



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/01994

Date and time of decision: 29 November 2017 12:18:00  
Fiona Kerr, 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 Hindu Tamil from Sri Lanka. [In] April 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). [In] February 2017, a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. In accordance with s.473DC(1) of the Act I have obtained new country information being the most recent DFAT Country Information Report on Sri Lanka<sup>1</sup> (the DFAT 2017 report). The DFAT 2017 report is dated 24 January 2017. While it was published a relatively short time before the delegate's decision, in my view, the applicant may have validly assumed that the delegate would have had regard to the most recent versions of sources accessed when undertaking the assessment. Additionally, I consider DFAT an authoritative source of country information, the DFAT information relied on by the delegate is now almost two years old and the DFAT 2017 report is DFAT's most recent assessment regarding the situation in Sri Lanka and was prepared for the specific purpose of protection status determination. I am satisfied there are exceptional circumstances to justify considering this new information.
4. On 15 March 2017 the applicant's representative provided a submission to the IAA (the first submission). The first submission also attached:
  - a transcript of the applicant's protection visa (SHEV) interview;
  - a letter dated [March] 2017 from the applicant's counsellor, with an attachment;
  - copies of two death certificates with English language translations.
5. The submission was not accepted. On 29 March 2017 the IAA returned the submission (but not its attachments) to the applicant's representative together with a copy of the IAA's Practice Direction for Applicants, Representatives and Authorised Recipients (the Practice Direction) asking for a revised submission that complied with the Practice Direction. On 30 March 2017 a revised submission (the revised submission) was provided to the IAA on behalf of the applicant. To the extent it reiterates the basis of the applicant's claims for protection, and takes issue with the findings of the delegate and evidence relied on by the delegate in reaching those findings, it is not new information and I have had regard to it. The submission also includes references to legal decisions which I am satisfied constitute legal argument and not new information.
6. In addition, the representative submits that the applicant's previous representatives failed to put forward integral aspects of his claims to the delegate; accordingly, a hearing should be scheduled in order for the IAA to properly understand his claims. The applicant's submission refers specifically to two issues – his 2008 torture and [assault] and his cousin's association with the Liberation Tigers of Tamil Eelam (LTTE) – which it claims were either not put forward and consequently, not considered by the delegate, or not adequately considered by the delegate; information was provided about each of these matters. The transcript of the applicant's SHEV

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

interview was included as “evidence that [the [assault]] were not raised at any point”. I have listened to the SHEV interview and accept that the transcript is an accurate reflection of that interview. As such, it is information that was before the delegate and is not new information. Having regard to the terms of Part 7AA of the Act, and for the reasons set out below, I have decided not to invite the applicant to an interview to provide further information about his claims.

7. The letter dated [March] 2017 from the applicant’s counsellor was not before the delegate and is new information. The letter sets out the applicant’s history of counselling commencing in 2013 and includes details of correspondence in 2016 with the applicant’s previous legal representative about the applicant’s claims that he was [tortured] during his 2008 detention; a copy of a further statement dated [October] 2016 signed by the applicant which his counsellor assisted him to draft was included with the counsellor’s letter. The letter indicates that the applicant’s further statement was sent to and received by the applicant’s former representative. I accept that the claim that he was [assaulted] was not specifically raised in his SHEV interview. However, I do not accept that the applicant was denied an opportunity to raise this in his SHEV interview. It is apparent from the transcript of his interview, and from listening to the interview, that his former representative was aware of and informed the delegate at the beginning of the interview that he had disclosed to his counsellor further details of the torture he alleges he underwent. His former representative also indicated that the applicant might be willing to disclose the details in his interview. Towards the end of his interview, he was twice asked by the delegate if he had provided all his claims; the applicant referred to going to counselling but only in reference to the death of his grandfather. Following his interview, [in] January 2017 the applicant’s former representative provided further information about the death of the applicant’s grandfather. The information provided indicates that the applicant telephoned his former representative with his counsellor to provide that information; there is no indication that on that occasion the applicant or his counsellor raised the [assault] issue with that representative. The applicant was informed at the beginning of his SHEV interview that it was his responsibility to raise all his claims for protection and provide evidence in support of those claims. Notwithstanding a number of opportunities to do so including after a break in his interview to discuss in private his claims with his representative, the applicant did not raise the issue. I have accepted that the applicant was detained in 2008 and have formed the view that the details of what he claims to have undergone during that detention (set out in the statement attached to the counsellor’s letter), scant as they are, do not materially affect my view of that claim. The applicant has not satisfied me the information could not have been given to the Minister prior to the decision being made nor am I satisfied that this information, if known, may have affected consideration of the claims: s.473DD(b). I accept that the applicant is unable to communicate without the help of an interpreter. However, I do not accept that he did not have any opportunity to discuss his claims with his previous representative. The applicant was informed by letter dated [December] 2015 that access to telephone interpreting services was available through the Translating and Interpreting Service (TIS); a telephone number and website address for TIS National was also provided. It is also clear from the information provided to the delegate [in] January 2017 that he was able to contact and provide further information to his then representative by telephone, at which time I consider the applicant had an adequate opportunity to raise with his representative any concerns he had about the adequacy of their representation and whether or not all his claims and evidence had been provided to the delegate. Having regard to all the circumstances, I am not satisfied that exceptional circumstances exist to justify consideration of the [assault] claim and supporting letter.
8. The submission mentions that the applicant has been involved in a humanitarian organisation (he doesn’t say when or where). This claim has not been previously made by the applicant. While the written statement submitted with his SHEV application sets out his community

activities and involvement, there is no suggestion in the information presented to the Department that the applicant has been involved in a humanitarian organisation. It is a bare assertion with no details, and no explanation as to its significance or relevance, or why this claim is only being made now. I am not satisfied that the information could not have been provided before the delegate's decision was made or that it is credible personal information that if known may have affected consideration of the applicant's claims. I am therefore unable to consider it.

9. In regard to the two death certificates provided with the first submission, one is the death certificate for the applicant's father. That certificate (and translation) and the claim that his father was killed on suspicion of LTTE involvement were part of the applicant's SHEV application and are not new information. It appears from the revised submission dated 15 March 2017 that the second death certificate is that of the applicant's cousin. This certificate was not before the delegate and both it, and the claim that his cousin had links to the LTTE and was killed as a result of that association, are new information. The applicant's representative submits that it is further evidence of the applicant's links to the LTTE and that it was not provided before because the applicant's previous representative advised him that this evidence was irrelevant to his claims. I do not accept that the applicant received legal advice that his cousin's death certificate was irrelevant to his claims. I consider it highly improbable that an experienced registered migration agent would give such advice. In the, in my view unlikely, case that he was mis-advised so that he thought the information was irrelevant, I accept that he may have decided against raising it at his SHEV interview notwithstanding that he was advised that if he did not provide all relevant information about his claims and the application was refused, he may not have another chance to provide that information. However, the translation of the certificate indicates that his cousin died by 'exploding shell' [in] December 2006 and the copy of his death certificate was issued by the registry in Sri Lanka in 2013. The written statement provided with his SHEV application does not refer at all to his cousin, although I note that the applicant stated in his entry interview [in] January 2013 that his cousin was shot by the army which is not consistent with the certificate provided. He did not state on that occasion that his cousin was killed as a result of his association with the LTTE. The applicant has not satisfied me that the information could not have been given to the Minister prior to the decision being made nor, given the inconsistencies in the evidence, that it is credible personal information which was not previously known and had it been known, may have affected consideration of the applicant's claims: s.473DD(b). Further, I am not satisfied that exceptional circumstances exist to justify considering the new information.
10. The revised submission also includes links to and extracts from country information some of which was before the delegate and which is not new information. Other country information was not before the delegate and is new information. The information does not relate to the applicant personally. The sources provided for the new country information indicate that the information was published before the date of the delegate's decision. The applicant's representative has not provided reasons why this information could not have been provided to the delegate before the decision was made. The new country information referred to is not significantly different, either in the range of publication dates or in the various assessments of the situation in Sri Lanka, from the range of information that was already before the delegate. The applicant has not satisfied me that s.473DD(b) is met nor am I satisfied that there are exceptional circumstances which would justify considering it. In addition there is also a reference to the DFAT 2017 report. Contrary to the Practice Direction, no copy of that report or extract on which the applicant relies has been provided. As discussed above I have, in any event, already obtained a copy of that report and it is before me.
11. On 13 July 2017 the applicant's representative provided five items of country information to the IAA. The representative submitted that the information points to the fact that there remains in

Sri Lanka a sense of hyper-vigilance as to possible LTTE or Tamil separatist resurgences and that any Tamils with even the most tenuous past connections to the LTTE remain at risk of harm. The submission also states that the DFAT 2017 report is not entirely accurate as to the situation in Sri Lanka and the attached updated country information should be taken into consideration.

12. Three of the articles<sup>2</sup> appear to be undated and not adequately sourced and so it is not possible for me to ascertain their credibility or reliability, or their relevance to the applicant's claims. These articles do not comply with the Practice Direction and I have decided not to accept them. In regard to the two remaining articles<sup>3</sup>, they were not before the delegate and are new information. The information is country information and does not relate to the applicant personally. One of the articles, dated 4 October 2016, was published before the date of the delegate's decision. The applicant's representative has not provided reasons why this information could not have been provided before the date of the delegate's decision. At the applicant's protection interview the applicant and his representative were advised of the importance of providing all his information at the SHEV interview as he may not have another chance to provide it. They were also advised that the delegate would have regard to any information which was provided before a decision was made. The applicant has not satisfied me that s.473DD(b) is met. I accept that the article illustrates that a sense of hyper-vigilance about a possible resurgence of the LTTE remains and that those with past connections to the LTTE may be at risk of harm including under the *Prevention of Terrorism Act*. However, the article concerns the risks, on return, to young men who were involved in the war. The applicant does not fit this profile and I am not satisfied that there are exceptional circumstances for considering this information.
13. In regard to the article dated 26 April 2017, I accept that it could not have been provided before the date of the delegate's decision. In considering whether exceptional circumstances exist to justify considering this new information, other information about white van abductions was before the delegate and the article provided is not significantly different from country information from a number of credible sources which similarly discuss these issues and which were also considered by the delegate. I note that the DFAT 2017 report considers a range of sources which report on such matters and does not suggest that such instances no longer occur. The applicant's representative does not state in which way the DFAT 2017 report is not entirely accurate as to the situation in Sri Lanka. I am not satisfied that exceptional circumstances exist to justify considering the new information.
14. On 14 July 2017 further country information was provided to the IAA by the applicant's representative. The information sets out key findings of a report published in July 2017 by the International Truth and Justice Project (ITJP). The information was not before the delegate and is new information. The applicant's representative submits that the information clearly shows that the DFAT 2017 report, is not entirely accurate. The new information is country information; it does not relate to the applicant personally. Given its publication date, I am satisfied that the new information could not have been provided to the delegate. However, other than stating that the DFAT 2017 report is not entirely accurate, the applicant's representative has not specified in what way it considers the DFAT 2017 report, which acknowledges there remain credible reports (including by the ITJP in an earlier report) of ongoing torture in Sri Lanka, is not accurate or why the information is relevant to the review. The delegate had regard to a range of other credible, authoritative information about ongoing

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<sup>2</sup> "A young man, originally from Batticaloa, was arrested when he returned to the country from Qatar"; "Members of LTTE intelligence entered Sri Lanka! Vigorous search is executed"; Untitled – identified as eelamalar.com's post..

<sup>3</sup> New Tamils "A Tamil man who arrived in Jaffna from Australia was sexually tortured by Intelligence Officers" 26 April 2017; Tamilnadan "Those who sought asylum in foreign countries should not return to Sri Lanka – Chief Minister of Northern Province" 4 October 2016

reports of torture in Sri Lanka and the new information is not materially different from that information which I have before me. I am not satisfied that exceptional circumstances exist to justify considering the new information.

15. On 14 August 2017, 30 August and 23 November 2017 further new information was provided to the IAA by the applicant's representative in the form of reports which appear to have been collated by the applicant's representative dealing with a range of issues in Sri Lanka. They are, for the most part, identical in content. Contrary to the Practice Direction, no explanation has been provided as to the matters in s.473DD of the Act, or the relevance of the information, and on their face, it is not apparent how the reports or the information referred to in them are relevant to the applicant. The applicant's representatives are registered migration agents, experienced in the requirements of reviews by the IAA and must be aware of the requirements of the Practice Direction. The new information fails to comply with the Practice Direction and I have decided under s.473FB(5) not to accept it.

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

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

- His father was shot and killed by the Indian Peacekeeping Force (IPKF) in 1988. He was suspected of being associated with the LTTE. His father had undertaken some training with the LTTE, which was common in the district at the time.
- His mother's father and [sibling] lived with his family. His [uncle], [Mr A] was involved with the LTTE and during 2006 he fled to [Town 1].
- He was displaced and relocated to [Town 2] from about 2000 until 2008. He returned to his home village in 2008.
- In 2008 the SLA rounded up his entire village and he was identified as an LTTE supporter because his uncle was LTTE. He was held for over a week and was interrogated, beaten and tortured, and questioned about his uncle. He was released after a week and ordered to report to the local Army camp weekly. Over the following years whenever there was an incident between the LTTE and the SLA, he was ordered to or taken to the camp for questioning.
- In [2012] the LTTE came to where he was working and talked to him about his uncle. They asked him to provide money to the martyr families but he refused.
- During this time he was too busy to return to the camp to sign. He was also providing [supplies] to his employees and the CID suspected him of providing [supplies] and other support to the LTTE. The CID approached his workplace with guns. He ran away and they chased and shot at him but he managed to escape. He travelled to a friend's house in [Town 2] and hid there for about 4 months. While he was hiding the CID visited his family home and accused his mother of raising an LTTE terrorist and of hiding [Mr A]. They took documents including his passport and threatened his mother. She was also accused of being an LTTE supporter because someone had informed the authorities she used to [provide aid] for the LTTE in her home in 1995.
- Since arriving in Australia his grandfather passed away. He had lived under a lot of stress including being intimidated by the CID about the applicant's whereabouts after he fled the country.

- The CID has been to his home many times since he has left. About 2 to 3 months prior to interview they went to his home and questioned his mother. The CID are looking for him because of his uncle and they are targeting his family.
- The CID killed his grandfather. When he wrote his statement of claims he believed his grandfather had died from other causes. His mother did not tell him because he is living alone and this would worry him.
- His mother does not sleep in the family home as she feels unsafe at night.

## **Refugee assessment**

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17. 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**

18. 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.

19. The applicant claims to be a Tamil and a Hindu. At his SHEV interview he submitted copies of documents, originals and translations, in support of his claimed identity. I accept that the applicant is a citizen of Sri Lanka, of Tamil ethnicity and the Hindu faith, and that Sri Lanka is his receiving country.

### *Uncle/LTTE associations*

20. The applicant has consistently claimed that his father was killed by the IPKF when the applicant was [young]. In his SHEV interview he did not repeat the claims that his father had undertaken compulsory training with the LTTE or that he had spent time in [jail] prior to him marrying the applicant’s mother. I am willing to accept these claims as plausible. However, the applicant did not press these claims at interview or provide evidence that either his father’s LTTE training, time in jail, or death at the hands of the IPKF, have had any ongoing repercussions for him.

21. I accept that the applicant was forced to relocate to [Town 2] town from 2000 until 2008, that his mother joined him there in 2006, and that they were able to return to [their] village in 2008.
22. The applicant has consistently claimed that he experienced adverse interest from the Sri Lankan authorities because of his [uncle], [Mr A], and [Mr A]'s membership of the LTTE. Notwithstanding some variations in the details which I attribute to the passage of time, the applicant has been generally consistent about his uncle's membership of the LTTE and on that basis I accept that he had an uncle, [Mr A], who was in the LTTE, that [Mr A] went to [Town 1] in 2006 and that he has not been seen since. Similarly, the applicant's evidence about what happened on his return to the village in 2008 has been consistent over the protection process and I accept that the entire village was subjected to a round up by the Sri Lankan army (SLA), that he was taken for questioning, detained in an SLA camp for a week, beaten and tortured over that week, then let go on condition he sign every week.
23. I have some difficulty with the applicant's claims that during the round up he was identified by members of the Karuna group as an LTTE supporter because he was the nephew of [Mr A] and that his treatment was because of his relationship to [Mr A].
24. At his SHEV interview, the applicant stated that [Mr A] had been in the LTTE but then left in 1999 of his own choice and came to live with the applicant and his mother, before rejoining in 2004 in the applicant's stead under the LTTE's one-member-per-family policy. I take it from his evidence that the area in which the applicant's village was situated was under the control of the LTTE. The last LTTE stronghold in the Eastern Province was captured in July 2007.<sup>4</sup> I note that the applicant's mother lived with him in [Town 2] from 2006 until their return to the village in 2008. The applicant did not give evidence that his grandfather (who remained in the village) was ever questioned by the SLA about [Mr A] and I consider it highly unlikely that if [Mr A] was known as an LTTE fighter, the applicant's grandfather (the father of [Mr A]) would not have been questioned by the SLA about [Mr A] sometime after the village fell to the SLA and it was only the applicant who, on his return in 2008, was subjected to adverse interest from the authorities because of that relationship. The applicant would have been of fighting age by the time he returned to his village in 2008, two years after [Mr A] left for the [Town 1]. In the east and north, military intelligence and other security personnel, sometimes allegedly working with paramilitary groups, were responsible for the documented and undocumented detention of civilians accused of LTTE connections. Observers reported that interrogation sometimes included mistreatment or torture following detention<sup>5</sup> and other information confirms that during the war, LTTE support was frequently imputed on the basis of ethnicity.<sup>6</sup>
25. Taking into consideration the country information before me and the applicant's evidence, I am not satisfied that the reason he was subject to detention and ill-treatment over a week in 2008 was because of his uncle [Mr A]. I find that as a Tamil male of fighting age from an area that had been under the control of the LTTE, the applicant was suspected of involvement in the LTTE and I find that his 2008 mistreatment was on the basis of his ethnicity and imputed LTTE support. Although I have some reservations about the frequency of the requirement, I accept that for the following four years he was required to sign at the SLA camp every week. I do not accept, however, that for the following four years, whenever there was an incident between the LTTE and the SLA, he was ordered or taken to the camp to be questioned. As noted above, the Eastern Province fell to the SLA in 2007 and the LTTE was comprehensively defeated overall in

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<sup>4</sup> UN Officer of the High Commissioner for Human Rights (OHCHR) "Report of the OHCHR Investigation on Sri Lanka" 16 September 2015

<sup>5</sup> US Department of State, "Country Reports on Human Rights Practices for 2015 - Sri Lanka", 13 April 2016, OGD95BE926320

<sup>6</sup> ibid



May 2009.<sup>7</sup> I am willing to accept that he may have been ordered or taken to the camp to be questioned while the war continued, that is, until May 2009. However, on the basis that the LTTE was defeated in May 2009 and there have been no terrorist incidents in Sri Lanka since the end of the war<sup>8</sup>, I do not accept that after that date he was ordered or taken to the camp to be questioned about incidents between the LTTE and the SLA and I consider this claim an exaggeration.

26. Given the defeat of the LTTE in the east even earlier, I do not consider it plausible that with no evidence of any contact in the intervening period, LTTE members came to his workplace [in] 2012 to talk about his uncle who had disappeared six years earlier and with whom the applicant had lived for only a brief period in around 1999, and to solicit funds for LTTE martyr families. I reject this claim as a fabrication.
27. Nor do I accept that in [2012], the CID approached his [workplace] with guns ready to shoot him. The applicant's evidence was that he experienced no problems between 2008 and 2012, notwithstanding signing at the SLA camp every week. He said he went, usually with his mother, signed the book and left. He said that sometimes they'd question him about [Mr A] but he was never detained or mistreated after the 2008 incident. In his SHEV interview he initially stated he wasn't sure why the CID came to look for him but he was scared so started running and they shot at him but he was able to escape. He later changed his evidence and stated he thought they'd come for him because they must have found out about the LTTE coming to meet him and wanted to question him about it; he said it must have been the reason because they had never come to his workplace before.
28. However, in his written statement he suggested that the CID suspected him of providing [supplies] and other support to the LTTE and implied that this may have been the reason for their visit.
29. I do not accept any of these explanations. Firstly, I have rejected the claim that members of the LTTE approached him to discuss [Mr A] and ask for money. Secondly, despite the fact that for four years he was signing every week, and with the exception of some questioning on occasion, he never experienced any further incidents of adverse attention from the authorities. His evidence was that the CID had to pass his house to get to their camp which was either close by (SHEV interview) or [even closer] (submission to the IAA). It is, in my view, highly implausible that the CID did not approach him at home and enquire why he had failed to report for up to 3 consecutive weeks, but instead, having shown no interest in him (other requiring him to routinely sign on every week), escalated their attention by coming after him to his [workplace] with guns. Thirdly, his evidence was that he had been providing [supplies] for his [workers]. In my view, if the CID had ever seriously suspected him of providing material support to the LTTE, they had a more than adequate opportunity while he was regularly signing on every week to question him about it and take action accordingly.
30. Given the varying explanations he has given for their interest in [2012] and the implausibilities identified above, I am not satisfied that the CID approached his [workplace] with guns, he ran, they chased and shot at him. It follows that I reject his claim to have subsequently gone into hiding in [Town 2], that the CID visited his family home and accused his mother of raising an LTTE terrorist and of hiding [Mr A], or that they took documents from his house including his Sri

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<sup>7</sup> UN Officer of the High Commissioner for Human Rights (OHCHR) "Report of the OHCHR Investigation on Sri Lanka" 16 September 2015

<sup>8</sup> UK Home Office "Country Information and Guidance Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

Lankan passport. I consider these claims further fabrications designed to enhance his claims for protection.

31. I accept that he lived in [Town 2] for a period of around four to five months before leaving for Australia but I am not satisfied that he was in hiding as claimed.
32. In his SHEV interview the applicant made the following new claims about [Mr A]. He said that in 2005 there was an economic ban in his area; [Mr A] organised a group of people to protest against that ban; he was involved in many protests like that and was leading those protests; if anybody asks who the leader is, they would say [Mr A]. He also claimed there was an incident (he did not state when) in which some Tamil farmers were killed by the village border force and [Mr A] formed a group and took revenge on them and that is why the Sri Lankan government is actively looking for him. Neither of these claims have been made before and the latter claim seems at odds with his claim that the reason the authorities were looking for [Mr A] was because he was a member of the LTTE. The applicant provided no further evidence in support of either of these claims and in view of his failure to mention them at an earlier stage of the protection process or, more particularly, during his SHEV interview when discussing [Mr A], I reject these claims as fabrications designed to bolster his protection claims.

#### *Death of grandfather*

33. The applicant's claims regarding the cause and circumstances of his grandfather's death have changed over the course of the protection process. In the written statement submitted with his SHEV application he stated his grandfather had died, that he'd suffered many hardships including being intimidated by the CID in his own home about the applicant's whereabouts after he fled the country. In his SHEV interview he stated that his grandfather had been beaten to death by the CID. He said his mother had told him initially that his grandfather had died of [an unrelated cause] but when he spoke to others in his home area they told him what actually happened; he said it was only 2 or 3 months ago that he found out about the real cause of his grandfather's death and that he'd only disclosed to his representative that he was beaten to death the day before his SHEV interview. He said he was only now saying what had happened to his grandfather because he had to talk about him.
34. Following his SHEV interview the applicant provided a copy of his grandfather's death certificate and subsequently, a series of photographs was provided to the delegate showing a dead body together with a copy of a letter dated [January] 2017 (and its translation) written by his mother, signed by members of her village and endorsed by the Village Officer stating that the photos are of the applicant's grandfather. The applicant also provided an untranslated copy of what he claims is his grandfather's national identity card for comparison purposes.
35. The letter appears to do no more than confirm that the photos are of the applicant's grandfather<sup>9</sup>; it does not state how he died much less that he died as a result of being beaten by the CID. Given the seriousness of the applicant's claims I consider this a significant omission. The photos are of poor quality and do not assist me to make a finding that the body is definitely that of his grandfather. However, I note the following. The applicant states he received the photographs from a friend late in 2013/early 2014. They appear to show a body lying in a pool of blood. The applicant stated his mother did not want to worry him about his grandfather's cause of death which is why she did not tell him the truth about how he died. Given the nature of the photographs, it is simply not credible that if they are of his grandfather, the applicant would

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<sup>9</sup> The translation of the letter indicates that the contents of the last paragraph written by the Village Officer is not sufficiently coherent to be translated in full. The translator notes, however, that she understands it confirms the relationship.

have been satisfied with the explanation given by his mother for his grandfather's death and that he would not have made further enquiries of his friends and mother at the time he received the photographs about the circumstances of his death. I therefore find it hard to accept the applicant's explanation that he only found out about what he claims is the real cause of his grandfather's death 2 or 3 months before his SHEV interview and I consider the applicant has not been truthful in regard to this claim. The death certificate provided for his grandfather indicates that he died of '[Medical Condition 1]'. The applicant claims that the cause of death was listed as [Medical Condition 2] due to fears of reprisals from the Sri Lankan army if the real cause of death had been listed. I do not accept this. Given what I consider to be the problems with his evidence and the late raising of this claim, as an official record of death I prefer the document provided from the Sri Lankan Register of Deaths which indicates that his grandfather died on [in] 2013 as a result of '[Medical Condition 1]'. It follows that I do not accept that the applicant's grandfather was beaten to death by members of the CID in an attempt to find out the applicant's whereabouts.

*Visits after he left/balance of claims*

36. I have rejected his claim that after the [2012] incident and while he claims to have been in hiding, the CID visited his family home and accused his mother of raising an LTTE terrorist and of hiding his uncle. In his SHEV interview he made the additional claims that the CID had come looking for him many times, that they threaten his mother about both him and [Mr A], and that his mother doesn't sleep at home at night for safety reasons. None of these claims have been made before and given my view that, after 2008, the applicant was not a person of interest to the authorities beyond the routine reporting and monitoring to which I have accepted he was subject, I do not consider these claims credible and I reject them as fabrications. Nor do I consider credible the other new claims that as recently as 2 to 3 months before his SHEV interview, they went to his home looking for him or that the authorities questioned a person who had returned from Australia about the applicant. At his SHEV interview he did not refer to the claim in his written statement that his mother was threatened and accused of being an LTTE supporter on the basis that someone had informed the authorities she used to [provide support] for the LTTE in her home in 1995. As they lived in LTTE controlled territory, I consider it plausible that his mother did so. However, he did not to press this claim at interview and I am satisfied that the fact that his mother may have [provided support] for the LTTE over 20 years ago has not had any repercussions for either his mother or the applicant.

*Tamil male from the Eastern Province/imputed political opinion generally*

37. The applicant's representative submitted to the IAA that in accordance with the UNHCR Eligibility Guidelines the applicant has real links to the LTTE which go beyond his residence in an LTTE controlled area; he therefore falls within one of the profiles considered by the UNHCR as requiring protection. The submission also refers to reports cited in the DFAT 2017 report where close relatives of former LTTE members claim to have been arrested and detained because of their family connections and close relatives may be subject to monitoring. I accept that the applicant was detained, interrogated, beaten and tortured in 2008 for a week and was subsequently required to sign weekly for a period of time, however, I have rejected his claim that this was on account of his relationship to [Mr A] and on that basis I do not accept that he fits one of the profiles identified by the UNHCR as requiring protection. The applicant's experiences during the war appear to be unfortunately common amongst Tamils who were often singled out for discriminatory treatment solely on the basis of ethnicity. During the conflict, more Tamils were detained by security forces under emergency regulations and the *Prevention of Terrorism Act* (PTA) than any other ethnic group; while this was primarily due to LTTE supporters and members being almost entirely Tamil, as noted above there were likely

instances of discrimination in the application of those laws with LTTE support at times imputed on the basis of ethnicity.<sup>10</sup> However, the election of a new government in 2015 has led to a number of positive developments in Sri Lanka in the five years since the applicant left. While there continued to be reports in 2015 that the security forces regularly surveilled or harassed young and middle-aged Tamil men, particularly in the north and east<sup>11</sup> more recent country information indicates that monitoring and harassment of Tamils in day-to-day life has decreased significantly; while some cases of monitoring continue to be reported, the overall prevalence of monitoring has greatly reduced.<sup>12</sup> Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities.<sup>13</sup>

38. The applicant's former representative submitted to the delegate that since the election of the Sirisena government there continues to be widespread systematic human rights abuses in Sri Lanka towards Tamils. The submission cites in support reports by the International Truth and Justice Project (ITJP) in January 2016 and a Freedom from Torture (FFT) report of August 2015. DFAT's most recent report acknowledges these reports (and others) and states there have been credible reports of torture carried out by the Sri Lankan military and intelligence forces during the conflict and in its immediate aftermath.<sup>14</sup> However, the ITJP report and a more recent report by FFT considered by the delegate indicates that referrals for torture continue to decline; although FFT received 17 referrals in 2015, this was a decrease from its previous report.<sup>15</sup> This is consistent with DFAT's assessment that while there continue to be reports of torture carried out in Sri Lanka those reports have declined; it also assesses that torture is not presently systemic or state-sponsored.<sup>16</sup>
39. There is credible information from a range of authoritative sources that, historically, Tamils suffered other forms of discrimination including in access to university education, government employment, and other matters controlled by the government.<sup>17</sup> Tamils also claimed the government intentionally supported Sinhalese emigration to the north and east to diminish the Tamil-speaking group's claim to majority status in any single geographical region of the country.<sup>18</sup>
40. In its 2016 report Human Rights Watch reported on steps by the new Sirisena government to improve the human rights situation in Sri Lanka such as abolishing the censorship of media and civil society groups, embarking on constitutional reforms to restrict executive powers, and taking steps to restore the independence of the judiciary.<sup>19</sup> It stated that in contrast to the combative approach of the Rajapaksa government, the government also initiated a new, more open dialogue with the international community, including human rights organizations although it noted the government had not yet taken significant measures to end impunity for security force abuse.<sup>20</sup> The government has, however, demonstrated a willingness to take action to address past abuses and in 2015 arrested and detained a number of military, police, and other officials

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<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.7

<sup>11</sup> US Department of State, "Country Reports on Human Rights Practices 2015 - Sri Lanka", 13 April 2016, OGD95BE926320

<sup>12</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 3.9

<sup>13</sup> *ibid*

<sup>14</sup> *ibid*

<sup>15</sup> Freedom From Torture "Sri Lanka – Update on torture since 2009" 6 May 2016 CIS38A8012881

<sup>16</sup> *ibid*

<sup>17</sup> US Department of State, "Country Reports on Human Rights Practices for 2015 - Sri Lanka", 13 April 2016, OGD95BE926320

<sup>18</sup> *ibid*

<sup>19</sup> UK Home Office "Country Information and Guidance Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016,

OGD7C848D17

<sup>20</sup> *ibid*

implicated in old and new cases that included the killing of parliamentarians and the abduction and suspected killings of journalists and private citizens.<sup>21</sup> The Sirisena government has also implemented a number of confidence-building measures to address the grievances of the Tamil community including the establishment of the Office of National Unity and Reconciliation to play a key role in the government's efforts towards reconciliation.<sup>22</sup>

41. The applicant's written statement indicates that he [was involved in community organisations]. His representative claims that these activities all advocated or catered for the interests of Tamils which, in turn, elevates his profile. I accept that the applicant was involved in these activities in his village. He did not, however, refer at all to his community involvement in his SHEV interview or state how these activities somehow elevated his profile. There is no information before me that Tamils involved in community groups such as these are at any increased risk of being identified by the authorities and subjected to adverse interest on that basis.
42. The country information before me indicates there is room for disagreement on the degree of progress made by the Sirisena government in a number of reconciliation and reform areas. The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, at the end of his Mission to Sri Lanka, stated that "virtually everyone agrees there has been progress, although opinions differ markedly about the extent of that progress."<sup>23</sup> In general, most country information suggests there have been improvements in Sri Lanka since the change of government. I also place weight on the assessment of Dr Paikiasothy Saravanamuttu, executive director of the Centre for Policy Alternatives in Colombo who said in 2015 that while there is some way to go to restoring normalcy it is relatively safe for people to come back and that for the country as a whole, there is a sense of things having changed and wanting to rebuild.<sup>24</sup>
43. In assessing his claims overall and taking into consideration the country information, I have formed the view that the applicant is not at risk of harm if he is returned to Sri Lanka. I accept that, like many Tamils, the applicant was subjected to detention and harm which extended over a week in 2008. However, this occurred during the war and the country information considered above indicates that conditions in Sri Lanka have changed considerably since then, particularly since the election of the Sirisena government. I am not satisfied that there is a real chance of serious harm to the applicant if he is returned to Sri Lanka on the basis of his age, gender, ethnicity, family connections, 2008 detention and subsequent monitoring, community activities or the fact that he is from an area that was formerly under the control of the LTTE.

#### *Illegal departure/returning asylum seeker*

44. His representative submits that as a person who departed without the knowledge of the Sri Lankan authorities, he will be considered a failed asylum seeker who departed illegally; he will be detained and questioned on return and in that process, at risk of harm. I accept that the applicant left Sri Lanka illegally and that on his return he will be perceived as a returning asylum seeker from the west. I also accept that both these things will have repercussions for him on return.

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<sup>21</sup>US Department of State, "Country Reports on Human Rights Practices for 2015 – Sri Lanka", 13 April 2016, OGD95BE926320

<sup>22</sup> ibid

<sup>23</sup>UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

<sup>24</sup> Australian Broadcasting Corporation (ABC) (News), "Six years after the end of Sri Lanka's civil war, Tamils in Jaffna still struggling to rebuild their lives", 10 October 2015 CXBD6A0DE14473

45. Returnees who depart Sri Lanka irregularly are generally considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act).<sup>25</sup> On arrival at the Colombo international airport, involuntary returnees are subject to a series of administrative checks to confirm their identity, and check for any outstanding criminal matters, including checks against immigration and intelligence databases.<sup>26</sup>
46. His representative submits that failed asylum seekers are more likely to be readily associated with the LTTE either by virtue of the fact that they sought asylum or because of a presumption of involvement in diaspora activities. It is the case that the government remains sensitive to the potential re-emergence of the LTTE and in the past this has resulted in Tamils being at risk of routine screening for LTTE connections and possible extended detention.<sup>27</sup> However, the focus of the government now is on those who have, or are perceived to have, a significant role in relation to post-conflict Tamil separatism or whose name appears on a 'stop' list at the airport.<sup>28</sup> The applicant does not fit this profile. It is possible that in routine arrival processing his previous detention and monitoring may come to light and that he may face further monitoring upon return. I do not accept, however, that monitoring is serious harm. Further, the country information does not support a finding that the fact that a person who has previously been monitored or left while being monitored, increases that person's risk profile, or otherwise results in adverse consequences. Country information indicates that both monitoring and mistreatment have reduced since the change of government and I do not accept he will face any other adverse action for having departed when under an existing reporting requirement. I do not accept that returning Tamil asylum seekers are, for that reason alone, imputed with a pro-LTTE or anti-government political opinion.
47. As a person who departed illegally he is liable to be charged under the I&E Act and arrested at the airport.<sup>29</sup> I do not accept his representative's submission, however, that he is at risk of being harmed while in detention. Returnees can remain in police custody at the CID airport office for up to 24 hours after arrival while enquiries are completed, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held at a nearby prison.<sup>30</sup> DFAT assesses that detainees are not subject to mistreatment during processing at the airport.<sup>31</sup> While it is aware of a small number of allegations or torture or mistreatment raised by asylum seekers who have been returned it cannot verify these reports as many allegations are made anonymously, often to third parties, and sometimes long after the torture is alleged to have occurred.<sup>32</sup> Overall, it assesses that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce, including for those suspected of offences under the I&E Act.<sup>33</sup>
48. In cases where a returnee pleads guilty, they will be fined and released.<sup>34</sup> If they plead not guilty, returnees are immediately granted bail by the magistrate on personal surety or may be required to have a family member act as guarantor, in which case the person may need to wait until a family member comes to court to collect them.<sup>35</sup> There are rarely any conditions in

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<sup>25</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.17

<sup>26</sup> *ibid* at 5.19

<sup>27</sup> UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

<sup>28</sup> *ibid*

<sup>29</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.21

<sup>30</sup> *ibid*

<sup>31</sup> *ibid*

<sup>32</sup> *Ibid* at 4.21

<sup>33</sup> *Ibid* at 4.22

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*.

relation to the bail and if they are, they are imposed on a discretionary basis; the person will only need to return to court when the case against them is being heard (or if required to give evidence as a witness in another case).<sup>36</sup>

49. The applicant does not claim to have been involved in, or accused of, organising or facilitating people smuggling. DFAT has been advised by Sri Lanka's Attorney-General's Department that no returnee who was merely a passenger on a people smuggling boat has been given a custodial sentence; instead, a fine is issued to act as a deterrent towards departing illegally in future and can be paid by instalment.<sup>37</sup>
50. I find that if the applicant pleads guilty he will be fined and released. If he pleads not guilty, he will be granted bail and required to return to court in future where, if he is found guilty, he will also be fined. The applicant has family in Sri Lanka and there is no information before me that he wouldn't be released on personal surety or that, if required, a family member would be unable to guarantee bail. It is therefore likely that he will spend no more than a few days in detention before he can be brought before a Magistrate and bailed. Given this and the information referred to above, I find the prospect that he will be harmed in prison to be remote. I further find that the imposition of a fine will not amount to serious harm.
51. Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.<sup>38</sup> It is the case that prison conditions in Sri Lanka are generally poor due to overcrowding and a shortage of sanitary and other basic facilities.<sup>39</sup> Even considering the possibility that he arrives on a weekend and is detained until he can appear before a magistrate and then until bail is granted, the period of detention will be, at the most, a few days. In my view, this does not 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.
52. In considering all of the treatment the applicant will experience - being detained and investigated for several hours at the airport, then potentially being detained on remand for a number of days during which he will be held in overcrowded and unsanitary conditions, and having to pay a fine - I find that this treatment does not amount to serious harm. Further, I find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather the application of a law which applies to all Sri Lankans.<sup>40</sup> In this case, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is a returning asylum seeker or an illegal departee.
53. Taking into account all of those claims which I accept and considering them against the country information, it is my view that even considered together there is not a real chance of serious harm to the applicant if he returns to Sri Lanka now or in the reasonably foreseeable future.

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid at 5.22

<sup>38</sup> *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

<sup>39</sup> US Department of State, "Country Reports on Human Rights Practices for 2015 - Sri Lanka", 13 April 2016, OGD95BE926320

<sup>40</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

## **Refugee: conclusion**

54. 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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55. 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**

56. 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.

57. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes and identified as an illegal departee and a returning asylum seeker. He is likely therefore, as discussed above, to be investigated and detained for several hours at the airport, and depending on the availability of a magistrate, may be detained for a number of days pending bail for the offence of illegal departure, and fined accordingly. I am not satisfied, however, that this treatment amounts to significant harm. I have found he is not a person of interest to the Sri Lankan authorities and I do not accept there is a real risk of torture or that he will be mistreated while being held and investigated at the airport or in remand, or face a total period of detention of longer than a few days in the worst case scenario.

58. The conditions to which he may be subject if detained on remand for a few days are likely to be poor. However, I do not accept that amounts to significant harm. The treatment does not consist of the death penalty or arbitrary deprivation of life. I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. Nor am I satisfied that it amounts to serious pain or suffering, pain or suffering that is cruel or inhuman in nature, or extreme humiliation. I similarly find that the imposition of a fine under the I&E Act for his illegal departure does not amount to significant harm within the meaning of s.5(1) and s.36(2A).

59. I am not otherwise satisfied that the applicant is at risk of significant harm on return. I accept that in 2008 the applicant was detained, questioned and mistreated over a week and was subject to routine monitoring and reporting conditions and on occasion questioned. However, the 2008 incident occurred in the heightened security environment that prevailed during the civil war when many Tamils were arrested, detained, ill-treated and even tortured by the armed forces on the basis of ethnicity and imputed LTTE support. The country information does not



support that he is at risk of harm because he left while being monitored and information considered above indicates the situation for Tamils has improved in the five years since he left. I am not satisfied that there is a real risk that the applicant will suffer significant harm on return to Sri Lanka on the basis of his Tamil ethnicity or imputed political opinion, his gender, age, family associations, his detention in 2008 and monitoring, community activities or his origins and residence in the Eastern Province.

60. I am not satisfied that his claims, when taken together, mean that there is a real risk of significant harm within the meaning of ss.36(2A) and 5(1) now or in the reasonably foreseeable future if the applicant is returned 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**

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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.