



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09458

Date and time of decision: 4 August 2021 18:43:00
M Anderton, Reviewer

Decision

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

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

Background to the review

Visa application

1. The applicant claims to be a Sri Lankan citizen from Northern Province who arrived in Australia by boat in June 2013.
2. On 22 May 2017 the applicant lodged a safe haven enterprise visa. His claims revolved around his LTTE (Liberation Tigers of Tamil Eelam) involvement in 1984-1988, torture in 2005 by CID and harassment since then as a suspected LTTE and planting a bomb in 2006 and continued harassment of him and his family.
3. On 1 July 2021 the delegate refused the visa. The delegate accepted the applicant had been in the LTTE, beaten and harassed as suspected LTTE, but the delegate did not accept that authorities continued to harass him after he was released from rehabilitation camp in 2011 or that he was suspected or wanted for planting a bomb in 2006.

Information before the IAA

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

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is a Tamil Catholic from Northern Province. He is married with [number] children who live in Sri Lanka.
 - In [school grade] the army stopped his bus and questioned everyone. As he did not have his ID with him, they suspected him of being LTTE and would not let him back on the bus. He caught the next bus. Once he got on the bus, he decided he would try to join the LTTE. After a few months he joined the LTTE. When he saw them in the street, he told them he wanted to join, and they were happy to take him.
 - Between 1984 – 1988 he went to India to be trained by the LTTE. He was involved in some fighting, but a lot of the work was non-military, soliciting donations and getting food resources. He left the LTTE as some others he trained with had not been given as much power as he had, and they were annoyed and started making problems for him. In his protection interview the applicant indicated he left because of change in ideology. The applicant returned home and married a year later. He did not mention he fought for the LTTE at the entry interview because others had said he would be sent to Nauru or PNG and he was afraid to go there.
 - At the end of 2005, the applicant was beaten and tortured by the army. CID had questioned his work colleagues when the applicant was not at work one day and accused him of talking to the LTTE. The next day CID were waiting for him at work and took him to their office. After they beat him, they asked him questions about working for the LTTE. He was released after 2 or 3 hours. He had to report to them the next day

and was told not to come back to the town where he was working. Later there was a ceasefire and he started a shop selling [products].

- In 2006 the LTTE let off a bomb near his shop. The police station was next to his shop. He was told to attend the police station and was asked who planted the bomb and told LTTE members had come to his shop before planting a bomb. Later that year the LTTE destroyed the police station next to his shop. He did not go to the shop that day as thought he would be targeted. The applicant's brother told him police came to the shop to asked where he was and accused him of planting the bomb. They told his brother to get the applicant. The brother went to get the applicant, but the applicant refused to go as he was too scared. The police threatened to shoot the applicant's brother, so the brother tried again to get the applicant to come to the shop. The applicant went to hide in the woods. He lived in the woods for a year. People brought him food and he was safe as it was very close to the LTTE area and the army did not come.
- The army assaulted the applicant's brother and the shop remained closed for a month until the priest got permission for the brother to reopen.
- In 2007 the army regained control of that area, so he went back to his village and sought sanctuary for 4 months with his priest at the local church. He returned to his family as he was sick of being stuck inside the church. As soon as he returned home CID visited regularly. He explained to them he had been in the woods. They said they would do nothing at this stage, but he would have to report. He thinks they left him alone because tensions had calmed down and the army had regained more control and were not feeling as threatened by the LTTE as at the time of the bombing in 2006.
- In 2008 he went to Vanni, which was LTTE controlled, and stayed with his brother in law's family. In 2009 the war escalated and he returned home to his village, M. His wife and [children] had decided to surrender so he went with them to the army camp. He told them he had been with LTTE a long time ago. He stayed in the camp 5 or 6 months.
- In 2009, when taking his children to hospital, the officer who had questioned him in 2005 saw him and told him to join the others at a different camp who had been involved with the LTTE. He was kept there for 19 months and was released with [a number of] others in April 2011 after IOM spoke to people at the camp.
- Within 2 days of returning home from rehabilitation, CID came to the house and asked him to attend their office. He went with his brother, who vouched for him not causing trouble. The brother knew some of the officers as he often drank with them and bought them drinks. The officers showed him a list of LTTE that the applicant was on and said they had permission to kill him. They let him go because of the relationship the brother had with some of the CID. He had to report to them if he decided to leave the area.
- He started a shop. CID asked him for money, but he refused as he did not have any. It affected his work and was afraid to keep his shop open for too long in case they came to interrogate him. At the protection interview he said it was different CID who harassed him for money.
- In 2012 CID came to the house and shop often and asked questions about any continuing relationship with the LTTE. He planned to leave at Easter as it was the longest break for his business. Since coming to Australia, CID come to the family home many times, monthly or even weekly. Eventually in 2017 the wife told them he had gone to Australia. She was asked to sign a document to that effect.

- In early 2016 police arrested and beat his [son]. Once the wife provided evidence to them of the son's physical and mental disabilities, they released the son and told him not to go to Australia. The other [son] continues to have difficulties with authorities and while at university [between specified years] he was required to let authorities know when he returned to the village.
- The applicant fears serious harm, including torture, false imprisonment and death.

Refugee assessment

7. 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

8. 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.
9. Based on his identity documents and claims, I accept the applicant is- a Tamil from Northern province, Sri Lanka. I find the receiving country is Sri Lanka.
10. While I have some doubts that the applicant joined the LTTE in 1984 and went to India for training given his age and claims not to have told his parents and his changing account, I accept that he may have been ex LTTE and was suspected LTTE. This is because the applicant has provided a rehabilitation certificate that indicates the applicant was detained for rehabilitation, which according to the country information was common for anyone suspected to be LTTE, at the end of the war.
11. Like the delegate I have concerns about the applicant's claims regarding being accused of a 2006 bombing and being wanted for that. I consider the applicant's claims lacked credibility in a number of respects. Firstly, the applicant's account of CID waiting for him at the shop to question him, rather than also coming to his home (which was only [distance] away) lacks credibility, particularly given his claims they knew he was LTTE, and suspected he had planted the bomb. In particular, his account of CID telling his brother to get the applicant and bring

him back to the shop lacked credibility. If the applicant was wanted as claimed, it is difficult to believe that they would wait- for the applicant to come to the shop and then when he was not there, ask the brother to go home and bring the applicant to them. Further, that the brother could return without the applicant to the shop and not face any harm from authorities or be arrested as well lacked credibility given the applicant's LTTE claims and the bomb investigation and accusations against the applicant.

12. Secondly, if the bomb went off near the applicant's shop, it is difficult to believe that the applicant would be suspected given his proximity to the police station (100 meters) and the blast. It is difficult to believe that a terrorist would place the bomb so close to one's own business, even if there were a police station nearby.
13. Thirdly, the applicant's account of living in the woods for a year 15 kms from his home lacked credibility also. If the applicant was wanted by authorities, I find it difficult to believe that he would not be found, even if it was near an LTTE area. Further, given other people in the area and his family knew where he was and visited him, and the proximity to his home, it is difficult to believe that the authorities could not have found him. Fourthly, that the applicant could return home 16 months later and not face arrest lacked credibility. If he had been wanted by the authorities and failed to attend their offices and evaded them for a year, in my view this would have been particularly serious, regardless of whether the authorities felt more in control of the LTTE incursions or that tensions had settled. Further, I note DFAT country information that the 2002 ceasefire ended in 2005/2006, so I do not accept the applicant's explanation as credible, and particularly given authorities concerns about terrorist or LTTE activities and it was during the civil conflict. It is not credible that the authorities would not have acted and arrested him if he was suspected of the bombing, a known past LTTE and refused and evaded police investigation and interrogation His disappearance during that period would have increased his profile and heightened authorities concern and adverse interest in him.
14. The applicant also claimed he was sent to a rehabilitation camp and upon release in 2011 CID visited his home and harassed him for money frequently. He claimed CID had discovered that he had been involved in the 2006 bombing. It is not credible that the authorities would not have known about the claimed 2006 bombing interest while he was at the rehabilitation camp. He was there for 19 months and claimed to have been questioned often about his LTTE involvement. According to country information the Sri Lankan authorities had sophisticated intelligence, and I am not satisfied that they would not have known of his past LTTE involvement and in particular if he were wanted for 2006 bombing and had evaded the authorities for more than a year.
15. Further, that CID or the authorities would still be interested in 2006 bombing in 2012 lacked credibility, particularly given the applicant had been through rehabilitation, the conflict ended in 2009 and according to the country information, the LTTE was a spent force.
16. When doubts were expressed by the delegate, the applicant added a new account saying the CID persons were different and just wanted to get money from him and they asked for 300,000 rupees and harassed him frequently for bribes. The applicant had not claimed this before. I consider the applicant was adding to his account to respond to delegate concerns, rather than recounting a lived event. I consider the applicant shifted his account from being of interest due to authorities find out he had escaped the 2006 bombing investigation to it was opportunistic extortion.

17. The applicant's account of his LTTE involvement also lacked details and changed. Initially he said he had not fought for them. He explained he did not mention this in his entry interview as he feared he would be sent to Nauru or PNG. Further, when asked about his involvement at the protection visa interview, he provided little meaningful detail saying he fought when he had to. The delegate spent some time trying to elicit more information, but little information or content was provided. Similarly, the applicant's account of purchasing food lacked meaningful detail or content beyond that he purchased food and kept a statement account of that.
18. Further I note the applicant claimed he collected taxes for the LTTE from 2001 – 2004. However, he also said he had no involvement (other talking to them) or work with the LTTE from 1988 to then. Further he left the LTTE in 1988 due to differences with colleagues and ideology. His account of his tax collection also lacked credibility and details. He claimed he collected them from businesses on the army side, but I find that difficult to believe given the risks involved in that, that others on the army side could easily report him. Further, he had left LTTE many years previous, so it is difficult to believe that he would again 16 years later become involved again.
19. Further, if the applicant was known with past LTTE connections or feared harm as a result of that, it is difficult to believe that he lived so openly in the community, owning his own shops and farm and lived 100 metres from a CID office.
20. Given the documentary evidence that the applicant was detained at a rehabilitation camp, I accept that he may have been and was suspected LTTE at some point in the conflict.
21. However, I consider the applicant has exaggerated his LTTE involvement, adverse interest and continued harassment by authorities, particularly after his release from rehabilitation. Further, I do not accept the applicant was suspected or involved or asked to be questioned about a 2006 bomb blast. I do not accept he was in hiding in the woods or at a priest's church. His account was not credible. I do not accept the applicant collected taxes or fought for the LTTE. I accept he may have assisted in purchasing food or supplies (not weapons) in the late 1980s. I do not accept he had involvement after that or that the authorities had any interest in him (other than at the rehabilitation camp) after that. I do not accept that CID or authorities harassed him for money or threats about investigation in the 2006 bombing. I accept he may have been questioned as a boy when he did not have his ID and questioned at other times during the conflict. However, I consider the applicant has embellished his claims and I do not accept that he was detained and beaten in 2005 as claimed or that he was of any interest relating to the claimed 2006 bombing. Further, I consider the applicant has added the extortion claims in response to delegate concerns about the credibility of his accounts. I do not accept he was extorted, under investigation, required to report, movements restricted, unable to go out or work or of any adverse interest.
22. The applicant's account of authorities continuing to visit his family to enquire about his whereabouts many years after he left Sri Lanka, when according to the applicant they knew he was in Australia somehow before his family told them, did not make sense. If they knew he was in Australia, there could be little point in enquiring about his whereabouts repeatedly. In any event, I do not accept the applicant's sons have been detained, harmed or harassed as I do not accept the authorities have or had any interest in the applicant. I do not accept the authorities have enquired about the applicant or harassed or harmed his family.
23. I accept the applicant is a Tamil Catholic from Northern province and spent 19 months in rehabilitation camp because of his LTTE connections or was suspected LTTE. Country

information the government established 24 rehabilitation centres at the end of the war. Those targeted for rehabilitation included not just former combatants but also those who performed non-combat functions for the LTTE as part of its civilian administration in Tamil populated areas. As at March 2019 12,1919 had completed rehabilitation. According to DFAT, persons were rehabilitated or de radicalised through education and training. I note the applicant said it was not rehabilitation or education or training and it was all lies.

24. I accept the applicant would have had to register upon return home after rehabilitation and may have had to inform if he moved from his local area. I do not accept he was required to report beyond that. I note DFAT stated this is like all Sri Lankans who are required to register with their local village officer to receive financial and other support and access to public services. DFAT noted there were no travel restrictions to rehabilitated former LTTE members and they could obtain a passport. Those who complete rehabilitation were issued a certificate of completion as evidence of their rehabilitation. I note the applicant has one of these. I note also the applicant was not prosecuted for any terrorism offences either during the process.
25. As discussed above, I find the applicant's LTTE involvement was low level, limited and ceased in 1988, many years ago. I do not consider the applicant was, or would be, perceived as high profile LTTE member.
26. DFAT noted following rehabilitation release a low profile LTTE member might be monitored and some Tamils imputed with LTTE links have reported police monitoring and harassment. The extent of monitoring depends on the persons former seniority within the LTTE, ongoing involvement in politically sensitive issue, including protests relating to disappeared persons and links to Tamil diaspora considered radical. However, the applicant has not claimed to have been involved in such activities or in the future and there is no evidence before of this. I do not accept the applicant was a senior person in the LTTE and found his links were particularly dated. Further, I am not satisfied that the applicant was, or will be of interest to authorities as he is not involved in politically sensitive issues, or radical Tamil diaspora.
27. Looking to the future, I am not satisfied the applicant faces a real chance of harm upon return because of past LTTE profile and he has served his rehabilitation. Further, I find that the applicant has managed to live openly and well since then, with shops and a farm and without harm. I have not accepted that he was of adverse interest, under investigation or being extorted. I do not accept he faces a real chance of that either upon return.
28. I have considered the information about Tamils. I accept that during the conflict they suffered disproportionately. However, the situation has changed significantly since then with the end of conflict in 2009 and even more so with Sirisena in power in 2015. Country information indicates a reduction in military presence, and that the LTTE is a spent force. While the government monitors for its re-emergence, they have sophisticated intelligence and interest in those who advocate for a Tamil separate state, there is no evidence or claim that the applicant has that profile or perceived as such. The applicant has lived and worked in Sri Lanka since the end of the conflict and his release from rehabilitation until his departure for Australia. I do not accept that he was in hiding at this time.
29. I have considered the country information about the November 2019 change in government in Sri Lanka and the return of the Rajapaksas.
30. The United States Department of State notes that Tamils reported suffering long-standing systematic discrimination in university education, government employment, housing, health

services, language laws, and procedures for naturalization of non citizens. The report also noted the government had a variety of ministries and presidentially appointed bodies designed to address the social and development needs of the Tamil minority. The government implemented a number of confidence-building measures to address grievances of the Tamil community. DFAT assesses Tamils face a low risk of official and societal discrimination. The UK home office states while there is some discrimination against Tamils, it does not amount to persecution.

31. I note country information in the delegate's decision of the use of the PTA in response to the 2019 Easter Sunday bombings, mostly against Muslims. The attack was found to be by a radical Muslim group. I note from the Eurasia review in March 2021 of the establishment of new rehabilitation centre to deradicalise individuals promoting extremist ideologies As part of the Prevention of Terrorist Act (PTA) it gives power to arrest and transfer people to rehabilitation centre for a year in lieu of prosecution for those suspected of holding radical or extremist views who cause or plan acts of violent or religious, racial or communal disharmony.
32. According the UK Home office 2020 Tamils with certain profiles such as political activists and journalists, families of disappeared persons who advocate for them and those- seeking to commemorate LTTE combatants are more likely to attract attention from authorities with reports of intimidation and surveillance. However, I do not accept that the applicant has a such as profile or will be perceived to have.
33. According to the US State Department 2020 report Tamils reported, especially in the North and East, that security forces regularly monitored and harassed members of their community, especially activists, journalists, and former or suspected former LTTE members.
34. I accept the applicant was a former or suspected LTTE member. I have not accepted he fits any other profile. There was no further commentary on the extent of this or independent verification of Tamil reports in the US State Department report. I note DFAT and other country information indicate interest by authorities is linked to seniority and extent of the LTTE profile. The information indicated that former low-level connections with the LTTE are unlikely to face harm from the Sri Lankan authorities. I note also the UK Home Office reports that authorities have an interest in those who advocate for Tamil separatism or according to March 2021 Eurasia report those with radical or extremist views who cause or plan violence and disharmony. Further, I consider the applicant's LTTE membership is particularly dated in 1980s. I have not accepted that he was high profile or that he continued to assist the LTTE after that. I consider the applicant's profile is and would be perceived as particularly low profile. Further, the applicant has completed his rehabilitation and was able to live and work without harm since then. Further, I do not accept he is or will be perceived as radical, extremist or planning acts of violence or disharmony or the re-emergence of the LTTE. Given this, I do not accept that he would be of adverse interest to authorities. I am not satisfied that the applicant faces a real chance of harm or adverse interest from authorities on account of his LTTE connections or Tamil ethnicity.
35. Further and in any event, even if monitored upon his return, I do not consider that amounts to serious harm.
36. Even having regard to the current political situation with the Rajapaksa's return to power, I am not satisfied that the applicant faces a real chance of harm as a Tamil or on account of his circumstances (including his LTTE connection or his business) or because the applicant lived in Australia for many years.

37. The present government has been in power now for well over a year and the evidence before me does not support a return to civil conflict or a real chance of harm to someone with the applicant's profile.
38. I note also the applicant has been able to own his shop and farm prior to and since 2011. I note his wife and children remain in Sri Lanka and one of his children has completed university.
39. Even in the current situation and political landscape, I do not accept the applicant faces a real chance of harm from the authorities or anyone.
40. Looking to the foreseeable future, I am not satisfied that the faces a real chance of harm on the basis of his Tamil ethnicity, former LTTE membership, origin, background, business or his circumstances.
41. The applicant has made no claims on the basis of his religion and on the country information I am not satisfied that he faces a real chance of harm on the basis of his religion.
42. The applicant did not claim to fear any harm as a failed asylum seeker or illegal departee or raise any concerns in that regard. I note also the delegate's decision did not address this either. The applicant has not made any submissions or complaint in that regard either.
43. In any event, it is evident though on the face of the material that the applicant would be a failed asylum seeker and illegal departee upon return to Sri Lanka. Accordingly, for completeness I have dealt with this below.
44. DFAT reports indicated thousands of Tamils have been returned without harm 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. Further, even with his former LTTE profile I have found the applicant's LTTE profile is low and that he has served his rehabilitation and I do not accept the applicant was or will be of interest to authorities. Like all returnees, he will very likely be subject to investigative processes to confirm his identity. He has his identity card and was not subject to any outstanding warrants and evidence that he has completed his rehabilitation.
45. I note from the 2019 DFAT report some returnees, in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities. Even if he is monitored upon return I do not accept that amounts to serious harm. Further, DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security.
46. 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 or returnee.
47. In respect of his illegal departure, the penalty is a fine which can be paid in instalments or if he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances. Even if held in airport holding cell if he arrives over the weekend, I am not satisfied the applicant faces a real chance of mistreatment upon arrival, during questioning or possible brief detention.
48. Further and in any event, 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 Immigration and Emigration Act (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.

49. I am not satisfied that questioning, process, and being held in airport holding cell if arrives on weekend, 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.
50. 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.
51. I am not satisfied the applicant has a well-founded fear of persecution for any reason.

Refugee: conclusion

52. 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

53. 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

54. 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.
55. 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.
56. As to treatment upon return as a failed asylum seeker or returnee I have not accepted that the applicant faces a real chance (and thus real risk) of any harm in that regard.
57. Further, even if he is monitored upon return for any reason, I am not satisfied that it amounts to significant harm as defined in the Act.

58. As to treatment for the illegal departure the applicant is very likely to be issued a fine and released. If 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. Further, 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 or significant harm.
59. 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.
60. 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

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

Decision

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

Applicable law

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.