



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/05555

Date and time of decision: 19 February 2019 10:29:00  
D Corrigan, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan national. On 17 March 2016, he lodged an application for a Safe Haven Entry Visa (SHEV).
2. In a decision dated 16 August 2018, a delegate of the Minister refused to grant the visa. The delegate found that the applicant did not face a real chance of serious harm or significant harm on account of his being a Tamil or due to any perceived links to the Liberation Tigers of Tamil Eelam (LTTE) and his being a failed Tamil asylum seeker who departed illegally.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). The IAA has a submission from the applicant's representative and it only discusses the findings of and other matters before the delegate and does not contain new information for the purpose of s.473DC(1) of the Act.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - He is a Tamil who fears harm on the basis of his race and perceived involvement with the LTTE.
  - His brother ([Brother A]) was kidnapped by the LTTE in 2001 and was killed in 2007. The Criminal Investigation Department (CID) approached the applicant in 2001 and questioned him about [Brother A]. He told them that [Brother A] had gone abroad
  - In July 2010, the applicant was again approached by the CID who had a photograph of [Brother A]. The applicant told them that he had lied in 2001 as he feared being tortured. They told him they would be coming to make further enquiries and warned him not leave where he was staying.
  - The applicant was scared and went to [Relative A's] house for a month to hide. He only visited his family house at night.
  - In August 2012, a white van came to his [Relative A's] house, so he ran away and hid with friends. His [Relative B] was arrested and has not been released to date. He is detained due to suspected involvement in the applicant's disappearance.
  - He illegally departed the country in October 2012.
  - In February 2016, his [relative] returned to Sri Lanka for a wedding and was questioned by the CID about him.

## Refugee assessment

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5. 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

6. 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.

### *Country of reference*

7. The applicant has provided originals of his Sri Lankan national identity card and birth certificate and he has consistently maintained that he is a Sri Lankan national. I accept that he is a Sri Lankan national and I find that Sri Lanka is his receiving country.

### *Tamil and LTTE claims*

8. I accept that the applicant’s brother was kidnapped by the LTTE in 2001 and served as a soldier (to the rank of [Rank A]) with them until he was killed in 2007. I accept that the CID approached the applicant in 2001 and questioned him about [Brother A] and that he told them that [Brother A] had gone abroad. I accept that in July 2010, the applicant was again approached by the CID who had a photograph of [Brother A]. I accept that the applicant told them that he had lied in 2001 as he feared being tortured. I accept that in August 2012, his [Relative B] was detained. The applicant’s claims about these matters has been consistent and in accord with country information concerning the forced recruitment of Tamils by the LTTE and its conflict with the Sri Lankan government.<sup>1</sup> He has also provided documentation from the Sri Lankan Ministry of Defence and police in relation to the arrest and detention of the [Relative B].

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka”, 23 May 2018.

9. I do not accept that the applicant was ever of ongoing adverse interest to the Sri Lankan authorities after the visit in July 2010. I do not accept that the applicant went into hiding after the July 2010 visit and that his wife was approached by the CID after he left. I do not accept that the applicant ran away from the authorities in August 2012 and that his [Relative B] was arrested and detained due to suspected involvement in the applicant's disappearance. I do not accept that in February 2016, when his [relative] returned to Sri Lanka for a wedding, he was questioned by the CID about the applicant. Nor do I accept that the applicant's [Relative B] was still being detained at the time of the SHEV interview. I am of this view for the following reasons:
- I have taken into account the applicant's evidence that he rather than his [Relative A] had lived with [Brother A] and that he thought it would be easy to escape into the jungle from his [Relative A's] house, however, I do not find it plausible or credible that if the applicant was seriously concerned with being apprehended by the authorities, that he would have went to live in his [Relative A's] house as it would have been simple for the authorities to locate and arrest him there by surrounding his [Relative A's] house and by keeping surveillance of the house. The applicant claimed that he went into hiding after the July 2010 visit and confirmed at the hearing that the incident of the [Relative B's] arrest was in August 2012 (and not August 2011 as suggested in his statutory declaration). I also do not find it plausible or credible that the authorities would have waited over two years before coming to search for him at his [Relative A's] house. I find this detracts from the credibility of the claims.
  - The applicant was not involved with the LTTE and he gave evidence that no other family member other than [Brother A] was involved in the LTTE which further indicates that he would not have been of any interest to the authorities. Whilst I note that it was he who lived with [Brother A], the applicant gave evidence that his other brother ([name] born in [year]) who was an adult male was not approached by the authorities about the applicant's whereabouts and I consider that this further detracts from the credibility of the claims.
  - The applicant has claimed the authorities saw him running away but that his [Relative B] who was at the residence and who did not attempt to run away was then arrested and detained for [number] years on suspicion of some involvement in his disappearance. I do not find it plausible or credible that if the authorities had seen the applicant running away that they would have blamed his [Relative B] for his disappearance and that he would still have been being detained [number] years after this event. I note the applicant has not claimed that his [Relative A] has been arrested or detained for sheltering him. I find this further detracts from the credibility of his claims.
  - I note the applicant has been able to provide evidence from the Sri Lankan Ministry of Defence and the police about his [Relative B's] detention in 2012. However, no further evidence has been provided to support that he was still in detention in the [number] years.
10. In making my findings I have taken into account and given some weight to the submitted copies of letters from [a local] Citizens Committee [in his] District, the Parish Priest from [a named] Church and the local Grama Niladari; however these do not overcome the highly significant and fundamental concerns I have about his credibility.
11. In making my findings, I have given substantial weight to the latest DFAT report because it is recent, authoritative and based on DFAT's on the ground knowledge and discussions with a range of sources as well as taking into account relevant and credible open source reports including those of the UNHCR, western governments and human rights organisations and Sri

Lankan non-governmental organisations. Furthermore, it has been specifically prepared with regard to the current caseload for decision-makers in Australia. Based on the country information before me, conditions in Sri Lanka, particularly in the north and east (where the applicant comes from) have significantly improved since the ending of the war in 2009 and from when the applicant left the country. DFAT have assessed that monitoring of Tamils in day-to-day life in has decreased significantly under the current government though surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. They state that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015 and that the current government includes 29 Tamils and President Sirasena presides over a diverse coalition of parties that includes Tamil members. DFAT state that they are not aware of an evidence to suggest that Sinhalese, Tamil, Muslim or other parties face any differences in treatment and that they understand Tamils do not receive unwarranted attention from authorities because of their political involvement. They assess that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. They assess that there is no official discrimination on the basis of ethnicity in public sector employment but that limited Tamil appointments are a result of a number of factors including disrupted education because of conflict and language constraints. DFAT have stated that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members has reduced significantly since the ending of the conflict and disappearances are no longer common.<sup>2</sup>

12. In making my findings, I have also taken into account the June 2017 UK Home Office report on Tamil separatism which states the following in terms of Tamil profiles of interest to the Sri Lankan authorities that a person being of Tamil ethnicity would not in itself warrant international protection. Neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.<sup>3</sup> Country information also indicates that the Prevention of Terrorism Act has been suspended and that the number of persons detained under it has reduced significantly and is in double digits as of July 2017.<sup>4</sup>
13. I have accepted that the applicant's brother was a [Rank A] in the LTTE and he was killed in 2007. I have also accepted that the applicant's [Relative B] was arrested in 2012. DFAT has stated that the UNHCR in 2012 identified a range of people with real or perceived links to the LTTE as including persons with family links or who are dependent on or otherwise closely related to persons with profile of being former LTTE combatants and cadres. They have further stated that the Sri Lankan government acknowledges that ex-combatants and their families may continue to face discrimination both within their community and from government officials. The Tamil National Alliance and the Tamil Civil Society Forum reported in 2016 that authorities continued to follow and monitor former LTTE cadres and their families. DFAT cannot verify claims that people have been arrested and detained because of their family connections with former LTTE members, but understands that close relatives of high profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring.<sup>5</sup>

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<sup>2</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

<sup>3</sup> United Kingdom Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism", 15 June 2017.

<sup>4</sup> DFAT, "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017.

<sup>5</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

14. I note that the information from the UNHCR is seven years old and that the more recent information from the UK Home Office and DFAT does not support that the applicant faces a real chance of being seriously harmed on account of his brother's involvement in the LTTE or his [Relative B's] arrest. Whilst I note that he had a brother who was a [Rank A] in the LTTE, his brother died a long time ago in 2007 during the conflict and the applicant was able to live without problems from the authorities from the ending of the war in 2009 until his departure three years later. I also note that the applicant and no other family member were actually involved in the LTTE. I have accepted that the applicant's [Relative B] was arrested in 2012 but I have not accepted that he was detained for a further [number] years or that his detention was related to the applicant and I note that over six years has passed since this arrest. The applicant has not claimed to have been involved in any post-conflict Tamil separatist activities either in Sri Lanka or in Australia. I do not accept that there is a real chance that upon return he will be imputed will be a pro-LTTE or Tamil separatist opinion by the Sri Lankan authorities or anyone else and be harmed as a result.
15. I note the applicant worked as a fisherman and [farmer] on his family property for many years before coming to Australia. There is no information before me to indicate that he will not be able to access accommodation upon his return. There is nothing before me to indicate that upon return to Sri Lanka, his capacity to subsist would be threatened. Whilst the country information indicates that the applicant may face a low risk of societal or official discrimination due to being a Tamil, given his profile and particular circumstances, I do not accept that there is a real chance that he will face serious harm upon return at the hands of the Sri Lankan authorities or anyone else on account of these claims.

*Failed Tamil asylum seeker who departed illegally*

16. I have considered the chance of the applicant facing harm on his arrival at Colombo airport or afterwards on account of being a failed Tamil asylum seeker who departed the country illegally. I accept that the applicant departed the country illegally.
17. In making my findings, I have given substantial weight to the latest DFAT report because it is recent, authoritative and based on DFAT's on the ground knowledge and discussions with a range of sources as well as taking into account relevant and credible open source reports including those of the UNHCR, western governments and human rights organisations and Sri Lankan non-governmental organisations. Furthermore, it has been specifically prepared with regard to the current caseload for decision-makers in Australia. In its most recent report, DFAT reported that between 2008 and 2017, over 2,400 Sri Lankans departed Australia for Sri Lanka. Many others have returned from the US, Canada, the UK and other European countries, and most of these returnees are Tamils. The Sri Lankan government claims that failed asylum seekers are welcome back with the Sri Lankan Prime Minister publicly stated this during a 2017 visit to Australia. However, DFAT have also noted that returnees may face practical difficulties upon return. There is limited reintegration assistance available and some returnees have reported social stigma from community members upon return. DFAT notes that the biggest challenge facing returnees are bureaucratic inefficiencies, rather than official discrimination, which can result in delays in obtaining official documentation and support. The Sri Lankan government has reportedly decreased systematic surveillance of returnees, although DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the North as recently as 2017. DFAT assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within the

communities. However, UNHCR conducted interviews with returnees in 2016 and only 0.3 per cent indicated they had any security concerns following their return.<sup>6</sup>

18. I accept it is possible that the applicant may be subject to monitoring for a period by the Sri Lankan authorities and face social stigma as a returning failed asylum seeker. I also accept that he will need to re-establish himself in Sri Lanka. I note the applicant worked as a fisherman and a [farmer] on his family property for many years before coming to Australia. There is no information before me to indicate that he will not be able to access accommodation upon his return. I do not consider the treatment he may face as a returning Tamil asylum seeker constitutes serious harm.
19. DFAT have reported for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.<sup>7</sup> The applicant has not claimed that there are any outstanding court orders or arrest warrants in relation to him. I have already found that he is not of any adverse interest to Sri Lankan authorities and that there is not a real chance that he will be imputed with a pro-LTTE and/or Tamil separatist political opinion and I am not satisfied that any investigations would lead to a real chance of him being seriously harmed. I do not accept, on the evidence before me, that the applicant will face a real chance of serious harm due to being a failed Tamil asylum seeker.
20. I accept the applicant left Sri Lanka illegally and that on return he may be identified by the authorities as such. DFAT have stated that most Sri Lankan returnees are questioned upon return and where an illegal departure from Sri Lanka is suspected, they can be charged under the Immigration and Emigrants Act (I&E Act). DFAT understands the Sri Lankan Police Airport Criminal Investigations Unit at Colombo's Bandaranaike International Airport makes most arrests. In the process, police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are former LTTE members. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. The magistrate then makes a determination as to the next steps for each individual; crew and facilitators or organisers of people smuggling ventures are usually held in custody. Apprehended individuals can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.<sup>8</sup>
21. The applicant departed Sri Lanka irregularly by boat via an unauthorised port and in doing so may be found to have committed an offence under the I&E Act. Penalties under the I&E Act for this offence can include imprisonment of up to five years and a fine. In practice those individuals who were mere fare paying passengers of a people smuggling venture are issued a fine which acts as a deterrent to depart illegally in future. The Attorney-General's

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<sup>6</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

Department, which is responsible for the conduct of prosecutions, claims no mere passenger has been given a custodial sentence for departing illegally.<sup>9</sup> There is no evidence before me to suggest that the applicant was involved in facilitating people smuggling or organising the vessel that was used to travel from Sri Lanka. Fines are issued by the Magistrate and act as a deterrent to future illegal departure. A guilty plea will attract a fine and can be paid in instalments and the defendant is free to go. The fines vary and can be LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,760). Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of a personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high.<sup>10</sup>

22. I accept that the applicant may be questioned and detained at the airport for processing by authorities for up to 24 hours with the possibility that he may be further held at an airport holding cell for up to two days. The applicant has no particular vulnerabilities and given the shortness of the time of detention that he faces and the information from DFAT about the treatment of persons who have illegally departed the country, I do not accept that his brief detention would constitute serious harm nor do I accept that there is a real chance that he will be tortured or face any other form of serious harm during this.
23. If the applicant does plead not guilty, there is no suggestion he will not be able to secure bail and I note that he has family members in Sri Lanka who could give a personal surety or guarantee. I accept that he may have to pay a fine but I note that this may be paid in instalments and it is a first offence. The evidence before me does not indicate that the applicant will be unable to pay the fine or any possible associated court costs.
24. Country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I find that it is a law of general application that is not applied or enforced in a discriminatory manner and not for reasons of race, religion, nationality, membership of a particular social group or political opinion and therefore does not constitute persecution. Taking into account that he has no particular vulnerabilities, I find that the questioning, brief detention and imposition of a fine and any associated court costs if they arise would not constitute serious harm to the applicant. I am not satisfied that the applicant faces a real chance of serious harm due to his illegal departure from Sri Lanka.
25. I find that the applicant does not face a real chance of serious harm on account of these claims.

#### *Overall assessment*

26. Considered cumulatively, I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning and official and social discrimination and having to pay a fine and possible court costs and being subject to a short term detention) amount to serious harm.

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<sup>9</sup> Ibid.  
<sup>10</sup> Ibid.

27. Considering his profile on a cumulative basis (including that he is a Tamil male from the north, his past interactions with the authorities, his brother's past involvement with the LTTE, his [Relative B's] arrest and his being a failed Tamil asylum seeker who departed illegally), I find that the applicant does not face a real risk of serious harm for any reason.

#### **Refugee: conclusion**

28. 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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29. 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**

30. 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.
31. For the reasons given above, I have found that the applicant would not face a real chance of serious harm on account of his being a Tamil male from the north, his past interactions with the authorities, his brother's involvement with the LTTE, his [Relative B's] arrest and his being a failed Tamil asylum seeker who departed illegally. The real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm on these bases even when considering his profile cumulatively.
32. I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning and official and social discrimination and having to pay a fine and possible court costs and being subject to a short term detention) amounts to significant harm even when considered cumulatively. I find that the treatment that he faces for illegal departure is one faced by the population of the country generally if they depart the country illegally and is not faced by him personally. I am not satisfied that there is a real risk that the applicant will be arbitrarily deprived of his life, be subject to the death penalty or be subject to torture. Nor does the evidence before me indicate that there is a real risk that he will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for any reason.

**Complementary protection: conclusion**

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

**Decision**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

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***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.