



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09096

Date and time of decision: 21 May 2021 10:24:00  
M Anderton, 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 applicant is a Tamil male from Trincomalee, Eastern Province, Sri Lanka who departed Sri Lanka in August 2012 and arrived in Australia by boat. On 1 June 2017 he applied for a Safe Haven Enterprise visa. The applicant claimed he and his family were frequently harassed with visits to their home by men in white vans because of his older brother's LTTE (Liberation Tigers of Tamil Eelam) connection, who had been forcibly recruited to the LTTE in 2005 and released after 3 or 4 months at the request of UNICEF. The applicant feared harm from unidentified men and the Sri Lankan authorities for this and for his illegal departure and seeking asylum.
2. On 26 April 2021 the delegate of the Minister for Immigration refused the visa because he was not satisfied the applicant was a refugee or that complementary protection obligations were owed. The delegate accepted the applicant's brother was forcibly recruited and the family occasionally harassed as a result, but did not accept that the his brother faced any serious problems with authorities as he had legally departed and returned to Sri Lanka a number of times without issue.

### Information before the IAA

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

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He is a young Tamil male from Trincomalee.
  - The applicant's older brother was forcibly recruited to the LTTE in 2005, when the applicant was [Age] years old. The brother did 3 or 4 months of basic training and was released upon the request from the UNICEF. (copy of the UNICEF letter provided)
  - In 2007/2008 unidentified people in a white van came to their house and threatened the older brother and accused him of being LTTE and having weapons. They threatened his parents also. The men came once a month, then increased their visits eventually to daily. Once in 2008 they beat the brother. They stopped coming after some time.
  - In 2009 after the war different men came in a white van and threatened the brother and beat him, accusing him of being LTTE. So his brother went to [Country 1] in October 2009. The vans continued to come to the house looking for the brother and threatened the parents and beat the father. The applicant would leave the house and hide till they left. Eventually they stopped coming.
  - After 6 months the applicant's brother returned to Sri Lanka as he was deported as his employee visa was cancelled. Four months after his return the men came again to the house regularly and threatened his brother. So the brother went to [Country 2] in 2010. The family did not have any problems after that for awhile.

- In 2011 the men came to the house again and threatened the father that they will take the applicant away. The applicant hid during these occasions. The applicant was enrolled in a course so was not home as much.
- In 2012 the men continued to come on weekends and threaten the family because they wanted the brother. In June 2012 the father decided it was not safe for the applicant to stay so found a way to leave eventually by boat in August 2012.
- Two months after the applicant left Sri Lanka, the men came to the house asking for the applicant. The father told them he had gone to Australia. The men beat the applicant's father. The applicant's father decided to move to [City] as he was afraid. The mother moved in with the mother in law in Trincomalee town.
- The applicant fears the unidentified people will seriously harm him because they have to been unable to find his brother, who they think is still an LTTE member. They will harm the applicant also because he managed to leave the country and is no longer under their control. He fears the Sri Lankan authorities will detain and torture him for having left illegally and sought asylum.
- At the protection interview the applicant added that his maternal uncle was LTTE and was killed in 1989/1990. He also added that when questioned about his brother he was beaten by authorities in July 2012. Since he departed Sri Lanka, his father took his boat to [City] for 2 or 3 years and his mother stayed at the grandmother's home. The applicant added that his brother had returned from [Country 2] in 2013 and stayed with their grandmother and mother for awhile and then went to [Country 3] on a work visa in 2014. He did not know if his brother had met with his father.

## **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. Based on the applicant's identity documents, I accept that the applicant is a Sri Lankan citizen and I find the receiving country is Sri Lanka.
  9. I accept the applicant is a young Tamil Hindu from Trincomalee.
  10. Essentially, the applicant claimed he and his family were harassed by unknown persons at various times since 2007/8 because his older brother's LTTE connection and enquiries about his older brother whereabouts. The applicant claimed his brother was forcibly recruited by the LTTE in 2005. As a result of intervention by his parents and UNICEF as his brother, who was under 18, was released after 3 or 4 months. A copy of a 2005 UNICEF letter was provided which indicated they had requested his brother's release from the LTTE.
  11. Given that letter and country information (DFAT (UK home office) about LTTE forcible recruitment, I accept that the applicant's older brother was forcibly recruited by the LTTE and after 3 or 4 months was released (at the behest of UNICEF) and returned home.
  12. Given country information about the conflict and treatment of Tamils during the conflict, I accept that the applicant's brother and family may have been harassed or asked questions from time to time during the conflict. However, for the following reasons, I do not accept that this was as frequent, serious or ongoing as claimed by the applicant.
  13. Firstly, it would have been evident that the applicant's brother had very little LTTE involvement and that he was as a child in 2005. The brother was forcibly recruited, as many were, and he was only with them a short time and released. Secondly, the family had approached UNICEF to have the brother released in 2005. The brother was released as he was under age. The family had a letter from UNICEF as proof of this, which could have been shown as evidence of non LTTE affiliation. It was also evidence that the family were prepared to do something to have their son released from the LTTE and were not sympathetic or associated with the LTTE.
  14. Thirdly, the brother's involvement was limited and occurred in 2005 and it is not credible that authorities or anyone would continue to visit frequently years later in 2007/8 to 2012, given such limited low level involvement. Fourthly, it is not credible that anyone would visit so often, with no consequences, if he was as highly sought out as the applicant's claims suggest.
  15. Fifthly, the applicant's account of the visits was poor, lacking in details and content and was repetitive. When asked to describe what happened a number of times, the applicant repeated that his brother or father were asked questions. In particular, I consider the applicant added to and embellished his account at the protection interview as he claimed for the first time that he was beaten. When the delegate noted this, the applicant added that he was tortured before he left for Sri Lanka. When questioned about the incident (what happened, what injuries, was he slapped) , the applicant responded to the leading question, saying that he was slapped. I find it difficult to believe that he would not mention before this time that he had been beaten or slapped, particularly given his claims it was just before he departed Sri Lanka. If that were the case, it does not make sense that such an incident was not mentioned. It would have been the first and only time he had been physically assaulted, and it was the claimed trigger for his departure. I consider the applicant was making up this account as he went along.
  16. Sixthly, it is difficult to believe that the family would be first harassed 2 to 3 years after the applicant's brother was in the LTTE, rather than earlier. In particular, it is difficult to believe

that the unidentified persons would increase their visits and come daily to twice daily. It is difficult to believe also that if the visits were so frequent and the brother was beaten in 2008 that the family would wait until October 2009 to send the brother overseas. Rather, I consider it is much more likely the timing coincided with the applicant's brother being of working age and obtaining a work visa to [Country 1].

17. Seventh, that the brother could depart Sri Lanka for [Country 1] in 2009 ( shortly after the conflict) and return to Sri Lanka and then depart again in 2010 to [Country 2] without coming to the attention of authorities is strong evidence that the brother was not of interest to authorities or anyone. Further, the brother was not detained by anyone or sent to rehabilitation camp towards the end or after the conflict, which further reinforces my view that the applicant's brother was not suspected LTTE or of any interest. Further, the apparent lack of interest in the brother leaving and returning to Sri Lanka is just not consistent with the applicant's claims that the applicant was being sought out daily in his home.
18. Eight, it is not credible that anyone would continue looking for the applicant's brother after so many years, particularly given such an extremely low LTTE involvement and the context of that involvement. Further, it would have been known or easily found out that the brother had been overseas and returned several times. I note also that the brother returned to Sri Lanka in 2013 from [Country 2], lived in Trincomalee with family for awhile before he went to [Country 3] on a work visa in 2014.
19. The applicant claimed he hid or was not at home when the men came to the house. However, the applicant continued to study, live and work in the same place until his departure in 2012. I consider the applicant could have been easily found if he were wanted. I do not accept the applicant, or his parents were threatened that they would take the applicant.
20. . I note the delegate accepted the applicant's brother was harassed and that the applicant was questioned about his whereabouts. However, for the reasons set out above, I do not accept that was the case. I consider the applicant's account not credible and improbable in many respects. I do not accept the applicant's brother was harassed about his LTTE involvement before going to [Country 1]. I do not accept the applicant or his family were questioned about his brother's whereabouts.
21. I do not accept that the applicant's father moved to [City] to hide and avoid harm after the applicant left Sri Lanka. Rather I consider he moved as part of his work as a fisherman, which is what the applicant initially indicated. Further, the applicant's mother would have been easily found at the grandmother's house in Trincomalee, so the hiding claims are difficult to reconcile. Further, like the delegate, I found the applicant's account of whether his father met with his brother in 2013 when he returned to Sri Lanka unconvincing and evasive. That the applicant did not know if his brother faced any problems upon return was also unconvincing and lacked credibility. Further, the family's claimed fear of harm and harassment after the applicant departed in 2012 is at odds with the fact that the brother (who was the claimed main target) returned and lived in Trincomalee with the family at the grandmother's house in 2013.
22. At the protection interview the applicant said his uncle was also LTTE, but was killed during the conflict in 1989/90. Given the applicant's late provision of such information, I have some doubts about this, particularly given he had discussed his brother's LTTE involvement. In any event, even if his uncle were LTTE and killed during the conflict, I do not accept that raised the applicant's profile. It occurred before the applicant was born and many years ago. Further, I note the applicant did not claim that he or the family were harassed on account of his uncle's

circumstances. I am not satisfied that the applicant faced any harm or will face any harm or interest as a result of his uncle's circumstances.

23. While I accept that the applicant's brother was forcibly recruited by the LTTE and he was released with the help of UNICEF in 2005, I do not accept that the brother or his family were of interest to anyone or authorities. It may be that the family were questioned or harassed as Tamils on occasion as according to the country information before the delegate this was not uncommon during the conflict. However, for reasons set out above, I consider the applicant has exaggerated his claims about the reasons, frequency, timing and level of harassment. I do not accept they were harassed often or frequently or that unidentified men or anyone came to their home. I do not accept the brother was accused of LTTE and having weapons. I do not accept that authorities, unidentified or unknown men, beat or threatened the applicant, his brother or anyone in his family or were interested in the brother or his family due to his LTTE involvement or were looking for him. I do not accept that the applicant was threatened or that anyone was looking for him or his brother or that they were or are of interest to anyone. I do not accept the applicant, his brother or his father was beaten. I do not accept the applicant was slapped or tortured. I do not accept anyone came looking for the applicant after he departed Sri Lanka. I do not accept the applicant suffered harm or threats or that he was or will be of interest to authorities, unidentified men or anyone.
24. I note also in the transferee interview that while the applicant referred to his brother's LTTE recruitment and family harassment, he said this occurred in 2008. When asked when this all happened, the applicant said when his brother was in Sri Lanka they came regularly, but when he left, they came once in a while. When asked again when it happened, the applicant said he was not sure of the date but said 2008. This reinforces my view that the applicant has exaggerated his claims about the frequency, nature and timing of the claimed harassment.
25. I accept the applicant is a young single Tamil Hindu male from Trincomalee.
26. I accept Tamils suffered disproportionately during the conflict and shortly thereafter. The country information in the review material refers to ill-treatment of LTTE persons or those with LTTE connections after the end of the war. I accept based on the country information before me, including the information provided by the applicant, and the more recent DFAT reports, that there are continuing reports of surveillance, detentions and torture against some Tamils, who may be suspected of certain LTTE roles or criminals. The country information indicates the situation improved after the conflict for Tamils and particularly with Sirisena coming to power in 2015.
27. While I accept that the family have had some harassment as Tamils during the conflict, I do not accept that was often frequent, sustained or continued or serious or due to the applicant's brother. Further, as discussed above I have found the applicant has exaggerated his claims about the level of harassment. I do not accept the applicant faced harm or was of interest. I do not accept that authorities or men in white vans or anyone threatened or were looking for the brother or applicant or his family. I do not accept the applicant was beaten, tortured or slapped by anyone in 2012 or that the family was threatened or harassed as claimed. I do not accept the applicant was under anyone's control or that there is a real chance he will be harmed because of his brother or because the applicant managed to leave the country.
28. While I have accepted that his brother was forcibly recruited to the LTTE in 2005, I do not accept that the applicant will be perceived to have a LTTE profile. The applicant confirmed he had no LTTE involvement but claimed the family were harassed due to his brother's involvement. As discussed above, the applicant's brother's involvement was long ago, limited,

in the context of forcible recruitment as a child and he was released due to family and UNICEF pressure. I consider this supports and evidences that the family do not support the LTTE or will be perceived as such. Further, the applicant's brother remained in Sri Lanka until 2009 when he went to [Country 1]. If he had been of interest, the country information indicates he would have very likely been detained or sent to rehabilitation camps. Further, the brother was able to return in 2010 to Sri Lanka and depart two more times after without harm which indicates he was not of interest to anyone.

29. I have considered the situation in Sri Lanka since the elections in November 2019 and the situation since then. Country information indicates that there is concern among Tamils given the return of the Rajapaksas to power and whether their concerns will be considered by the Rajapaksa government. Human Rights groups have accused the government of suppression dissent and activism, with journalists subjected to police interrogations and arrest. According to US State Department reports the government implemented confidence building measures to address grievances of the Tamil community, including promoting social integration, securing language rights for all and supporting a healing process within war affected communities and non-recurrence of violence. However, the report also stated that Tamils suffered discrimination in university education government employment, housing and health services. Tamils in the north and East reported security forces monitored and harassed members of the community especially activists, journalists and former or suspected former LTTE members.
30. However, I do not accept the applicant faces a real chance of harm in that regard as he is not, and I do not accept that he will be perceived or involved as or in victim, disappeared or human rights defenders groups or media or politically sensitive activity or will be of adverse interest or has or will have a profile of interest. Further, I have not accepted that he was or will be perceived as former LTTE member, or that his was brother (who now lives in [Country 3]) was of interest in the past either.
31. DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing. However, the applicant is educated, qualified as an aluminium fabricator in Sri Lanka, was previously employed in Sri Lanka and worked in Australia and his family have a home and the applicant is contact with his family. On the evidence and given his circumstances, I am not satisfied that the applicant faces a real chance of harm or discrimination. In any event, I am not satisfied that the applicant faces a real chance of discrimination that amounts to serious harm.
32. The present government has been in power now for over a year and the evidence before me does not support a return to civil conflict or harm to someone with the applicant's profile and circumstances, including as a young Tamil male from the East, whose brother was forcibly recruited to the LTTE or whose LTTE uncle was killed in the conflict in 1989/90. Further, I note the applicant's family continue to work and reside in Sri Lanka without harm.
33. Even in the current situation and political landscape, I do not accept the applicant faces a real chance of harm from the unknown or unidentified men in white vans, authorities or anyone.

*Failed asylum seeker and Illegal departure and data breach*

34. The applicant claimed to fear harm for his illegal departure and as a failed asylum seeker. I note also the delegate dealt with the applicant being part of the Department of Immigration data breach in February 2014 (letter sent to him on 19 March 2014) and I accept the applicant was part of that breach. However, the applicant has not raised any claims in that regard. In any

event, even assuming the information was accessed, it revealed little beyond the applicant's identity and immigration status. It did not identify him as an asylum seeker, but even if that were inferred, it is very likely the authorities will be aware that the applicant is a failed asylum seeker because if he returns on a temporary travel document organised by authorities. There is no evidence that the applicant's claims were disclosed or that the applicant faces a real chance of harm upon return on the basis of the data breach.

35. I accept the applicant departed Sri Lanka without a passport and therefore illegally. For that reason, he has committed an offence under Immigration and Emigration Act (IAEA) and will very likely face questioning at the airport and may be charged and fined. I accept he will return as a failed asylum seeker on a temporary travel document. Country information in the DFAT and UK Home office reports indicates he would face questioning and an investigative process to confirm his identity at the airport as a returning asylum seeker on a temporary travel document.
36. The DFAT reports indicate that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, after claiming asylum. Although there have been reported instances of returnees being harmed in the past, the information before me indicates those were people with substantial links to the LTTE or outstanding warrants. As discussed above, I do not accept that the applicant would be perceived as LTTE or anti-government. I do not accept that the applicant has such a profile or would be perceived as such. I have not accepted that he or his brother is wanted or of interest to Sri Lankan authorities.
37. Credible country information in the DFAT and UK Home Office reports and review material before me indicates that there is no mistreatment of returnees upon arrival or questioning at the airport and all returnees are treated the same regardless of their ethnicity and religion. Even considering his time spent in Australia, I do not accept the applicant faces a real chance of harm as a failed asylum seeker. I note from the 2019 DFAT report some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities. However, as discussed above I do not accept the applicant has been or will be suspected of LTTE links or has any such profile of interest (this is so even considering he is a young Tamil male from Trincomalee whose brother was forcibly recruited in 2005 and had a deceased LTTE uncle) and I do not accept he faces a real chance of monitoring or adverse interest upon return.
38. Further, DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Based on the country information and the applicant's circumstances, I do not accept the applicant faces a real chance of, mistreatment on arrival in Sri Lanka or during the questioning process to establish his identity and any criminal history. I have not accepted he was or will be of adverse interest to authorities or anyone. Further, I do not accept he faces a real chance of any harm upon return to his home. I do not accept there is a real chance of any harm as a failed asylum seeker subject to the data breach.
39. In respect of the penalty for his illegal departure, country information indicates a guilty plea attracts a fine of LKR 3000 (approximately \$25AUD) for a first offence to LKR 200,000 (AUD\$1670) and if a guilty plea is made, the returnee is free to go and the fine can be paid by instalments. In the event he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances.



40. I note from country information that if the applicant arrives over the weekend he may be briefly held in an airport holding cell (not in prison) until he can appear before a magistrate. In any event, DFAT has assessed risk of torture or mistreatment to detainees is low and considered with the applicant's profile and circumstances, I am not satisfied the applicant faces a real chance of mistreatment upon arrival, during questioning or possible brief detention.
41. Further, I am not satisfied that Tamil returnees are treated differently and find the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. Furthermore, I am not satisfied that the IAEA provisions that deal with breach of the departure laws from Sri Lanka are discriminatory on their face or disclose discriminatory intent or that they are implemented in a discriminatory manner.
42. I am not satisfied that questioning, process, and being held in airport holding cell, travel or possible costs for court appearances and the application of a penalty for illegal departure amount to discriminatory conduct for the purposes of s.5J of the Act.
43. I have had regard to all of the evidence before me and the totality of the personal circumstances of the applicant and the recent political landscape. I am not satisfied the applicant has a well-founded fear of persecution from anyone for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.
44. I am not satisfied the applicant has a well-founded fear of persecution for any reason.

#### **Refugee: conclusion**

45. 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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46. 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**

47. 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.
48. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

49. As to treatment upon return as a failed asylum seeker or returnee I have not accepted that the applicant faces a real chance of any harm in that regard. Further, I am not satisfied that he faces a real risk of significant harm as a failed asylum seeker or returnee.
50. As to treatment for the illegal departure and any questioning and detention the applicant may experience in relation to this, I find the applicant is very likely to be issued a fine and released. In the event he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances. If he arrives on a weekend, he may be held in an airport holding cell over the weekend while waiting to come before a magistrate. However, I am not satisfied there is a real risk he would be subject to the death penalty, arbitrarily deprived of his life or be tortured or face cruel or inhuman treatment or punishment or degrading treatment or punishment (as defined) or significant harm as defined.
51. Having regard to his circumstances, I am not satisfied that the treatment the applicant may face as an illegal departee, including travel to court appearances, possible costs and penalties, involves an intention to cause severe pain or suffering, pain or suffering that can reasonably be regarded as cruel or inhuman in nature or an intention to cause extreme humiliation.
52. I am not satisfied that, individually or cumulatively, any processes or penalties the applicant may encounter under the IAEA, would constitute significant harm as defined under ss.36(2A) and 5 of the Act.
53. I note the country information about a low risk of official or societal discrimination against Tamils, including their ability to access education, employment or housing. However, as discussed above, I am not satisfied that the applicant faces a real risk of such harm. I note the applicant has been education, has a family home and was previously employed. Upon return I am not satisfied that he could not similarly find employment and accommodation. Further, and in any event, I am not satisfied that such discrimination amounts to significant harm or that the applicant faces a real risk of significant harm in that regard.
54. In relation to the remainder of applicant's claims, which I have accepted, I have found that the applicant does not have a real chance of harm on any of these bases. For the same reasons and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not satisfied the applicant will face a real risk of any harm, including significant harm on any of those bases if removed to Sri Lanka.

#### **Complementary protection: conclusion**

55. 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:

...

**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.