vague and undetailed and he was not able to specify the nature of the claimed problems and harassment. In his statutory declaration that accompanied his visa application, he did not refer to any problems during this period and he stated that "The problems that made me leave flee Sri Lanka for Australia first began in June 2012." At the SHEV interview, the applicant commented that he was depressed and that he had just told them the same thing. I do not find this to be a satisfactory explanation as there is no evidence before me as to his mental state and he was legally represented in the preparation of the declaration and the contents of the declaration were interpreted to him from the English language to the Tamil language. I find that the applicant (and his brother) did not experience any problems or harassment at the hands of the authorities or anyone else from the time of the visit to the [workplace] and his brother's detention and release in 2008 to the incident at the checkpoint in July 2012.
11. I accept that in June 2012 when the applicant was going through a checkpoint an officer asked him to [work] for CID [members]. I accept he was told that they would not pay for materials and when he stated that he could not afford to pay for the materials, the officer hit him with a helmet. The applicant has been consistent in these aspects of his claims. However, I do not accept that the applicant was forced on a number of occasions to [work] for the army as he claimed at the SHEV interview. At this interview, his evidence was very vague about how many times he had been required to do this despite being asked on several occasions. Furthermore, in his statutory declaration he did not mention being forced to [work] on other occasions and I note that he was legally represented in the preparation of the declaration and the contents of the declaration were interpreted to him from the English language to the Tamil language.
12. I do not accept that after the checkpoint incident his house was visited three times by CID members who told his wife that he should report to camp and that he was not at home during those visits. Asked at the SHEV interview why the CID had not taken any action against him whilst he was in detention for attempting to illegally depart the country, he said it was in a different area. I do not accept this is a satisfactory explanation given his claim that he was of such adverse interest to members of the CID that they three times went to his house and given the Sri Lankan police force is a trained and active national police force responsible for enforcing criminal and civil law and maintaining general law and order.<sup>3</sup> Further to this, I note the applicant was not detained during the checkpoint incident which indicates that he was not considered to be of any ongoing adverse interest.
13. I accept that the applicant boarded a boat to go to Australia but it was intercepted by the navy. I accept that the applicant and others were arrested, questioned, accused of involvement in the LTTE, beaten with a rod, detained and then released. The applicant was consistent in these claims. I do not, however, accept that at a court hearing he was granted bail and his wife agreed to act a surety for him and that when he departed Sri Lanka a second time a warrant was issued for his arrest and was delivered to his brother's place in 2016. Information from the Department of Foreign Affairs and Trade (DFAT) was that if a person pleaded guilty to an illegal departure charge they would have been fined and then were free to go.<sup>4</sup> Given the applicant had travelled to the southern city of [City 3] and was caught on a

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<sup>3</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

<sup>4</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015.

boat by the navy 1.5 days from departure from this place, I do not consider it plausible or credible that he would have entered a not guilty plea. Furthermore, the applicant has not provided any evidence of the grant of bail nor the arrest warrant despite claiming the latter was delivered to his brother's place.

14. Whilst I have accepted that the applicant [worked] for the LTTE during the conflict, country information indicates that the provision of support for the LTTE by ordinary Tamils during the conflict was widespread.<sup>5</sup> The applicant has not claimed that he was detained or questioned by the authorities during the conflict despite, according to his claims, regularly passing through army checkpoints. The applicant was not questioned or detained during the visit by the authorities to his brother's [workplace] in 2008 and his brother was released after being detained. I do not accept that the applicant and his brother experienced any problems with the authorities until the checkpoint incident in 2012 which only involved the applicant and the applicant has not claimed that his brother has suffered any problems after his departure from Sri Lanka in 2012. Whilst I accept that the applicant and others were accused of involvement in the LTTE when he first tried to illegally depart in the country in 2012 he was released back into the community which he indicates that he was not of any ongoing adverse interest. I do not accept that when the applicant departed Sri Lanka in October 2012 that he was of adverse interest to the authorities or anyone else for any reason (including an actual or imputed pro-LTTE political opinion). I do not accept that an arrest warrant was issued in relation to him or that he was given bail and his wife acted as surety. I do not accept it is credible or plausible that that the checkpoint incident which involved a CID officer striking him and him not being arrested or detained would lead to the police maintaining an interest in him in 2018. There is no reason apparent as to why the police would be searching for him six years after his departure. Given this, I do not accept that since his departure, the authorities have been to any of his relatives' houses to look for him (including two weeks prior to the interview). I do not accept that the authorities told his wife that she was required to report to the police on 21 June 2018 as he claimed at the SHEV interview.
15. The applicant has never been a member of the LTTE and has not claimed that any of his family members have been. Since coming to Australia, he has not engaged in any pro-LTTE or Tamil separatist political activities. His support for the LTTE was very limited and occurred a long time ago during a conflict that ended nine years ago. DFAT have assessed that the LTTE no longer exists as an organised force in Sri Lanka.<sup>6</sup> I find that upon return he will not engage in any activities that are pro-LTTE or Tamil separatist and this will not be due to a fear of harm but due to a lack of interest and the fact that the LTTE no longer exists as an organised force in Sri Lanka. I do not accept the applicant is of any adverse interest to anyone in Sri Lanka and I do not accept that upon his return to Sri Lanka he will be imputed with a pro-LTTE political opinion or of being linked to the LTTE or Tamil separatism by the authorities or anyone else.
16. Based on the country information before me, conditions in Sri Lanka, particularly in the north and east (where the applicant comes from) have significantly improved since the ending of the war and from when the applicant left the country. DFAT have assessed that monitoring of Tamils in day-to-day life in has decreased significantly under the current government though surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. They state that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015 and that the current government includes 29 Tamils and President

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<sup>5</sup> Daily Mirror (Sri Lanka), "Tragic phenomenon of forcible recruitment of Tamil civilians by the LTTE", 3 October 2015.

<sup>6</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

Sirasena presides over a diverse coalition of parties that includes Tamil members. DFAT state that they are not aware of an evidence to suggest that Sinhalese, Tamil, Muslim or other parties face any differences in treatment and that they understand Tamils do not receive unwarranted attention from authorities because of their political involvement. They assess that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. They assess that there is no official discrimination on the basis of ethnicity in public sector employment but that limited Tamil appointments are a result of a number of factors including disrupted education because of conflict and language constraints. DFAT have stated that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members has reduced significantly since the ending of the conflict.<sup>7</sup> Country information indicates that the Prevention of Terrorism Act (PTA) was suspended in late 2016 and the number of persons detained under it has reduced significantly and was in double digits as of July 2017.<sup>8</sup>

17. The June 2017 UK Home Office report on Tamil separatism opines that a person being of Tamil ethnicity would not in itself warrant international protection and 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 are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.<sup>9</sup>
18. Given the applicant's profile, I do not accept that there is a real chance that he will face serious harm upon return for any reason including his Tamil ethnicity, his family or his actual or imputed political opinion.
19. DFAT have noted that Sri Lanka recognises religious holidays for Hindus and that school students are able to study Hindu religious classes in most public and private schools and that there are some Hindu public schools. They assess that while no laws or official policies discriminate on the basis of religion, adherents of religions other than Buddhism face a low risk of official discrimination from local government authorities, which can affect their ability to practise their faith freely.<sup>10</sup> The applicant told the delegate that he had no issues with being a Hindu in Sri Lanka and he has not claimed that his family have ever suffered harm in practising Hinduism and taking into account the totality of this information and his individual circumstances, I find that he would not face a real chance of any harm on account of his religion.
20. There is no evidence before me that [people working in Occupation 1] are targeted for harm and harassment in Sri Lanka and other than the one off incident in 2012 at the checkpoint where he was asked to do work for the army with his own materials, I do not accept that he was subjected to adverse treatment by the authorities in relation to his work and six years has now passed since that incident. I find that there is not a real chance of any harm upon his return to Sri Lanka for reason that he has or would work as [Occupation 1].
21. I have considered the chance of the applicant facing harm on his arrival at Colombo airport or afterwards on account of being a failed Tamil asylum seeker who departed the country illegally. I accept that he departed the country illegally and that he had previously done so on two other occasions. However, on the first occasion when he went to [Country 1] by boat in

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<sup>7</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

<sup>8</sup> DFAT, "UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017.

<sup>9</sup> United Kingdom (UK) Home Office, "Country Information and Guidance: Tamil Separatism", 15 June 2017.

<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

2008 he was able to return to Sri Lanka in 2009 legally and he has not claimed that he faced any problems upon his return due to this illegal departure afterwards. Nor has he claimed that his earlier departure was a consideration during his processing for his initial 2012 attempt to leave Sri Lanka.

22. In its most recent report, DFAT reported that between 2008 and 2017, over 2,400 Sri Lankans departed Australia for Sri Lanka. Many others have returned from the US, Canada, the UK and other European countries, and most of these returnees are Tamils. The Sri Lankan government claims that failed asylum seekers are welcome back with the Sri Lankan Prime Minister publicly stated this during a 2017 visit to Australia. However, DFAT have also noted that returnees may face practical difficulties upon return. There is limited reintegration assistance available and some returnees have reported social stigma from community members upon return. DFAT notes that the biggest challenge facing returnees are bureaucratic inefficiencies, rather than official discrimination, which can result in delays in obtaining official documentation and support. The Sri Lankan government has reportedly decreased systematic surveillance of returnees, although DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the North as recently as 2017. DFAT assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within the communities. However, UNHCR conducted interviews with returnees in 2016 and only 0.3 per cent indicated they had any security concerns following their return.<sup>11</sup>
23. I accept it is possible that the applicant may be subject to monitoring for a period by the Sri Lankan authorities and face social stigma as a returning failed asylum seeker. I also accept that he may need to re-establish himself in Sri Lanka after his time in Australia. I note that and that the applicant had been employed as [an Occupation 1] for a long period of time prior to his departure and that he also has a brother and a wife who still reside in Sri Lanka. I am not satisfied his capacity to subsist or find accommodation will be threatened. I do not consider the treatment he may face as a returning Tamil asylum seeker constitutes serious harm in this case.
24. DFAT have reported for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal 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 hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.<sup>12</sup> I have already found that the applicant is not of any adverse interest to Sri Lankan authorities and that he is not the subject of criminal prosecution or is on bail and that an arrest warrant has not been issued in relation to him. I am not satisfied that any investigations would lead to a real chance of him being seriously harmed. I am not satisfied that he faces a real chance of serious harm as a returning Tamil asylum seeker even taking into account his and his family's past history and interaction with the authorities, his occupation, his actual or imputed political opinion and his religion.
25. I accept the applicant left Sri Lanka illegally and that on return he may be identified by the authorities as such. DFAT have stated that most Sri Lankan returnees are questioned upon return and where an illegal departure from Sri Lanka is suspected, they can be charged under

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<sup>11</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

<sup>12</sup> Ibid.

the Immigration and Emigrants Act (I&E Act). DFAT understands the Sri Lankan Police Airport Criminal Investigations Unit at Colombo's Bandaranaike International Airport makes most arrests. In the process, police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are former LTTE members. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. The magistrate then makes a determination as to the next steps for each individual; crew and facilitators or organisers of people smuggling ventures are usually held in custody. Apprehended individuals can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.<sup>13</sup>

26. The applicant departed Sri Lanka irregularly by boat via an unauthorised port in 2012 and in doing so may be found to have committed an offence under the I&E Act. Penalties under the I&E Act for this offence can include imprisonment of up to five years and a fine. In practice those individuals who were mere fare paying passengers of a people smuggling venture are issued a fine which acts as a deterrent to depart illegally in future. The Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger has been given a custodial sentence for departing illegally.<sup>14</sup> There is no evidence before me to suggest that the applicant was involved in facilitating people smuggling or organising the vessel that was used to travel to Australia. Fines are issued by the Magistrate and act as a deterrent to future illegal departure. A guilty plea will attract a fine and can be paid in instalments. The fines vary and can be LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,760). The magistrate will usually grant bail to those who plead not guilty on the basis of personal surety or guarantee by a family member. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high.<sup>15</sup>
27. I accept that the applicant may be questioned and detained at the airport for processing by authorities for up to 24 hours with the possibility that he may be further held at an airport holding cell for up to two days. If he does plead not guilty, there is no suggestion he will not be able to secure bail and I note that he has family members in Sri Lanka who could give a personal surety or guarantee. I accept that he may have to pay a fine and that this would be his second offence but I note that this may be paid in instalments. The evidence before me (including his long work history in Sri Lanka as [an Occupation 1]) does not indicate that the applicant will be unable to pay the fine or, if necessary, associated bail costs.
28. Country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I am also satisfied that the questioning, temporary detention, imposition of a fine or any other costs associated with possible bail or the court appearances if they arise would not constitute serious harm to the applicant.
29. I am not satisfied that the applicant faces a real chance of persecution for his illegal departure from Sri Lanka in 2012.

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

30. Considered cumulatively, I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning, short term detention and the payment of a fine and any other costs associated with possible bail) amount to serious harm. Considering his profile on a cumulative basis (including his Tamil ethnicity, his family background and history, his past interactions with the authorities, his actual or imputed political opinion, his religion, his occupation, his being a failed Tamil asylum seeker and his illegal departure), I find that he does not face a real risk of serious harm.

#### **Refugee: conclusion**

31. 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**

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32. 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**

33. 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.
34. For the reasons given above, I have found that the applicant would not face a real chance of serious harm on account of his ethnicity, his family history, his past interactions with the authorities, his actual or imputed political opinion, his occupation, his religion, his illegal departure or for being a failed Tamil asylum seeker. The real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm on these bases even when considering his profile (including his Tamil ethnicity, family background and history, his past interactions with the authorities, his actual or imputed political opinion, his occupation, his religion, his being a failed Tamil asylum seeker and his illegal departure) cumulatively.
35. I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning, short term detention and the payment of a fine and any other costs associated with possible bail) amounts to significant harm even when considered cumulatively. I am not satisfied that there is a real risk that the applicant will be arbitrarily deprived of his life, be subject to the death penalty or be subject to torture. Nor does the evidence before me indicate that there is a real risk that he will be subjected to cruel or

inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for any reason.

**Complementary protection: conclusion**

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

**Decision**

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

## Applicable law

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

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

In this Act, unless the contrary intention appears:

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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.