



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06218

Date and time of decision: 3 April 2019 15:15:00  
R Adolphe, 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 Tamil from the Batticaloa District of the Eastern Province of Sri Lanka. He arrived in Australia [in] November 2012 as an unauthorised maritime arrival. On 17 February 2017 the applicant lodged an application for a Class XE, Subclass 790, Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister for Immigration(the delegate) refused to grant the visa on 8 January 2019, on the basis the applicant did not face a real chance of serious harm or real risk of significant harm upon return to Sri Lanka.

### 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).
4. On 31 January 2019 the IAA received an email containing a statement from the applicant. The statement contains discussion on why the applicant does not agree with the delegate's decision. To the extent that the discussion reiterates and addresses the claims made by the applicant, and presents argument, I have had regard to it.
5. The statement also includes information which was not before the delegate in relation to the applicant's mother [and siblings]. This is new information.
6. The applicant states that his mother and uncle were summoned to court in 2013 and were required to pay a sum in order to be released from a court hearing. He also states that his sister was physically and sexually assaulted by Sri Lankan authorities because of her family association to him and an imputed Liberation Tigers of Tamil Eelam (LTTE) connection. He claims that on account of this treatment she committed suicide in November 2016. The authorities at this time also threatened to harm him and his mother. He further states that after the SHEV interview in December 2018 his brother was abducted, detained, tortured, abused and forced to give a false confession that he and the applicant were LTTE cadres. In January 2019 his brother was accused of organising a people smuggling venture. On this occasion his brother was abducted, detained, tortured and released with injuries [which] required medical treatment. His brother told him at this time that the authorities had vowed to kill the applicant upon his return to Sri Lanka. This is new information as are the documents he has provided in support of these new claims which are a court document which is entitled "Summons to a Witness to Give Evidence", an English translation of his sister's death certificate and an obituary in a Sri Lankan newspaper.
7. The court document provided to the IAA is in part written by hand in what appears to be the Tamil language. An English translation has not been provided. The document appears to be signed by [a] Court Registrar [in] October 2013. Confusingly the date the witness is requested to appear in court is fourteen days prior to this [in] August 2013. Furthermore, a "Summons to a Witness to Give Evidence" notice is not a document that supports the applicant's contention that his mother and/or uncle forfeited surety they had allegedly provided for him in 2012. Both the type of document and the content in which I can extract leads me to question the reliability of the document.

8. The English translation of the applicant's sister's death certificate has been provided without a copy of the original document. A copy of what is purported to be his sister's obituary published by a newspaper has also been provided in what appears to be Tamil with no English translation. The forms in which the supporting documents have been provided prevent any meaningful assessment of their contents. The applicant's IAA statement details that the applicant's sister committed suicide in November 2016 directly after she had been physically and sexually assaulted by the Sri Lankan authorities. During the SHEV interview the applicant informed the delegate that his sister had passed away, however he did not indicate that there had been any adverse circumstances surrounding her death which I consider to be a significant omission given the seriousness of this claim.
9. The applicant was clearly advised by the delegate at the SHEV interview that it was extremely important to provide the Department with complete and accurate protection claims as early as possible, including during the interview, and that it was his responsibility to raise his claims for protection. The applicant was also cautioned that if his application was refused he may not have another chance to provide further information to support his claims.
10. With possibly the exception of the claimed abduction of his brother in January 2019, all of the new information provided by the applicant relate to events that pre-dates the delegate's decision some of it by a number of years. The applicant has argued that he did not provide this information to the delegate as she was determined to reject his claims and failed to give him an opportunity to present his evidence, particularly the incidents that have occurred since he has come to Australia. He contends that he was interrupted whenever he attempted to speak, was stopped from speaking further about details and that the delegate stated that she did not believe anything he said. He further argues that she brushed off information as not important and requested that he only reply to her questions.
11. I have listened to the audio of the SHEV interview. I do not agree with the applicant's assessment regarding the delegate's conduct during the interview and consider the two hour interview was thorough and ample opportunity was provided to the applicant to present his claims and any additional detail. The applicant was legally represented in the SHEV application and a Registered Migration Agent (RMA) was present at interview. Concerns the delegate had regarding his protection claims were put to the applicant, however at no point the delegate stated that she did not believe anything the applicant said. The delegate provided the applicant with a break to consult with his RMA and before the interview concluded the applicant was given a further opportunity to provide any additional information. His RMA gave oral submissions at interview and the delegate invited the applicant to provide any further information to her within seven days of interview and reiterated that information received before her decision would be considered. An extension of time to provide additional information was requested, but nothing further was received.
12. The delegate specifically asked the applicant during the interview if his family members had experienced any adverse attention at any time since he had been in Australia to which the applicant raised an issue with his brother from 2013 but failed to mention any of the claims now made to the IAA. Similarly, the court process regarding the applicant's illegal departure charge was discussed at length and the delegate informed him that she was particularly interested in any information of events that had occurred before 2015 that related to this process. On more than one occasion the applicant stated that he did not know if his mother had received information about the charges nor knew of any details about appearance dates which does not sit with his claims that he was not provided an opportunity to explain the incidents during the interview. I have also noted above that the applicant had raised the fact his sister had passed away two years earlier in 2016 during the interview but did not mention

this was related to any suspicious circumstances. After the delegate provided a break, and the applicant had time to discuss his application with his RMA, the applicant told the delegate that his father was unable to return from working in [Country 1] to attend his sister's funeral as he feared harm in Sri Lanka, however, he also failed at this opportunity to raise the claims regarding his sister.

13. I consider that the applicant had plenty of opportunity to present all his claims to the delegate and I do not accept the reasoning provided for the non-disclosure. I also have concerns regarding the genuineness of the documents the applicant has supplied and the timing of the provision of the information, in the absence of a credible explanation, leads me to doubt its reliability.
14. Turning to the new claims relating to the applicant's brother that are said to have occurred in December 2018, after the SHEV interview and in January 2019. The applicant states that his brother had been arrested for LTTE involvement and that after his sister died [in 2016] his brother was followed continuously by the CID and army and he was falsely identified as a people smuggler by paramilitaries. He contends that he was abducted by CID and tortured and abused and starved while detained and that he was forced to sign documents stating he and the applicant were LTTE cadres. He has also claimed that the CID abducted his brother a second time after he was reported to be facilitating people smuggling. He was again tortured and beaten and released. He had not previously claimed that his brother had ever been imputed with LTTE involvement or come to the adverse attention of the Criminal Investigation Division (CID). The applicant has not given any reasons as to why his brother who he claimed in the primary stage has suffered from a [serious condition] since 2013, would now be imputed with LTTE involvement in 2018. He has also provided no reasons as to why the paramilitary or the CID would suspect he was involved in facilitating people smuggling. Having not ever claimed that his brother had come to the adverse interest of the CID during the war, immediately after or in the subsequent decade, I consider it somewhat convenient the applicant has presented these unsupported claims to the IAA only following the refusal of his SHEV application.
15. I have too many doubts as to the reliability of the new information contained within the applicant's statement to the IAA and the other related documents. I have considered whether there are any exceptional circumstances for considering the new information including those reasons advanced by the applicant and I am not satisfied that there are any. I am not satisfied that s.473DD(a) has been met.
16. The applicant's IAA statement also contains an extract of new country information from Amnesty International's 2017/18 report. This is new information. The report was published on 22 February 2018 and there is no indication that it was not publicly available from this date. The applicant was assisted by an RMA in the presentation of his case to the Department. The information is general country information, rather than personal information, which reports on the progress in Sri Lanka particularly in terms of human rights and its commitment to repeal the Prevention of Terrorism Act (PTA). I am not satisfied the requirements of s.473DD(b) is met.
17. A further two articles from the TamilNet online news website were provided to the IAA. These articles are also new information. They were published in July 2014 and June 2018 which I note was before the delegate made her decision. The articles report that the Sri Lankan soldiers sexually assaulted a child in Jaffna in 2014 and two girls in Challiththeevu in 2018 respectively.

18. The applicant has stated in his submission that these articles are relevant to his claims however, the relevance is not apparent to me. The applicant has not explained how the articles are relevant or why he did not provide them to the delegate at the primary stage if they were material. The applicant has not claimed to know the victims of the assaults and he has no residential history in the villages where the assaults allegedly took place. The review material contains a variety of information which reports on Sri Lanka's history of human rights violations which includes sexual assaults perpetrated by the Sri Lankan authorities and information relating to the PTA. I am not satisfied that the new information add anything more. I am not satisfied that there are any exceptional circumstances that justify the consideration of the Amnesty report or the TamilNet news articles. Section 473DD has not been met.

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

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19. The applicant's claims can be summarised as follows:
- He is a Hindu Tamil male from [Town 1] in the Eastern Province of Sri Lanka.
  - He was kidnapped in 2003 by LTTE and informed he would be trained as a LTTE fighter.
  - He made a failed attempt to escape and was beaten and tortured by LTTE members.
  - Students and parents protested for the LTTE to release the abducted children and he was handed over to the United Nations International Children's Emergency Fund (UNICEF) staff and was reunited with his family.
  - He moved to [Town 2] and lived with his [aunt] from 2003 until July 2010. He studied privately for his [education] and in 2007 returned to [Town 1].
  - He was kidnapped in August 2007 by two Karuna group members and taken to the [Town 1] Tamil Makkal Viduthalai Pulikal (TMVP) Office. He was instructed to undergo training and join their paramilitary group. He escaped after [a number of] days and returned to [Town 2].
  - In January 2011 he was living in [Town 1] and working at his uncle's [store]. He became [a member] of a [group] called the '[Name] club'.
  - In May 2012 the TMVP requested the applicant and the [Club] provide their support for their party and assist in campaign duties. The applicant refused to provide this assistance.
  - As a respected community member the applicant's father was asked to stand as a TMVP candidate and he refused to do so.
  - The applicant assisted the Tamil National Alliance (TNA) party and put up posters and attended some meetings.
  - A TMVP member purchased [something] from him at his uncle's [shop]. He returned to the store intoxicated and tried to attack the applicant with a sword. The police refused to act on the applicant's complaint of the attack.
  - The TMVP were angry that the applicant and his father were not supporting their party. They requested the applicant report to their office. They detained him for a few hours, slapped and threatened him. The TMVP released the applicant after his family demanded his release. The police refused to act on a complaint the family made regarding the incident.

- The applicant made a failed attempt to flee Sri Lanka in June 2012. He was questioned, detained and attended [Court]. His mother and uncle acted as surety and he was granted bail.
- The TMVP came looking for the applicant when they lost the election on 8 September 2012.
- He departed Sri Lanka in November 2012 illegally.
- He had pending court proceedings that he failed to attend and an arrest warrant was issued in 2015 for his arrest.
- Since coming to Australia two men told his mother they would kill the applicant upon return for not supporting the TMVP. His mother made a complaint to the police but they refused to take action.

### **Factual findings**

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20. The applicant claims to be a Tamil male from the Eastern Province of Sri Lanka of Hindu faith. The evidence and narrative provided by the applicant as to his identity has been consistent since he arrived in Australia. He has provided a copy of his birth certificate and his national identity card (NIC) in support of his claims. I am satisfied that the applicant is a [age] Tamil male from the Eastern Province of Sri Lanka of Hindu faith. I am satisfied that he is a Sri Lankan national and that Sri Lanka is the receiving country for the purposes of this review.
21. I accept that in 2003 the applicant, as a [young] male, was taken by LTTE members and told he would be trained as a LTTE fighter. I also accept that whilst being held at the camp he tried to escape and as punishment a LTTE member [caused an injury to him] which resulted in a permanent scar. The applicant's evidence has been consistent since arriving in Australia that he was abducted for a short time. Country information also reports that at that time the LTTE were recruiting children and young adults, including forcibly.<sup>1</sup> I also accept that the LTTE's plan to train the applicant as a young fighter was impeded by protests from students, teachers and community members that placed pressure on the LTTE to release the abducted children of [Town 1]. The applicant provided a UNICEF case number and provided a detailed description of his release from the LTTE. A letter has been provided on UNICEF letterhead. It is written in what appears to be Tamil without an English translation. Despite not being able to verify the contents of this letter, I am persuaded by the applicant's other evidence and accept that after two weeks the LTTE released the applicant and UNICEF staff reunited him with his family.
22. The applicant claimed, and I accept, that after the abduction his family sent him to live with his [aunt] in [City 1] from October 2003. He claimed that he engaged in private study whilst in [City 1] in preparation for his [examinations].
23. The applicant has provided education certificates that indicate his [certificate] was issued by [a certain] College in 2007. I accept the applicant's evidence that he was awarded his [specified] education in 2007 and that he returned to [Town 1] to sit these exams in August 2007.
24. The applicant claimed that after he sat his [exams] he was staying temporarily in [Town 1] visiting with his family when he was abducted for a second time. On this occasion he claimed

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<sup>1</sup> Austrian Centre for Country Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

he was taken by TMVP members on a motorbike to their political office and then onto an SLA camp. He was instructed to undergo training at the camp to become a TMVP paramilitary member. He claimed that after [a number of] days he and another forced recruit left the camp and walked for three hours to a bus that he caught back to his [aunt's] home in [City 1]. Unlike his account of his abduction by the LTTE, I did not find his account of this claimed event compelling. Whilst I note that there are reports that the TMVP forcefully recruited members, country information also states that the Karuna Group formed the associated political party TMVP in December 2007 in preparation to contest the Eastern Provincial Council elections in 2008.<sup>2</sup> It is questionable that the applicant was abducted by TMVP members and taken to their political office and a training camp four months before the party had formed. I also consider his description of simply walking away from the camp due to low security is somewhat implausible particularly considering the effort that he says had been made to forcefully recruit him through abduction. I am not satisfied that the applicant was abducted by TMVP members, held at a training camp and subsequently escaped after [a number of] days. I find the applicant has contrived this abduction claim for the purposes of his claims for protection.

25. The applicant's residential history has consistently indicated he permanently moved back to [Town 1] in 2010. He noted in his application that his family felt it was safe for him to relocate to the family home in light of the civil war having ended the year before, which I accept.
26. The applicant claimed that upon return to [Town 1] he joined a [group] called the "[Name] Club" and at the end of 2011 became [a senior member]. The applicant gave a convincing account at interview of the club's structure, funding and membership and I accept that he was [a senior member] of the [Club] in [Town 1] from the end of 2011.
27. The applicant claimed that as [a senior member] of the [Club] he was approached by both the TMVP and TNA political party members seeking the club's support in campaigning activities for the upcoming September 2012 Eastern Provincial Elections. The applicant claimed that he declined the TMVP's request to assist in their campaigning but had provided some assistance to the TNA party. He told the delegate that this assistance involved putting up posters on walls and fences and attending some political meetings. Country information before me indicates that the TMVP were affiliated with the Sri Lankan authorities and the primary focus of the TNA was to represent the rights and interests of Tamils in Sri Lanka.<sup>3</sup> I accept that Tamils such as the applicant would seek to be involved in campaign activities for the TNA at election time and may have been reluctant to show support of the TMVP. I accept the applicant was involved in these relatively ordinary TNA activities.
28. At interview the applicant told the delegate that his father was a respected community member and he was [a senior member] of a [group]. He organised an annual festival and [undertook a specific task]. The applicant claimed that it was on account of his father's reputation that he was asked to assist the TMVP in their election and asked him to stand as a TMVP candidate, however his father had declined to do so.
29. The applicant contends that he and his father's refusal to assist the TMVP and his provision of support to the TNA angered members of the TMVP and they sought to harm him. He has described two incidents that occurred in May/June 2012. The first incident occurred at the applicant's uncle's [store]. The applicant claimed that a TMVP member was intoxicated and came to the [store] and swung a sword towards him, and that he and his colleagues were

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<sup>2</sup> Austrian Centre for Country Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

<sup>3</sup> Ibid

able to physically stop the TMVP member from harming anyone. The applicant claimed he reported the incident to police, however the police refused to take the matter seriously on account they believed it to be no more than drunk and disorderly behaviour.

30. The second incident occurred when the applicant was called to the TMVP office in [Town 1]. He claimed that he was kept there for a few hours and the TMVP members threatened to kill him and slapped him numerous times. He was released by the TMVP after his family came to the TMVP office and demanded his release. He also claimed that this incident was reported to the police however the police on this occasion also took no action against the TMVP. The applicant did not provide any evidence of a complaint to police.
31. I am not convinced by the applicant's evidence that he was sought out and harmed for his, or his family's refusal, to politically support the TMVP. The description of the event at the [store] appeared to be that of a random intoxicated person and I am not persuaded that the applicant was specifically targeted. I am not convinced the applicant was called to the TMVP office and was questioned, threatened and slapped. While the applicant has claimed that these actions were a result of his and his father's refusal to assist the TMVP, I note only the applicant was questioned by the TMVP. He did not suggest his father was similarly sought out despite him seemingly having rejected a role of much greater importance. I also have doubts that had the TMVP, who at the time were regarded as a powerful paramilitary group, regarded the applicant as a person of such serious concern that they would have agreed to release him to his family after a few hours at their demand.
32. I have taken into account that the applicant has been consistent with regards to the broader elements of these claims since arriving in Australia, stating in his arrival interview that in 2012 as the [Club] [senior member], he had been approached by the TMVP to support them in their contest of the election and that he was attacked in the [store] by a TMVP member. However, I consider that the applicant has sought to embellish his evidence to support his claim that he was targeted by the TMVP. I accept that the applicant, as the [Club] [senior member] was approached by the TMVP for political support and that on one occasion he felt threatened by an intoxicated TMVP member who came into his uncle's [store] with a sword, however, I am not satisfied that this was a targeted attack as the applicant has claimed. I am not convinced by the applicant's other evidence and do not accept that his father was asked to be a TMVP candidate, that he was targeted by the TMVP, that he went to a TMVP office was held for a few hours, questioned, threatened or slapped. I am not satisfied that these claims are genuine. In regards to assistance he provided to the TNA, I am willing to accept that he and members of the [Club] put up campaign posters and attended party meetings. However, I consider that this support to be minor and not sufficient to attract the attention of TMVP members the applicant claims.
33. The applicant's written and oral evidence is that he made a failed attempt to depart Sri Lanka in June 2012 and that there is a warrant for his arrest for failing to appear in court to face charges relating to this illegal departure. His evidence is that he boarded a people smuggling boat that was later intercepted at sea by the Sri Lankan Navy before it had left Sri Lankan waters. He claimed that all the passengers and crew were held in custody for [a number of] days before being brought before a Magistrate in [City 1]. His matter was heard en masse with the other passengers and the Magistrate found the applicant was guilty and gave him a two week custodial sentence. He returned to court after [a number of] weeks and was granted conditional bail and released on the recognisance of his mother and uncle. He claimed that he was told that he would be called upon to again appear in court in a further six months. He told the delegate at the interview that his release from jail by the courts was not conditional upon any requirements such as reporting.



34. Details of his experience relating to the illegal departure charge were discussed at length in the SHEV interview. He told the delegate that he had not been subjected to any mistreatment in the processing of the charge including his time he was in prison in [City 1], although he did mention that the prison guards had mocked him for the failed attempt to leave Sri Lanka. He confirmed with the delegate that the authorities had not asked him any questions regarding the LTTE and they had not believed him that he had departed Sri Lanka for any other reason other than for economic purposes.
35. Country information does not support the applicant's claims that the matter of his illegal departure was an ongoing matter and further court appearances were required.<sup>4</sup> The applicant has claimed that his mother and uncle provided surety for his release, although he has not provided any documentary evidence of this. Having appeared before a Magistrate twice and serving a short custodial sentence for the illegal departure offence, it is unclear why the applicant claimed he needed to reappear before the Magistrate again six months after his release. The applicant provided a copy of what he claims is a warrant for his arrest which is dated [in] October 2015. He has provided an English translation of the document that states the particulars of the alleged offence or reasons for issue of warrant was "Absent to the court". The delegate asked the applicant why the arrest warrant was not issued until 2015 to which he reasoned that the court systems were inefficient in Sri Lanka and they only heard the cases one at a time and there were 100 people on the boat and his turn did not come up until 2015. After the delegate clearly conveyed her doubts as to the credibility of this court hearing in 2015, the applicant changed his evidence and told her that his family had received information for him to appear two or three times before this date but he was unsure of the details. The delegate put the applicant on notice that she had concerns with his claims and told him that had it been true there were other notices or court documents he would be well aware of this information as it was very important. She also urged him to speak to his family and provide to her as soon as possible the information regarding any documents or information that preceded the 2015 arrest warrant yet the applicant did not provide any further information or documents to the delegate prior to her decision.
36. I accept that the applicant made a failed attempt to depart Sri Lanka and was found guilty of committing the offence of illegal departure. I am satisfied that he was processed in a group, found guilty by a Magistrate and served two weeks in prison. I am unpersuaded by the applicant's evidence that his illegal departure matter was ongoing when he departed Sri Lanka and a warrant was issued in 2015 for his arrest, particularly when considered in light of country information about the processing of such matters and that also document fraud is prevalent in Sri Lanka.<sup>5</sup> I have significant doubts that the applicant was released on bail. The applicant provided no documents in support of the bail arrangements. The applicant did not state that he pleaded not guilty to the offence and was awaiting trial. On the contrary, his evidence indicates he was found guilty and a sentence imposed. I am not satisfied that the applicant was released on bail and consider the amount that he states was paid by his mother and uncle to the courts for his release in 2012 was a fine for the offence he committed. I am satisfied that his prior illegal departure matter has concluded and the applicant has no outstanding arrest warrants or court hearings regarding this matter.
37. On the day of the Provincial Council Elections, 8 September 2012, the applicant claimed that TMVP members came to the applicant's house looking for him. He claimed that at the time he was staying with a friend [and] his mother had informed him of the TMVP visit via phone. He decided not to return home to [Town 1] and travelled to [Town 2] and lived with relatives

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<sup>4</sup> UK Home Office, "Sri Lanka – Bulletin: Treatment of Returns", 1 December 2012, CIS28615

<sup>5</sup> DFAT, "Country Information Report – Sri Lanka", 16 February 2015, CISEC96CF1164

while plans were made for him to depart Sri Lanka a second time. The applicant did not claim to be involved in any other work for the TNA or have any interaction with any political party members since May/June and even during these two months I find that his political involvement was insignificant and that he was not a person or held the profile of a person that would attract the adverse attention of the TMVP or anyone else for these activities. I consider it highly improbable that on the day of the election TMVP members came to the applicant's house searching for him and on account of this visit the applicant fled Sri Lanka two months later. I do not accept these events occurred

38. He stated that his family made the arrangements with people smugglers and in November 2012 he departed Sri Lanka illegally by boat a second time. On this occasion the boat was not intercepted and he travelled to Australia by sea. On the basis of the applicant's evidence and the information contained in the review material, I am satisfied that the applicant departed Sri Lanka illegally by boat in November 2012.
39. His written evidence also states that on two occasions two TMVP men came to his family home in search of the applicant and had threatened to kill him because he refused to support them in the election. He claimed that these events occurred in 2012 and again in 2015. He claimed that his mother lodged a complaint with the police on these occasions however he has not provided any evidence of such complaints. I find this claim difficult to believe given his level of involvement with the TMVP some three years earlier. I am not satisfied the claim is credible.
40. Towards the end of the interview the delegate asked the applicant about his family members and if anything had happened to them since he departed Sri Lanka. He told the delegate that in 2013 TMVP men had come to his house and detained his brother [due to the association with him]. He stated that his brother was severely beaten and needed surgery and now he has [a serious condition]. This seemingly significant event was not raised in his written statement, which I consider to be a substantial omission given the seriousness of the information. I also noted that at the start of the SHEV interview the applicant told the delegate that his brother had medical issues and he had undergone some surgery [which] has rendered him unable to work, however he did not mention that the injuries were the result of physical attack on him by TMVP members and only provided this serious claim briefly in response to the delegate's question. I am not satisfied the applicant was providing a truthful response to the delegate's question. I accept that the applicant's brother has [a serious condition] and he is unable to work. However, I am not satisfied with the applicant's evidence and I do not accept that he was detained and assaulted by the TMVP in 2013 or any other time.
41. His application also indicates that shortly after he departed Sri Lanka his father travelled to [Country 1] as he was also subject to harassment by the TMVP although he has not provided any further details regarding the alleged treatment or the circumstances in which this occurred. He has indicated that his father works in [Country 1] and sends money home to his wife and [injured] son (applicant's brother) and I accept this is true. However, on the applicant's evidence I am not convinced that he fled Sri Lanka for fear of harm relating to the TMVP or any other group or the authorities, particularly for the only reason the applicant has advanced being his father had allegedly refused to run as a candidate in the provincial elections of 2012. I consider the claim is not credible and I am not satisfied that the applicant's father fled the country in 2012 for the reason the applicant has provided and that he remains in [Country 1] fearing he will be harmed if he returns to Sri Lanka. I consider that the applicant has manufactured these claims and the applicant's father lives in [Country 1] for work purposes.

42. A letter dated [in] January 2013 on letter head that indicates it was issued from the Office of [an official from] Batticaloa District accompanied the visa application. The document is written in what appears to be Tamil and an English translation has not been provided to allow for any meaningful assessment of its contents. There has been no explanation provided for the document or how it relates to his claims, noting that the applicant had the benefit of legal representation in the primary stage and has provided submissions to the IAA. I am satisfied that had the document had some relevance to his claims, the applicant has been given the opportunity to provide this. I have afforded this document no weight in my assessment.

### **Refugee assessment**

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43. 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**

44. 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.
45. I accept that the applicant, as a young Tamil male in the Eastern Province, was kidnapped and held by the LTTE in 2003 for a short period. I accept the LTTE at this time succumbed to pressures from the community and UNICEF and the applicant and other child abductees were released to their families. I accept that the applicant provided some low level support to the TNA party for two months in mid-2012. However, I do not accept that the applicant was sought after by the authorities, or paramilitary groups or anyone else and I do not accept that when the applicant departed Sri Lanka he was at risk of being harmed by the TMVP, or any paramilitary group, the CID or any arm of the Sri Lankan authorities.
46. Since the applicant has departed Sri Lanka there have been a number of significant improvements. is the UK Home Office has reported that those at risk of harm are individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have, a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. Additionally,

in its opinion LTTE membership in itself does not necessarily warrant protection either unless the person held a significant role.<sup>6</sup> The applicant's LTTE involvement was limited to being a child victim of abduction some sixteen years ago for a few weeks. The evidence does not indicate that despite this, the applicant was ever perceived as an LTTE member, let alone one with a significant role. While not suggesting that improvements in the area of human rights and reconciliation is still needed, the most recent DFAT, UK Home Office and US Department of State reports indicate that those who are at risk of serious or significant harm on return to Sri Lanka are individuals who have been participating in post-conflict Tamil separatism or renewal of hostilities within Sri Lanka or would be regarded as a threat to the state.<sup>7</sup> The applicant has not engaged in any Tamil separatism in Sri Lanka or Australia, nor has he committed any criminal or terrorist acts or any other conduct that would be regarded as a threat to the state. The evidence does not suggest that the applicant's profile as a former victim of a LTTE child abduction will result in a risk of harm in Sri Lanka in the foreseeable future.

47. It is widely documented that violence, torture, sexual assault and other human rights abuses occurred in Sri Lanka during the war and the years that immediately followed and the victims were often Tamil.<sup>8</sup> However, in the applicant's case he has not claimed that the Sri Lankan police, army or navy officers harassed or mistreated on account of his ethnicity prior to departing Sri Lanka. Furthermore, there have been significant improvements in the Sri Lanka since the applicant departed. The Sirisena government was elected into office in 2015 on a platform of post-conflict reconciliation, transitional justice, good governance, anti-corruption and economic reform.<sup>9</sup> Progress on some of the commitments made by Sirisena have been slow and the government has received much criticism in implementing changes including the failure to appeal the Prevention of Terrorism Act (PTA) which is widely reported as having a disproportionate impact on ethnic minorities, such as Tamils.<sup>10</sup> Despite these criticisms, country information does report on a number of positive developments for Tamils in the country politically and socially as well as government initiatives to address concerns.<sup>11</sup> Observers of the situation in Sri Lanka such as the UK Home Office<sup>12</sup> and DFAT<sup>13</sup> have in their more recent reports stated that in their opinion, being of Tamil ethnicity would not in itself warrant international protection, and that Tamils are not being systematically targeted and subjected to serious harm because of their race.
48. The applicant mentioned in his SHEV application that he could face harm upon return to Sri Lanka from people who support the TMVP party. I do not accept he was previously targeted by the TMVP. In 2015 DFAT report noted that while the TMVP remained engaged in some

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<sup>6</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

<sup>7</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; US Department of State, "Country Reports on Human Rights Practices for 2017 – Sri Lanka", 20 April 2018, OGD95BE927333; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>8</sup> Freedom from Torture, "Sri Lanka – Update on Torture since 2009", 6 May 2016, CIS38A8012881; International Truth and Justice Project (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", 1 August 2015, CISEC96CF13070; ITJP, "Joseph Camp", 16 March 2017, CISED50AD3592; United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; International Truth and Justice Project "Unstopped: 2016/17 Torture In Sri Lanka", 14 July 2017, CISED50AD4849

<sup>9</sup> DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

<sup>10</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

<sup>11</sup> US Department of State, "Country Reports on Human Rights Practices for 2017 – Sri Lanka", 20 April 2018, OGD95BE927333

<sup>12</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

<sup>13</sup> DFAT, "Sri Lanka – Country Information Report", 23 May 2018 CIS7B839411064

criminal activity, it had renounced paramilitary activities.<sup>14</sup> A report from 2016 state that the TMVP leader had been arrested by the CID over the killing of a Tamil parliamentarian.<sup>15</sup> There is nothing more recent before me to suggest that paramilitary activity has been re-enlivened, and no credible basis on which it may be said that the applicant would face a real risk of any harm from people who supported the TMVP.

49. I am similarly not satisfied that the applicants' TNA involvement would found a claim for protection. DFAT stated in their 2018 report that Tamils do not receive unwarranted attention from authorities because of their political involvement, including with the TNA. In the 2015 election the TNA secured 16 members of parliament. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased.<sup>16</sup> I accept that the applicant has previously participated in low level campaigning activities for the TNA for a short time in 2012. He has not indicated that he has any desire to become politically active upon return to Sri Lanka, however, should he wish to become engaged in the future, the evidence does not suggest that he would be prevented from doing so or would place himself at any risk of harm.
50. I accept that the applicant has some scarring on his leg that occurred from an incident with a LTTE member in 2003. The applicant has contended that he will be imputed with LTTE involvement upon return to Sri Lanka when his body is searched and the scar is discovered. The most recent DFAT and UK reports state that they were aware of reports in a Freedom from Torture report from 2011 that documents cases of harm because of an LTTE imputation was made on the basis of scarring. However, the UK Home Office noted a decision in the Upper Tribunal which noted that there was insufficient evidence to suggest that a permanent marking such a scar or tattoo is a risk factor. Moreover, DFAT have stated in their 2018 report that it was unaware of any more recent evidence to suggest that people were being detained because of scarring. Relevantly I have also note that the applicant had engaged with the Sri Lankan authorities on a number of occasions including in 2012, when he was intercepted during an illegal departure, brought before a Magistrate and served a short time in prison and he did not indicate that his scar ever caused him any issue.
51. Overall, I am satisfied the applicant does not face a real chance of harm on account of his past involvement with the LTTE, his ethnicity, his scarring, his political associations (including any such associations he may have in the future), nor any other factors in his or his family's profile or circumstances.
52. I accept that the applicant will be returning to Sri Lanka on temporary travel documents. I accept that given the manner in which he will return to Sri Lanka and the temporary documents he will use to re-enter he may be identified as someone who has sought asylum and lived for a period in Australia. Country information indicates that the Sri Lankan authorities will take investigative measures to confirm the identity of those returning with temporary documents.<sup>17</sup> The process may take several hours and police from the returnee's local area, family and neighbours may be contacted if required.<sup>18</sup> DFAT assesses that the

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<sup>14</sup> DFAT, "Country Information Report – Sri Lanka", 16 February 2015, CISEC96CF1164

<sup>15</sup> Austrian Centre for Country Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

<sup>16</sup> DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

<sup>17</sup> DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

<sup>18</sup> Ibid

returnees are not subject to mistreatment during the process at the airport and procedures for returnees are standard and apply to all returnees regardless of ethnicity or religion.<sup>19</sup>

53. DFAT reports that the Sri Lankan government have consistently stated that failed asylum seekers are welcome back to Sri Lanka. Between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka and many others have returned from other countries such as US, Canada, the UK and other European countries.<sup>20</sup> Nevertheless, DFAT reports that those returning can face practical challenges. There is minimal reintegration assistance available to returning asylum seekers. Many returnees have difficulty in finding suitable employment and reliable housing on return, with those who have skilled best placed to find well paid employment. There is anecdotal evidence that the CID regularly visited and/or telephoned returnees in the north of Sri Lanka as recently as 2017.<sup>21</sup> However, the Sri Lankan government have reported that systematic surveillance of returnees has decreased and in 2016 UNHCR conducted interviews with returnees and only 0.3 per cent reported that they had security concerns in Sri Lanka following their return.<sup>22</sup> The country information does not report on the surveillance of returning asylum seekers elsewhere in the country.
54. The applicant is from the East of Sri Lanka, where his family still resides, and there is no suggestion he would return to the North. I am not satisfied there is a real chance he would be subject to visits or surveillance. I accept that he may face social stigma as a returning asylum seeker. I accept the applicant will need to re-establish himself on return to Sri Lanka. The applicant has acquired work experience in Sri Lanka [and] in Australia in [and] I am not satisfied that the applicant will be prevented from securing employment in the future. He has family including his mother who currently lives in the Eastern Province of Sri Lanka and there is no evidence to suggest he would not return to live there. I am not satisfied that the treatment the applicant may encounter as a returning asylum seeker amounts to serious harm.
55. I accept that the applicant departed Sri Lanka illegally by boat. I also accept that he is a repeat offender of illegal departure having received a conviction for a failed attempt in June 2012. I accept that upon return the applicant will be identified as someone who has departed illegally and I accept that the Sri Lankan authorities will have records that will reveal that this will be his second time he has departed unlawfully.
56. The applicant has stated that the Sri Lankan courts rely on concocted evidence produced by the CID to imprison innocent Tamils permanently and that they will invent new witnesses against him and false evidence to the courts. The country information does not support that the applicant will not be treated fairly before the court for illegal departure should he be charged. I have had regard to reports that indicate that those returnees who have been targeted or punished more severely in the past were mostly known LTTE members who had a significant role in the conflict or those who have criminal records, extant court orders or arrest warrants.<sup>23</sup> There is no credible information to suggest that the applicant would be

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<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> International Truth and Justice Project (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; International Truth and Justice Project (ITJP) "UNSTOPPED: 2016/17 TORTURE IN SRI LANKA", 14 July 2017, CISED650AD4849; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; Tamil net, 16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Canadian IRB: Immigration and Refugee Board of Canada, "Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the

identified as a person of concern to the authorities or that these reports of torture or human rights violations are informative of the circumstances that he may face upon return to Sri Lanka. The weight of the country information before me does not support his argument that he has a profile of someone at real risk of being targeted or punished more severely.

57. Although I accept that the applicant is likely to be identified as having previously departed illegally, I do not accept that he is subject to a greater penalty or differential treatment, even as a repeat offender. As discussed earlier, I am satisfied that he paid his fine and the matter concluded, and I do not accept there is a warrant for his arrest relating to illegal departure. The evidence does not support that he is at a real risk of a custodial sentence or mistreatment for reoffending. I am not satisfied on the country information before me that the applicant would for any reason face a real chance of suffering ill-treatment during any period of detention following his arrest in relation to the legal proceedings for his previous departure attempts.
58. Under the Immigration and Emigrants Act (I&E Act) it is an offence to depart Sri Lanka other than via an approved port of entry or exit.<sup>24</sup> I accept that the applicant engaged people smugglers to depart Sri Lanka and consequently has committed an offence under the I&E Act. The penalties under the Act can include imprisonment up to five years and a fine, however, in practice the penalties are applied to such persons on a discretion basis and in most cases only a fine is issued. The Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future.<sup>25</sup> There is no information to suggest that the applicant was ever involved in organising or facilitating a people smuggling venture and I consider that he was merely a fee paying passenger. I am not satisfied there is a real chance that the applicant will be subject to a custodial sentence, even taking into account his previous transgressions.
59. Returnees who are deemed to have committed an offence under the I&E Act are transported to the closest Magistrate Court where a Magistrate (as soon as one is available) makes a determination as to the next steps for each individual.<sup>26</sup> If there is a delay in immediately accessing a Magistrate, the individuals are kept in an airport holding cell which usually does not exceed 24 hours but can in certain circumstances, such as over a weekend or a public holiday, take up to two days. If a returnee pleads guilty, they are fined and free to go. In most cases, when a returnee pleads not guilty, they are usually granted bail on personal surety or guarantee by a family member.<sup>27</sup> Country information states that the fine amounts vary from LKR 3,000 (AUD 25) for a first offence to LKR 200,000 (AUD 1,670).<sup>28</sup> DFAT assesses that although the fines for illegal departure are low the cumulative costs associated with regular court appearances over protracted lengths of time (if applicable), can be high.<sup>29</sup> DFAT is unable to assess if penalties for multiple illegal departures are higher, however the reference to the scale of fine suggest that this is a possibility. The delegate referred in her decision that the fine could be up to LKR 200,000 (AUD 1,670) and the applicant has not

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country illegally; factors affecting the treatment, including ethnicity and religion”, 10 November 2017, OG020B81694; Sri Lankan Mirror, “Another Tamil returnee arrested”, 1 July 2015, CXBD6A0DE16698; Country of Origin Information Services Section (COISS), “Situation Update: Sri Lanka Tamil Returnees”, 5 September 2017, CRF00C22F109

<sup>24</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Ibid

made any claims that he would not be able to pay this amount if required. DFAT also note that the payment of the fine can be made over time in instalments. I am not satisfied that the treatment the applicant will receive for a second illegal departure charge, including possible short term detention at the airport, possible court appearances and the fine, amounts to serious harm. Furthermore, 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.

### **Refugee: conclusion**

60. 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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61. 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**

62. 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.
63. I accept that the applicant may face penalties upon return to Sri Lanka for reoffending under the I&E Act by illegally departing Sri Lanka to travel to Australia in November 2012. These penalties are very likely to include the payment of a fine, possible short term detention and possibly other costs associated with court appearances and if applicable, bail costs. 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 that the applicant will face a real risk of significant harm for this reason.
64. I also accept that upon return the applicant may experience some social stigma from community members and undergo an initial period of re-establishment after returning to Sri Lanka having sought asylum in Australia and resided here for an extended period. I am not satisfied that these circumstances, even when considered in combination with the treatment he may experience for his second illegal departure, would amount to 'significant harm'. The harm does not include arbitrary deprivation of life, the death penalty, or torture. Nor am I satisfied that he would be subject to cruel, inhuman or degrading treatment or punishment, as



defined. I am not satisfied the applicant faces a real risk of significant harm as a returning asylum seeker who has a history of departing Sri Lanka illegally.

65. For the reasons given above, I have otherwise found that the applicant does not face a real chance of serious harm as a consequence of his ethnicity his scarring, his past brief interactions with the LTTE, his past political activities. As 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 upon return to Sri Lanka.

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

66. 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:

...

***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.