



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/01452

Date and time of decision: 4 August 2017 19:03:00  
Jessica McLeod, 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 an referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. [In] May 2016 he applied for a Safe Haven Enterprise visa (SHEV). [In] November 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this visa. The delegate did not accept the applicant's claimed political involvement in the 2008 and 2012 Eastern Provincial Council elections or that he would otherwise be returning with a profile that would lead to him suffering serious or significant harm upon return.

### Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act). This includes inter alia, a post-interview submission provided to the department [in] August 2016.
3. On 1 December 2016 the IAA received a submission from the applicant's representative. To the extent that it contains legal and other arguments responding to the delegate's decision, refers to case law and policy advice, reasserts claims and references country information that was before the delegate, I am satisfied that this does not constitute new information and have had regard to it.
4. However the submission contains references to country information which was not before the delegate and which constitutes new information. Two of the reports predate the decision<sup>1</sup> and one was published the day after the decision was made.<sup>2</sup> They relate to Tamil university students being shot and killed by the police, Buddhist monks verbally assaulting and humiliating Tamil government officials, Sinhalese colonisation, land grabbing and other issues affecting Tamils in Sri Lanka. No explanation has been provided as to why the reports which predated the decision could not have been provided prior to decision and I am not satisfied they contain credible personal information. I have not considered the information in these reports because I am not satisfied this new information meets s.473DD(b)(i) or s.473DD(b)(ii). I accept the report which post-dated the decision could not have been provided before the delegate made his decision. However the report relates to a specific incident between a Buddhist monk and a Grama Sevaka prompted by the filing of court cases against Sinhalese. I do not consider this relevant to the applicant's circumstances and claims and I therefore am not satisfied there are exceptional circumstances to justify considering the information in this report.
5. The submission also stated that *"....there have been several incidents of serious harm perpetrated by state and non-state agents in majority Tamil areas in Sri Lanka since the end of the war. Tamil university students being shot and killed by the police, Buddhist monks verbally assaulting and humiliating Tamil government officials, colonisation of Sinhalese, land grabbing are some of the more recent incidents that have occurred in majority Tamil areas. Such incidents of serious harm against the Tamils continue unabated to this day."* While I accept that Sri Lankan authorities' mistreatment towards Tamils was a material issue before the delegate, I consider the incidents mentioned relating to university students, abuse by Buddhist monks, Sinhalese colonisation and land grabbing amounts to new information. It was not suggested that these events post-dated the delegate's decision. No explanation has been provided as to why the reports could not have been provided prior to decision and I am not satisfied they contain

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1 K, Nesan for World Socialist Website (wsws.org), "Police murder of two Jaffna University students exposes Sri Lankan

2 Colombo Telegraph, "You Tamil Dog, I Will Kill You" Buddhist Monk Tells Grama Sevaka In Batticaloa", 12 November 2016

credible personal information. I am not satisfied s.473DD(b)(i) or s.473DD(b)(ii) is met and nor are there exceptional circumstances to justify considering this information.

6. On 9 December the applicant provided what appears to be a candidate registration purportedly for the applicant's [Relative 1] who he claims contested the local election in 2008. No explanation has been provided as to why this could not have been provided prior to the decision but I accept that if genuine, it is credible personal information which may have affected consideration of the applicant's claims. However, I am satisfied that the applicant was sufficiently on notice as to the delegate's concerns relating to his claimed involvement with his [Relative 1]'s political campaign in 2008. I am not satisfied there are exceptional circumstances to justify considering this information. I have nevertheless accepted the applicant's claims relating to his [Relative 1]'s political campaign in 2008.
7. On 28 December 2016 the applicant's representative referred to two matters currently before the High Court of Australia which I accept relates to case law and does not constitute new information. However the representative also provided to the IAA an undated report by the UN Committee Against Torture (CAT). The CAT report is the 'Concluding observations on the fifth periodic report of Sri Lanka' and states it was adopted at a CAT meeting on 30 November 2016. On that basis I am satisfied the report could not have been made available to the delegate prior to his decision. I consider the report contains the most up to date available information regarding torture in Sri Lanka. I am satisfied there are exceptional circumstances to justify considering this information.
8. I have also obtained new information, specifically information on the treatment of Sri Lankans of Tamil ethnicity and citizens who have departed Sri Lanka illegally and sought asylum abroad from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017.<sup>3</sup> The delegate relied on the then current 18 December 2015 DFAT report for Sri Lanka and the 2017 report was only published after the delegate's decision. I am satisfied that there are exceptional circumstances to justify considering this new information.
9. Among the representatives' submissions were references to other decisions from the Refugee Review Tribunal (now the Administrative Appeals Tribunal) and the IAA. I note however that I am not bound by them. I have undertaken my own analysis of the situation in Sri Lanka and have assessed this case on the specific and individual circumstances of this applicant currently before me.

### **Applicant's claims for protection**

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10. The applicant's claims can be summarised as follows:

- He is a Tamil Hindu born in [year] in [Village 1], a predominantly Tamil fishing village in [District 1] in the Eastern Province of Sri Lanka.
- In 2005 he replaced his [Relative 1] (who fled to Australia, was granted protection and is now a citizen) as head of the [sports club] in [Village 1]. In the Provincial Council election of May 2008, that [Relative 1]'s brother stood in [Village 1] for the pro-Tamil party, Tamil Democratic National Alliance (TDNA).

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<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

- The sports club supported the TDNA, and through the club the applicant also became involved, assisting his [Relative 1]'s campaign through organising meetings, canvassing and putting up posters. He organised meetings with other sports clubs in the village and enlisted their support.
- The Tamil Makkal Viduthalai Pulikal (TMVP) party (the political wing of the 'Karuna Group', a paramilitary organisation closely aligned with the authorities) was also contesting the election under as part of the United People's Freedom Alliance (UPFA).
- During the election campaign he and his [Relative 1] were threatened by supporters of the TMVP. Very shortly after the election, which the UPFA won, he received a letter from the TMVP asking him to attend their office. He ignored the letter because a couple of his [Relative 1]'s colleagues had previously been beaten by the TMVP, and he feared the same thing might happen to him.
- When he was playing [sport], two men from the TMVP arrived on motorbikes and took him to their office in [Village 1]. They detained him for [number of] days and gave him water but no food. They tied his hands to a window and beat him. They beat him with a plastic pipe. They said they were punishing him for not withdrawing his support for the TDNA during the election. They released him on the condition that his [Relative 1] leave the TDNA, which he later did, and also on the condition that he and the sports club give the TMVP their support. When he agreed to their demands they took him to [Village 1] hospital and spoke to the doctor. They told the doctor to treat him but not to make any record of his treatment. He was kept in the hospital overnight. He had suffered severe bruising and couldn't walk.
- The TMVP came back to him and forced him to work for them. He was forced to do manual and humiliating work, including cleaning their toilets and putting up marquees for their gatherings at any time of day, even in the middle of the night. He hated doing this work and felt very insecure. The TMVP treated him roughly and were threatening. As a result his father helped him leave the country.
- He had been issued a passport while at school. He travelled lawfully to [Country 1] and in October 2008 and then went to [Country 2] in December 2008.
- While he was in [Country 2] his family contacted him and told him that the TMVP had moved their office out of the village. He thought it was safe to go back so he returned to Sri Lanka in February 2009. He went to his village and resumed working for his father.
- A few months later the same two men from the TMVP, who had previously detained him came to the village and found him at the [sports ground]. They took him to their office (which was now in [another location]).
- They forced him to start working for them again. They threatened to shoot him if he went to the police and or if he tried to run away. They continued to treat him very roughly. For instance, when he dug a hole they kicked him and made him fall in, and laughed at him. If they found any fault in his work they banged his head on the desk.
- They also made him bring members of sports club to help with the manual labour. They feared being shot if they didn't cooperate.
- Because of this situation he decided to seek asylum in Australia. He went lawfully to [Country 3] in September 2009 and then travelled to [Country 4] in October 2009 he where he found an agent to help him travel to Australia.
- Before any arrangements were made he heard from my family that the Sri Lankan government had made the TMVP hand in their arms, and had closed their offices,

except for one in [District 1]. His family said that it was safe to return so he took their word. He returned to Sri Lanka and to his village in February 2010 and again resumed his work for his father and his involvement in the Sports Club.

- The Sports Club organised [an event] held [in] June 2012 in the village. It was a major [event].
- After the [event], around July or August 2012, the [club official] and he were at the club grounds when we were approached by two men he didn't recognise. They said they were from the TMVP. They demanded they work for them in the Provincial Council election, which was coming up in September 2012. He declined, telling the men that he was supporting the Tamil National Alliance (TNA). They then showed him that they were armed and threatened to kill him if he didn't support them. They also said that the party had taken offence because it hadn't been invited to the [event]. They then left.
- He went home very briefly to collect some clothes, and the same day he fled to [District 1], where he went into hiding at the house of a [relative]. He hid there while his father made the arrangements for him to leave the country with the help of an agent.
- While the arrangements were being made he heard that supporters of the TMVP were asking his friends for his whereabouts.
- [In] September 2012 he departed Sri Lanka by boat from [District 1]. About a month after he arrived in Australia, some men from the TMPV spoke to his [sibling] and again threatened to kill him.
- He fears he will be seriously harmed and / or killed by supporters of the TMVP if he return to Sri Lanka and by the authorities because he is a Tamil from the East who supported the TDNA and therefore will be imputed with a political opinion against the government. He also fears harm on the basis that he would be returning as a failed asylum seeker from the west who left illegally.

## **Factual findings**

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### **Identity and nationality**

11. The applicant has provided documentary evidence and a consistent and plausible narrative of issues relevant to his identity. I accept the applicant's claims as they relate to his identity, nationality and receiving country. I accept he is a Tamil Hindu from [Village 1] village in [District 1] in the Eastern Province of Sri Lanka. I find Sri Lanka is his receiving country and [District 1] is his home region.

### **Problems with the TMVP**

12. The applicant claims he will be seriously harmed and/or killed by TMVP members and supporters because he refused to support them in two elections and instead campaigned for the TDNA (in 2008) and the TNA (in 2012).

### *2008 events*

13. The applicant claims he became involved in politics in 2008 when he was head of [a sports club] and his [Relative 1] was contesting the election as a candidate for the TDNA. He claims that although he was not a TDNA member himself he helped his [Relative 1] campaign by organising

meetings, canvassing door to door and putting up posters. As team captain at the SC he also got his team members involved and organised meetings with other SCs to enlist their support.

14. I note the applicant has interchangeably referred to the party his [Relative 1] campaigned for as the EPRLF (Eelam People's Revolutionary Liberation Front) or the TDNA. Country information confirms that the EPRLF contested the 2008 provincial elections under the banner of the TDNA, a coalition formed from smaller Tamils parties.<sup>4</sup> I am prepared to accept the applicant and his sports club engaged in some low-level campaign support for the TDNA in 2008. I am satisfied from country information that was before the delegate that the TMVP/Karuna group was responsible for election violence around this time. I am prepared to accept that in the lead up to the election the applicant, his [Relative 1] and some sports club members faced some problems including threats from local rivals in the TMVP.
15. The applicant claims that after the TMVP won the 2008 election, they sent him a letter asking him to attend their office and around two weeks after the election they abducted him and two other Sports Club team mates. He claims they detained him for [number of] days and beat him in punishment for helping his [Relative 1]'s campaign. He claims he was released on the condition that his [Relative 1] agreed to withdraw his support from the TDNA and that his sports club would provide support to the TMVP.
16. However, there are some anomalies in the applicant's accounts. In his written application he stated the TMVP had taken him to the hospital and warned the doctor not to make a record of his treatment but in the SHEV interview he stated that upon release (rather than the TMVP taking him to the hospital), they told the applicant to go to the hospital. I find this to be a discrepancy in the applicant's accounts. When discussing the abduction-detention incident during the SHEV interview, the delegate asked the applicant why the TMVP was so interested in him and why they would have gone to such lengths as to hold him for [number of] days. The applicant responded that in his area the TMVP could not get a lot of votes. He stated they had lost in that area and they were angry at him for this. Contesting as part of the UPFA coalition, the TMVP won 52% of the vote gaining 20 seats on the Eastern provincial council in 2008. I accept from this that although the TMVP's coalition won overall, the TMVP did not win all the seats. However the applicant has consistently claimed they defeated his [Relative 1] in their local seat so I find his explanation that the TMVP lost in his local area to be contradictory to his other evidence. I note also that later in the SHEV interview the applicant stated that after he returned home from [Country 1], he was again detained by the TMVP for [number of] days and forced to work for them. However he had previously made no mention of a second detention incident and when the delegate clarified if he had been twice detained he responded in the negative and said once they had taken him for [number] days but had then allowed him to return home. I find the applicant's evidence about the hospital, whether the TMVP won or lost the local seat and whether he was detained once or twice to be problematic.
17. There is no information before me to indicate the applicant's [Relative 1], the TDNA candidate was targeted in any similar manner to that claimed by the applicant. I consider implausible that rather than targeting the [Relative 1] directly, the applicant was abducted and targeted for his and the club's role in supporting his [Relative 1]'s TDNA campaign. I also consider it implausible that the applicant was released on the condition that his [Relative 1] withdraw from the TDNA given the TMVP had just heavily defeated the [Relative 1] and the TDNA in the election winning 20 seats to the TDNA's one seat.<sup>5</sup> Given the timing of the incident and how heavily the TDNA had

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4 International Crisis Group, "Sri Lanka's Eastern Province: Land, Development, Conflict - Asia Report N°159 - 15 October 2008", Asia Report No.159, 01 October 2008, CIS16622

5 International Crisis Group, "Sri Lanka's Eastern Province: Land, Development, Conflict - Asia Report N°159 - 15 October 2008", Asia Report No.159, 01 October 2008, CIS16622

been defeated and their limited representation in the new council, I find it implausible that the TMVP had any interest in ensuring the applicant's [Relative 1] withdraw from the TDNA and I do not accept they needed support from the Sports Club. Taking into account the applicant's low-level assistance in both elections, his problematic evidence about the abduction incident and the implausibilities identified above, I do not accept the applicant was ever abducted and detained by the TMVP.

#### *2009 – 2012 events*

18. The applicant claims he left Sri Lanka twice after being subjected to extended periods of forced labour by the TMVP - for six to eight months after the 2008 election and for around one year from 2009-2010. He claims that while working for them they often called him to come at midnight, physically harmed him and threatened to kill him. They also forced him to bring other sports club members to do manual labour and they cooperated out of fear of being shot. He claims he only returned to Sri Lanka on both occasions because he had been told the TMVP office was no longer in his village and that they had disarmed.
19. Country information does support that during these years the authorities and paramilitary groups frequently harassed young Tamil men and that the TMVP and Karuna group were responsible for election related violence, abductions and had previously employed methods of forced recruitment. It does not however support that the TMVP or Karuna group systematically forced civilians such as the applicant to do forced labour over an extended period. I have nonetheless considered whether this may have happened to the applicant. However I am not satisfied that the applicant's low level political support for the TDNA in 2008 made him a target of the TMVP for the coming four years. I note the applicant was able to lawfully depart and re-enter Sri Lanka without any problems in 2008, 2009, 2010 and 2011. The applicant claims he did so secretly without the knowledge of the TMVP however given country information indicates the Karuna group/ TMVP were aligned with the authorities during these years I am satisfied that had the applicant been wanted by the TMVP he could have been apprehended. There is also no evidence before me that his family was approached or targeted by the TMVP looking for him during either of these overseas absences or that any of his family members were required to work for them in his absence. Having considered the evidence, I am not satisfied that the applicant was subject any periods of forced labour by the TMVP/Karuna group.
20. The applicant claims that after he returned from his second trip abroad, in 2012, he resumed his activities in the Sports Club. He claims that in July/August, he was approached by TMVP members who were angry they had not been invited to a recent Sports Club hosted event. He claims they wanted him to support their campaign but he refused and told them he was supporting the TNA. He claims that in the 2012 election he and the other sports club members undertook similar activities for the TNA as they did for the TDNA in 2008.
21. The applicant confirmed at the SHEV interview he was not a member of the TDNA or TNA. The delegate asked the applicant why he continued to involve himself in politics when he had had problems from this previously, including, being abducted by the TMVP. The applicant responded that he helped the TNA in 2012 because they didn't have weapons (ie. they were not an armed group) and it was only when two armed people came and took him that he understood the TMVP had not disarmed. I have concerns about this due to the applicant's conflicting accounts about whether he had been taken by the TMVP more than once (also discussed above). I also found the applicant's explanation of why he supported the TNA to be over simplistic for someone who claims he had been involved in political campaigning for that party and another party previously and that these activities had placed him in danger. When the delegate later asked him if he would continue to support the TNA upon return the applicant responded "*I don't*

*know whether I will be alive if I return to Sri Lanka*". The delegate then asked what it was about the TNA he supported and he did not answer the question, instead responding by asking who would provide him with security as the TNA could only provide security for one to two years.

22. The applicant claims he held a high profile as head of the sports club however I note the applicant's description of his position has varied between being head of the [sports club], head of the sports club and [team] captain. I have some concerns about whether the applicant has sought to embellish his level of leadership and profile within the club. I note that while he explained he first obtained the position as head of the [club] following his [Relative 1]'s departure, I have concerns about the plausibility of the applicant twice leaving the club and repeatedly resuming in leadership positions each time he returned. Even if I were to accept the applicant held a leadership position in club, I have concerns about the plausibility of the applicant returning to Sri Lanka having purportedly fled the TMVP twice already and upon return taking up a leadership position in a TNA supporting club and engaging in election related activities with the TNA. Given his claimed history with the TMVP, I also consider it implausible that he responded to the TMVP in the manner claimed. Taking into account all the concerns I have outlined above arising from inconsistencies in the applicant's accounts, the simplicity and vagueness of his responses regarding the TNA, my concerns about the applicant's role and profile in the Sports Club, that I do not accept he was targeted for forced labour by the TMVP and the implausibilities outlined above, I do not accept the applicant was threatened on this occasion.
23. It follows that I also do not accept the applicant went into hiding or that TMVP members, supporters or anyone else came looking for him, and have continued to threaten him and his family, who have continued to live in their home village in [District 1] since the applicant's departure. Having considered the evidence, I do not accept the applicant is of any adverse interest to the TMVP or their paramilitary wing, the Karuna group.

### **Imputed anti-government political opinion**

24. The applicant claims to fear the authorities because his TDNA/TNA support will lead the government to impute him as having an anti-government political opinion. Given his activities for the TDNA were low level only and limited to 2008 and he was able to lawfully travel in and out of the country subsequently on two occasions and there is no evidence before me that he had ever been of interest to the authorities for this, or for any other reason, I do not accept the applicant's low level political support for the TDNA in 2008 has imputed him with an anti-government political opinion or profile. I have not accepted the applicant undertook political activities for the TNA in 2012 and on the evidence he has not been politically active in Australia. I do not accept the applicant has been imputed with an anti-government political opinion on the basis of support he has given to any political parties in Sri Lanka.

### **Refugee assessment**

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25. 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

26. 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.

27. I have not accepted the applicant engaged in political activities for the TNA in 2012. I consider the applicant's political support and activities were low-level and limited to assistance in the TDNA's campaign in 2008. I am not satisfied that it resulted in him having a profile of interest such that he was targeted by the TMVP / Karuna group for the four years following the 2008 election and leading up to his departure in 2012. I am not satisfied on the evidence that he has engaged in any political activities in Australia that have bestowed on him an identifiable profile as a supporter of any party, or as an opponent to the government in any way. I am not satisfied that the applicant had, or currently has a political profile that would cause him to be targeted upon return. I am satisfied the applicant would not face a real chance of harm from the TMVP/ Karuna group, the authorities or others in relation to his previous political activities.

28. I accept however, that the applicant may be minded to support the TNA into which according to the applicant the TDNA was folded in 2012. Even if he participated in future political activities, I find that on the basis of his previous activities, it would be of a low-level nature only. Country information that was before the delegate indicates the influence of the Karuna group and their political arm (the Tamil Makkal Viduthalai Pulikal or 'TMVP') has significantly faded in recent years and that while the TMVP remains engaged in some criminal activity, in 2015 DFAT advised it had renounced paramilitary activities.<sup>6</sup> Meanwhile the political power of other Tamil parties, particularly the Tamil National Alliance, has exponentially grown. Contesting under the Ilankai Arsu Kachchi (ITAK), the TNA won 16 seats in the August 2015 Parliamentary election and the TNA's profile has been enhanced with the TNA leader, Rajavaothian Sampanthan formally appointed opposition leader.<sup>7</sup> While incidents of election related violence were recorded<sup>8</sup> 2015 elections were described as 'peaceful' and 'credible' and DFAT assesses that the Sirisena government has been engaging constructively with the TNA.<sup>9</sup> Having regard to this information and that the applicant's participation in any political activities would be of a low-level nature only, I am satisfied the applicant would not face a real chance of harm from the Karuna group/TMVP, the authorities or others if he were to engage in political activities upon return.

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6 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

7 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

<sup>8</sup> Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508

9 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

29. Since the applicant's departure, the situation for Tamils in Sri Lanka has changed considerably. Information before the delegate indicates that developments in Sri Lanka's political landscape at the national and provincial levels are significant and indicative of a more positive future for Tamils. The August 2015 Parliamentary elections (which were deemed credible by international commentators) enabled political participation for a number of Tamil political parties operating under the umbrella of the Tamil National Alliance (TNA), who is now formally in opposition. I am satisfied that the TNA now has a substantial level of political influence and representation in senior levels of government.<sup>10</sup>
30. DFAT assesses that under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life has significantly decreased. Tamil community members reportedly feel able to question or object to monitoring or observation activities.<sup>11</sup> The Sri Lankan government is still sensitive to the potential re-emergence/resurgence of the LTTE<sup>12</sup> but country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor when they originate from, or reside in, an area that was previously controlled by the LTTE.<sup>13</sup> It no longer supports a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age or place of origin.
31. In 2016 the UK Home Office advised their decision makers that there is an onus on Tamils to demonstrate that they will face on return ill-treatment from the current, as opposed to the previous, government.<sup>14</sup> The UK suggests that persons may be at risk if they are perceived to be an LTTE sympathiser, a threat to the integrity of Sri Lanka due to a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, are journalists or human rights activists critical of the government, are individuals who gave evidence to the 'Lessons Learned and Reconciliation Commission' implicating the authorities in alleged war crimes, and / or are persons whose name appears on a computerised "stop" list accessible at the airport.<sup>15</sup> The applicant confirmed at the SHEV interview that he has not have any involvement with the LTTE and there is no indication in the referred material or submissions that the applicant ever came to the adverse attention of the authorities while he was in Sri Lanka for LTTE related reasons or any other reasons. I am satisfied the applicant was not previously perceived as an LTTE member, supporter or sympathiser while he was in Sri Lanka nor subsequently. There is no other evidence before me of the applicant having been engaged in (or suspected thereof) Tamil separatism, or activities which would impute him as an LTTE sympathiser, or threat to the state and nor does he fit within the other risk profiles identified by the UK, nor other sources in the material before me.
32. I am not satisfied that the applicant faces a real chance of harm now or in the reasonably foreseeable future on the basis of his Tamil race, his origins from [District 1] (being in the Eastern Province), his gender, age (noting that he is a relatively young man. Even when all of these factors are considered cumulatively, I am not satisfied they bestow on the applicant a

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10 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

11 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

12 UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17;

13 UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012 UNB0183EA8; UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143;

14 UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

15 UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

profile which indicates he will be at risk upon return of being detained under the operation of the Prevention of Terrorism Act (PTA), or that he otherwise has a well-founded fear of persecution from the authorities nor others on the basis of any imputed LTTE support or links, because he would be considered a threat to the integrity of the Sri Lankan state, or for any other reason.

33. I accept that should the applicant be returned to Sri Lanka, he would be identifiable to authorities at the airport as a failed or returning asylum seeker from Australia who departed Sri Lanka illegally.
34. I accept that the applicant will be subject to police investigations to confirm his identity and to address whether he would be trying to conceal his identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. I accept this may involve interviewing him, contacting the police in his home in [District 1], contacting his claimed neighbours and family and checking criminal and court records. I also accept he will be checked against the authorities' sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases.<sup>16</sup>
35. I accept that during the airport processing procedures, the applicant's personal history may be revealed however on the evidence, I am not satisfied the authorities would uncover anything of concern. I have considered the submissions from the applicant's representative regarding the authorities and TMVP having an adverse interest in the applicant on account of his illegal departure and requested asylum. I am satisfied the applicant was not a person of interest when he departed Sri Lanka and I am not satisfied he has become of interest thereafter. I find this similarly applies to the TMVP and Karuna group. I find it implausible that the Karuna group has any adverse interest in the applicant and I note country information does not indicate there are TMVP/Karuna group members amongst the airport authorities. I am not satisfied the applicant will be targeted by the TMVP/Karuna group at the airport upon return. I am also not satisfied on the evidence that the applicant would not be listed in the authorities' stop and watch lists, or that he would be identified as someone trying to conceal their identity, or who has outstanding court orders/arrest warrants or a criminal/terrorist background.
36. Between 2008 and 2015, over 1,500 asylum seekers were returned from Australia to Sri Lanka as well as thousands from the US, Canada, the UK and other European countries, the majority of which have been Tamil. Of the thousands of returnees who have returned since 2009 there have been allegations of torture or mistreatment and I note the concerns and observations in the CAT report provided by the applicant's representative.<sup>17</sup> However I am not satisfied that these reports or allegations are informative of the circumstance that would be faced by the applicant upon return. DFAT assesses the risk of harm for the majority of returnees is low and continues to reduce.<sup>18</sup>
37. DFAT and other sources considered by the delegate advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are

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16 DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

17[Information deleted].

18 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

not subject to mistreatment during processing.<sup>19</sup> Reporting from the UK indicates that as the LTTE is now considered a spent force and there have been no terrorist incidents in Sri Lanka since the war's end, the Sri Lankan government's objective has shifted to identify activists in the Tamil diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state.<sup>20</sup> I am satisfied that the applicant would not be perceived as an LTTE sympathiser or a threat to the integrity of the Sri Lankan state. I am not satisfied there is anything in the applicant's profile that would bring him to the adverse attention of authorities, either during the airport processing procedures, after he has returned to his home region. I do not accept the applicant faces a real chance of harm as a failed / returnee asylum seeker.

38. The applicant has committed an offence under the Immigration and Emigration Act 1988 (I&E Act) in departing Sri Lanka other than via an approved port of departure. According to DFAT, returnees who have been charged under the I&E Act can remain in police custody at the airport for up to 24 hours after arrival and should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be held at a nearby prison. Information from DFAT does not indicate that detention is selectively applied, that returnees are processed in any discriminatory manner or that those who committed an offence under the I&E Act face a higher risk of torture or other mistreatment.<sup>21</sup>
39. I find that while being questioned and processed at the airport the applicant will face a brief period of detention. The information before me indicates there is a possibility he may be detained more than a day while awaiting an opportunity to appear before a magistrate. While I am satisfied that this would be dependent on the timing of his arrival and that such a period of detention is likely to be remote, I accept that if the applicant's detention did extend to more than a day that it may occur in a Sri Lankan prison. I have considered the submissions from the applicant's representative about the conditions the applicant may face. Information that was before the delegate indicates that conditions in Sri Lankan prisons are poor,<sup>22</sup> however I am satisfied on the information that this is due to economic and resourcing conditions and old infrastructure, not a result of any systematic or intentional conduct by the Sri Lankan authorities. The country information before me indicates that any such detention would only continue until the applicant was given an opportunity to appear before a magistrate, and I find this would likely be brief.
40. In the post-interview submission provided to the department it was submitted that the applicant's fragile mental state will be exacerbated by any period of detention upon return. I note that beyond this submission, no information (medical or otherwise) has been provided about the applicant's mental health. The IAA does not have a duty to get, request or accept, any new information whether it is requested to do so by a referred applicant or by any other person, or in any other circumstances. Nevertheless, I have considered whether it is necessary to interview or obtain new information from the applicant. I am satisfied the material issues remain those that were before the delegate. The applicant is also capably represented, and submissions

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19 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

20 UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

21 DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

22 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; Information provided in post-interview submission and Committee Against Torture report provided to the IAA

have been provided in relation to the determinative issues including the risk of harm during any period of detention. I am satisfied that it is not necessary to seek further information or interview the applicant in all the circumstances. I have nevertheless taken into account the impact that this brief period of detention may have on the applicant psychologically. I accept the applicant would find any period of detention difficult. However, when having regard to all the circumstances, I find that the conditions will not be such as to rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment or otherwise amount to serious harm for the applicant.

41. Penalties for illegally departing can include imprisonment of up to five years and a fine of up to 200,000 LKR. There is nothing before me to indicate that the applicant would be perceived and treated as anything other than a mere passenger on the people smuggling vessel, who DFAT assesses, the Sri Lankan authorities tend to view as victims.<sup>23</sup> According to the Sri Lankan Attorney-General's Department, returnees who were merely passengers on a people smuggling venture have not been given custodial sentences for their illegal departure, but rather fined on a discretionary basis, with fines payable by instalment.<sup>24</sup>
42. Country information indicates the applicant, if he pleads guilty to departing illegally, will be required to pay a fine (which he can do by instalment) and will subsequently be released.<sup>25</sup> In most cases if a person pleads not guilty, they will be granted bail on their own personal surety immediately by the magistrate, or may be required to have a family member act as guarantor and wait for their family member to collect them. The applicant has not claimed and there is no other evidence in the referred material or submission to indicate he would not be granted bail on his own personal surety, or that he would not have a willing family member to act as guarantor if required. I note the applicant's parents and siblings are all living in the applicant's home village in Sri Lanka. If bailed, there are rarely any conditions, and if there are, they are imposed on a discretionary basis. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to Police or Police stations between hearings.<sup>26</sup>
43. On the evidence before me, I find that the applicant will be issued a fine and released. If the applicant pleads not guilty, he will be released on his own personal surety. If he did need a family member to act as guarantor and to come collect him, I am satisfied that my findings above regarding his not facing a real chance of serious harm while detained in waiting would also apply in this circumstance.
44. In the submission to the IAA the applicant's representative submitted the delegate ought to have considered the financial capacity of the applicant and/or his family members being able to pay a fine. However the submission does not provide any information about the applicant or his family's financial situation. There is no information before me which indicates the applicant will be prevented from obtaining employment or earning a livelihood upon return. The applicant has previously worked in his father's [business] and the applicant confirmed at the SHEV interview

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23 DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105

24 DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105

25 DFAT, "DFAT Country Report - Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105

26 DFAT, "DFAT Country Report - Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105

that his father still has this business. I note the reference in the post-interview submission to the applicant's fragile mental state however no other information has been provided about this. I have nonetheless had regard to the applicant's mental state but I am not satisfied that it would prevent him from working upon return. I am not satisfied the applicant has any vulnerabilities which will prevent him from being able to do this work, or any other work upon return. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment. I am not satisfied that the payment of a fine amounts to hardship which would threaten his capacity to subsist, or otherwise amount to serious or significant harm, or that being held in detention for a short period at the airport, or possibly a nearby prison, cumulatively amounts to serious harm.

45. Information from DFAT does not support that the I&E Act laws and procedures are selectively enforced or that they are applied in a discriminatory manner. I find that the process leading to charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to all Sri Lankans who depart illegally and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
46. I have considered all of the circumstances relevant to the applicant's case. I do not accept the applicant will be seriously harmed and / or killed by the TMVP/Karuna group, their supporters, the authorities or others for any previous political activities, for any support he may provide to the TNA upon return, nor for any imputed LTTE or any-government profile arising from his being a young Tamil male from [District 1] / the Eastern Province, even taking into account that he would be returning as a failed asylum seeker from Australia who left illegally. Nor do I accept his status as a failed asylum seeker upon return would themselves be factors that would give rise to serious harm. I have considered the applicant's circumstances and characteristics cumulatively but I am not satisfied they give rise to a well-founded fear of persecution.

#### **Refugee: conclusion**

47. 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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48. 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**

49. 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.

50. I have found that the applicant would not face a real chance of harm from the TMVP/Karuna group, their supporters, the authorities or others on account of his previous political activities in Sri Lanka, nor if he engaged in such activities upon return. For the same reasons and because 'real chance' equates to 'real risk', I am also not satisfied that the applicant faces a real risk of harm amounting to either serious or significant harm upon return to Sri Lanka.
51. I accept there are reports of mistreatment of Tamils accused of having LTTE links and asylum seekers who have been returned to Sri Lanka. However DFAT reports that the risk of torture or mistreatment for the majority of returnees is low including for those suspected of an offence under the I&E Act.<sup>27</sup> I am satisfied the applicant was not of interest to authorities on account of LTTE links or being a threat to the Sri Lankan state when he departed Sri Lanka. I found above that even though the applicant would be returning to Sri Lanka as a young Tamil male from [District 1] in the Eastern Province who left illegally and sought asylum in Australia, he would also not be suspected of being an LTTE member, supporter or sympathiser or a threat to the Sri Lankan state upon return. Having regard to this and the fact that as noted above, the country situation has changed considerably under the Sirisena government, I have not accepted that he would face a real chance of harm from the authorities, nor the TMVP/Karuna group upon return. Based on the same information, and for the same reasons, I am also satisfied that there is not a real risk that he would face harm amounting to either serious or significant harm for these reasons.<sup>28</sup>
52. I have accepted there remains a degree of discrimination and harassment in the country towards Tamils, but having regard to the information before me I am satisfied it is low level, continues to reduce, and would not constitute serious harm, whether separately or cumulatively. I am also satisfied that any discrimination or harassment the applicant face upon return would not manifest in a way that would arbitrarily deprive the applicant of his life, result in the death penalty being carried out against him. Nor am I satisfied it would result in torture, cruel or inhuman treatment or punishment or degrading treatment or punishment intentionally inflicted. I do not therefore accept that he will face discrimination, harassment or monitoring in Sri Lanka for any reason in that would amount to significant harm for the purposes of s.36(2A). Having regard to the changed security conditions in Sri Lanka I am also satisfied the applicant does not face a real risk of significant harm arising from generalised violence.
53. As to his treatment under the criminal justice system as a person who departed illegally and any questioning and detention he may experience in relation to this, or his return as a failed asylum seeker, as set out above, I find that the applicant will be issued a fine and released, or if he pleads not guilty, he will be released pending his court date. While I have found above that the applicant will not receive a custodial sentence, I have considered the conditions the applicant may face if he is held in a nearby prison while waiting to come before the magistrate, or waiting for his family to act as guarantor and collect him. Information that was before the delegate indicates that in general, prison conditions in Sri Lanka do not meet international standards due to a lack of resources, over-crowding and poor sanitation. However there is no evidence that prisoners subjected to short periods of detention awaiting collection or prosecution under the I&E Act are currently or will be subject to the death penalty or otherwise arbitrarily deprived of their life nor tortured. The evidence also does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. In light of this, I am not satisfied that the applicant would be subject to acts or omissions which would constitute

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<sup>27</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>28</sup> *MIAC v SZQRB (2013) 210 FCR 505*

significant harm, as defined under s.36(2A) and s.5 of the Act during his time in detention or prison while awaiting his Magistrates Court hearing or collection by a family member.

54. In terms of punishment, I have found above that rather than receiving a custodial sentence, the applicant will likely receive a maximum fine of up to 200 000 rupees. I note that the government allows payments to be made in instalments and I am not satisfied he would be unable to pay the fine. I am not satisfied that questioning and the imposition of such fine would amount to significant harm under the definition in s.36(2A).

55. I have taken all the applicant's circumstances into account and have considered how his various profile factors and claims interact or compound affecting the risk upon return. However even taking into account the applicant's cumulative circumstances and profile, I do not accept he would face a real risk of significant harm. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.

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

56. 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**

...

***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.