



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Jun 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: M98/2025  
File Title: Plaintiff M98/2025 v. Minister for Immigration and Citizenship  
Registry: Melbourne  
Document filed: Defendant's submissions as requested by the Court  
Filing party: Defendant  
Date filed: 03 Jun 2026

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

BETWEEN:

**Plaintiff M98/2025**  
Plaintiff

and

**Minister for Immigration and Citizenship**  
Defendant

## DEFENDANT'S FURTHER SUBMISSIONS

### Introduction

1. By email from the Senior Registrar to the parties dated 13 May 2026, the Court has invited further submissions on the question whether any claim that the plaintiff wished to undergo gender-affirming surgery, and did not want to return to Malaysia because gender-affirming surgery was unavailable, was capable of giving rise to a protection obligation pursuant to s 36(2)(a) of the *Migration Act 1958* (Cth), or a claim for complementary protection pursuant to s 36(2)(aa) of the *Migration Act* – and, in particular, whether an inability to access such surgery is capable of meeting the definition of “serious harm” (ss 5J(4)(b), (5)) or “significant harm” (s 36(2A)) for the purposes of those respective provisions.

### Significant harm (complementary protection)

2. As outlined in the defendant’s **Response** dated 2 February 2026 at par 15, the plaintiff appears to assert that the absence of gender-affirming surgery options in Malaysia amounts to cruel or inhuman treatment or punishment, or degrading treatment or punishment (for the purposes of s 36(2A)(d)-(e) of the *Migration Act*).
3. Section 5(1) defines:
  - a. “cruel or inhuman treatment or punishment” as relevantly limited to 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 (i.e. simpliciter), 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; and

- b. “degrading treatment or punishment” as relevantly limited to an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable.
4. The effect of those defined terms is that, differently from the application of the relevant concepts in international law, there must be an actual subjective intention to effect the relevant harm.<sup>1</sup>
  5. In the instant case, there was nothing before the delegate to evidence any such intention (and the reference in the **DFAT Country Information Report**<sup>2</sup> to a 1983 *fatwa* banning Muslims from undergoing gender-affirming surgery, and otherwise the unavailability of such surgery in Malaysia, did not supply evidence of any such intention).
  6. Therefore, any claim was not capable of meeting the definition of “significant harm” for the purposes of s 36(2A).
  7. For completeness, it is unlikely that an absence of gender-affirming surgery would amount to cruel or inhuman treatment or punishment, or degrading treatment or punishment, under international law (shorn of the specific intentionality requirements in the *Migration Act*).
  8. In *L v Lithuania*,<sup>3</sup> the European Court of Human Rights rejected the applicant’s contention that the absence of any lawful possibility of undergoing full gender reassignment surgery comprised a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”). The Court observed as follows:<sup>4</sup>

---

<sup>1</sup> *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [4]-[5], [10]-[27] per Kiefel CJ, Nettle and Gordon JJ.

<sup>2</sup> Caldwell Affidavit at p 78 (par 3.130).

<sup>3</sup> (2008) 46 EHRR 22. The Court, however, upheld the applicant’s complaint in respect of Article 8 (respect for private life).

<sup>4</sup> (2008) 46 EHRR 22 at [46]-[48]. By way of further context for the two decisions cited: (1) *D v United Kingdom* (1997) 24 EHRR 423 concerned an applicant who had AIDS, and the place to which it was proposed he be deported (St Kitts) did not have the medical treatment he would require, which would therefore hasten his death; (2) *Pretty v United Kingdom* (2002) 35 EHRR 1 concerned an applicant who was suffering from a degenerative and incurable illness and who

46 The Court observes that the prohibition under Art.3 of the Convention is of an absolute nature, but that the kind of treatment qualified as inhuman and degrading will depend upon an examination of the facts of the specific case in order to establish whether the suffering caused was so severe as to fall within the ambit of this provision. Moreover, according to its established case-law, Art.3 entails a positive obligation on the part of the State to protect the individual from acute ill-treatment, whether physical or mental, whatever its source. Thus if the source is a naturally occurring illness, the treatment for which could involve the responsibility of the State, but is not forthcoming or patently inadequate, an issue may arise under this provision. [fn: See, for example, *D v United Kingdom* (1997) 24 E.H.R.R. 423 at [51]-[54]; *mutatis mutandis*, *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 at [49]-[52].]

47 However, an examination of the facts of the present case, whilst revealing the applicant's understandable distress and frustration, does not indicate circumstances of such an intense degree, involving the exceptional, life-threatening conditions found in the cases of Mr D and Mrs Pretty, cited above, and thereby falling within the scope of Art.3 of the Convention. ...

48 Consequently, the Court finds no violation of Art.3 of the Convention.

### **Serious harm (refugee claims)**

9. The instances of “serious harm” in s 5J(5) of the *Migration Act* are not exhaustive; nevertheless, they indicate that the concept of serious harm is concerned with conduct which, among other things, both (1) constitutes an interference with the basic human rights or dignity of a person; and (2) is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it.<sup>5</sup> Thus too, the explanatory memorandum accompanying the Bill which would enact the statutory predecessor to s 5J(5), provided:<sup>6</sup>

The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection.

10. The plaintiff here, although expressing a “dream” to become a man and, in that connection, a desire not to return to Malaysia because of the unavailability of

---

complained of the criminal laws which would prohibit her husband from assisting her to commit suicide, and a refusal by the Director of Public Prosecutions to grant an immunity from prosecution to her husband in respect of those laws.

<sup>5</sup> *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at [89]-[91] per Gageler J (as he then was); see also at [59], [70] per French CJ, Kiefel, Bell and Keane JJ.

<sup>6</sup> See par 23 of the Explanatory Memorandum to the Migration Legislation Amendment Bill (No. 6) 2001 (Cth), quoted in *BZAFM v Minister for Immigration and Border Protection* (2015) 321 ALR 117 at [56] per Robertson, Griffiths and Mortimer JJ.

necessary surgery,<sup>7</sup> did not suggest a mental anguish of any particular magnitude, let alone one equivalent to being forced to endure a mock execution. There was therefore, on the material before the delegate, an insufficient basis on which they could be satisfied of “serious harm” in connection with the plaintiff’s desired surgery.

11. The above difficulties for the plaintiff arise even before turning to the other necessary elements of a refugee claim, including the need to show that the essential and significant reason for the absence of gender-affirming surgery was a Convention reason: *Migration Act*, ss 5J(1)(a), (4)(a). In that regard, the DFAT report to which reference has been made (see par 5 above) did not identify why gender-affirming surgery was not available in Malaysia, and nor did the plaintiff proffer his own explanation.

### **Conclusion**

12. Ultimately, in a given case, it may be open to find that the denial of a particular medical treatment or service by the State may result in serious harm or significant harm. Such a finding would be sensitive to the individual facts and circumstances. The unavailability of gender-affirming surgery in Malaysia was not capable of amounting to serious or significant harm in respect of the plaintiff in the present case.

**A F SOLOMON-BRIDGE**

Dated: 3 June 2026



.....  
Michelle Stone  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the defendant

---

<sup>7</sup> See Response at pars 16, 18.