



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06293

Date and time of decision: 29 April 2019 11:01:00
V Price, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act*

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka. He lodged an application for a protection visa on 11 November 2016.
2. On 25 January 2019 a delegate of the Minister of the Department refused to grant the visa finding that the applicant did not face a real chance or risk of harm in 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. The applicant's representative provided to the IAA a statement by the applicant accompanied by supporting material. To the extent the statement discusses the findings of the delegate this is not new information as defined. A copy of a family photograph; a copy and a translation of a death certificate for the applicant's grandmother; and translations of [Country 1] residence permits for two of the applicant's sisters were included in the supporting material. The photograph and the death certificate were provided to the Department and are not new information. His sisters' [Country 1] residence permits were also before the Department and the translations of these documents do not constitute new information as defined.¹ I have considered all of this material in my assessment.
5. New information was provided to the IAA consisting of: an untranslated letter dated October 2015 relating to the grant of a [Country 1] residence permit to one of the applicant's sisters; reference to independent information that was not before the delegate; and new claims relating to the applicant's [Relative A]. In respect of the untranslated letter, I accept it pertains to the grant of his sister's asylum application in [Country 1]. That she (and his other sister) has been granted asylum in that country is not in contention, I have accepted this and had regard to this matter in assessing the applicant's claims. However, as noted, this letter itself is untranslated and I cannot be satisfied as to its contents or relevance to the applicant's particular claims. I am not satisfied that there are exceptional circumstances to justify considering this information for the purpose of s.473DD(a) of the Act.
6. The new claims relate to the current whereabouts of the applicant's [Relative A]. They appear to have been provided in response to the findings in the decision record, based on the applicant's own evidence during the protection visa interview that his [Relative A] continued to reside at home since his May 2018 arrest. The applicant did not indicate in his IAA statement when his [Relative A] moved to his present location. However, given the context of his evidence at the interview, I am prepared to infer that this event post-dated the delegate's decision. In any event, I accept that on its face this information constitutes credible personal information in the relevant sense, in that it is at least capable of being believed. Given the potential relevance of this information to the applicant's claims I am satisfied there are exceptional circumstances to justify considering this information. This new information meets s.473DD(a) and (b). I am not prevented from considering it and have had regard to it in my assessment.

¹ *ABJ17 v MIBP* [2018] FCA 950.

7. In respect of the new independent information the articles and reports are best described as general country information rather than credible personal information, and they all pre-date the delegate's decision. One article relating to allegations of torture against Tamils is brief without relevant details; the respective links for two of the sources did not work and I cannot be satisfied as to the contents of the information contained therein or of their relevance to the applicant's claims; and in any event in relation to all of these sources, I note I have more current and detailed independent information from authoritative sources in the review material. In respect of reports from the Australian Department of Foreign Affairs and Trade (DFAT) and the United Kingdom Home Office (UKHO), these have since been replaced, the updated versions of those reports are included in the review material before me and I have considered those current reports. Overall, on all the evidence before me, I am not satisfied that there are exceptional circumstances to justify considering the new independent information for the purpose of s.473DD(a). I must not consider it.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
- The applicant participated in a march to celebrate [an event] in Jaffna in May 2012. About five thousand people took part in the march. Some people in the crowd carried flags of the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan Army (SLA) thought it was an LTTE march. The march went on for about 2-3 hours and the applicant went home afterwards without incident.
 - About ten days later four men claiming to be from the Criminal Investigation Division of the police (CID) took the applicant from a local cricket ground near his home. He was taken to a house and placed in a room. The applicant's request to have his mother present was refused. The applicant was shown a photograph (of the march) and asked if he knew the people in the photograph. The applicant recognised himself. He agreed he was in the march, but said he did not know the other people in the picture. He was returned to the cricket ground and told not to say anything. He went home and did not tell his family anything.
 - Three days later the same four men came and took him away to an unknown location. He was again shown pictures of the march, asked questions about the other participants and was beaten and burned with cigarettes over a seven hour period. He was released the next day and was again told not to say anything. However, this time the applicant did tell his family what had happened to him.
 - The men came to his house again two days later, and issued threats to his sister. They continued to visit his home for the next week and behaved in a threatening and harassing manner towards his sisters. His sisters went to stay with their grandmother (in [a specified location]) and the applicant moved to live with his sister's family. The CID continued to visit his home. His grandmother died in mysterious circumstances, [in a location], and the family believe the CID killed her.
 - The applicant left the country, travelling legally to [Country 2] in June 2012. The applicant's sisters remained in hiding and eventually fled the country in October 2013. They were granted protection in [Country 1].
 - The applicant fears he will be interrogated and harmed on return for these reasons.
9. At interview the applicant gave the following additional evidence:

- The CID continue to visit his family seeking him, their most recent visit was in May 2018 when they also detained his [Relative A] was detained as the authorities wanted information on the applicant and his sisters. He was subsequently released with the assistance of a local justice of the peace.
10. In new information to the IAA the applicant claimed that his [Relative A] has now been sent to reside with his father's friend in [a named town], he has restricted his movements and his parents are seeking to get him out of the country.
 11. The delegate considered that claims to fear harm on the basis of his Tamil ethnicity and as a failed asylum seeker arose on the material.

Factual findings

12. I accept on the documentary and oral evidence before me that the applicant is a Sri Lankan national and that he is of Tamil ethnicity.
13. The applicant's evidence is that he was born and resided in Jaffna in the Northern Province of Sri Lanka until his departure from that country in June 2012. The applicant departed Sri Lanka legally travelling on his own passport to [Country 2] where he remained for several months before beginning his journey to Australia. He stated that he did not apply for any protection in that country. I am not satisfied on the evidence before me that he has a current right to enter and reside in [Country 2] or any other country (apart from Sri Lanka).
14. His parents continue to reside in their family home in Jaffna in the Northern Province of Sri Lanka and I consider this is the area to which he would return.
15. The applicant stated, and I accept, that neither he nor any members of his family were members of the LTTE. He has claimed the authorities believe him to hold a political opinion in support of the LTTE due to his Tamil ethnicity and participation in a march in 2012 as set out above. His evidence to the Department has been credible. He has provided a clear, detailed, consistent and plausible account, in a manner suggestive of lived experience, in relation to his past experiences in Sri Lanka and his oral evidence was presented in a manner indicative of lived experience. He did not appear to have exaggerated or embellished his claims in any way and the narrative and time frames of the claimed events appeared plausible and logical. He provided a statement from his father, written in 2013, attesting to the claimed events and confirming the authority's interest in the applicant and the continued harassment of the family. The applicant's evidence is also broadly consistent with independent information in the review material.
16. Information confirms that at the time of the claimed events the Sri Lankan authorities were interested in locating, arresting, prosecuting and suppressing former members and supporters of the LTTE and Tamils were often imputed with pro-LTTE political opinions due to their ethnicity (DFAT 2018 and UKHO 2012). The authorities monitored and took photographs of public events such as that described by the applicant (Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD) 2016, UKHO 2012) and DFAT 2018). The applicant's evidence regarding his questioning and treatment by the CID and the subsequent treatment of his family members is also consistent with information before me regarding the manner in which the CID were known to operate at the time of the claimed events (Freedom From Torture (FFT) 2015 and International Truth and Justice Project (ITJP) January 2016).

17. On the evidence before me, I accept that; the applicant participated in a procession to celebrate [an event] in May 2012; individuals unknown to the applicant held up LTTE flags during the procession; the applicant (in the front of the march) was photographed by the authorities at the event; he was subsequently detained by the CID and questioned about the march, his support of the LTTE and other participants in the march on two occasions; on the first occasion he was held for several hours; on the second he was held overnight; he was subjected to treatment amounting to serious harm on both occasions; he was at that time imputed with a pro-LTTE political opinion; the CID continued to visit his home; and he hid for a short time with his sister's relatives before his family arranged for him to travel to [Country 2] in June 2012, about a month after the march.
18. I have considered whether the fact the applicant was able to legally travel to [Country 2] indicates he was of no further interest to the authorities. While I find this indicates he was not on a 'stop' or 'watch' list at that time, I accept his explanation that at the time of his departure he did not yet have an official police record, the authorities did not consider he would travel outside the country, and his family paid a lot of money to expedite his visa. In the circumstances of this particular case, I do not consider that his legal departure is indicative that he was not of any ongoing interest to the authorities. The applicant also provided a letter from the local Grama Officer that he has not been punished by the Court or produced in Court in relation to an offence. This letter pre-dates the events and is entirely consistent with his claims that he was not officially charged with an offence prior to his departure from the country. I do not consider it detracts from his evidence that he was questioned on two occasions by the CID as claimed and that he remained of interest to them at that time.
19. I accept on the evidence before me, including the applicant's evidence, the statement by his father, and the independent information, that the CID continued to visit his family home searching for the applicant in the period after his departure from the country and that they harassed and mistreated his elder sisters on several occasions. The applicant and his family believe that his grandmother was killed, [in a location], by CID in April 2013 on one such occasion when they came looking for his sisters. The applicant stated that there were no actual witnesses to her death and while it cannot be conclusively stated that the CID were responsible, the timing of their visit correlated with her that of her death. The applicant's account of the circumstances surrounding her death was as detailed as possible given he had left the country at that time and was relying on information from his family.
20. The applicant provided a copy of his grandmother's certificate of death with the visa application. I accept that she died in April 2013 as claimed. Her official cause of death was stated to be [accidental]. This is not necessarily inconsistent with the applicant's claimed version of events and I accept the applicant's evidence that if the authorities were involved in her death they would not be identified as the perpetrators on any official documents. However, even so, the informant on the death certificate was the 'Acting Inquirer into Sudden Death at the [specified hospital]', rather than the authorities. If her death was caused by a third party then I have some doubts that it would have been ruled as an accident. Ultimately, even taking into account the general credibility of the applicant, I cannot be positively satisfied that the CID were responsible for the death of his grandmother. However, based on the detailed and consistent evidence before me, what I do accept is that: the CID went to his grandmother's house on that occasion searching for his sisters; they questioned his grandmother; that she was later found dead by the applicant's father; and that the applicant, his family and members of the village believe the CID are connected to her death. The applicant stated that his sisters departed Sri Lanka in October 2013 (also legally) and

provided evidence to support that they were subsequently granted asylum in [Country 1] and I accept these matters, and accept they have not returned to Sri Lanka.

21. The applicant claimed that the authorities continued to question his family regarding the applicant and his sisters after they left the country. He stated the CID last visited his family in May 2018 when they briefly detained his [Relative A], by then aged about [age], releasing him after intervention from the local justice of the peace. The applicant stated the reason his [Relative A] was taken was to scare his parents and to try and get further information regarding the whereabouts and activities of the applicant and his sisters. I have given these aspects of the applicant's claims careful consideration. I initially had some doubt that the authorities would have remained interested in the applicant or his family members given the relatively low level activity in which the applicant was engaged and the passage of time since the events. However, against these matters I give weight to the overall credible nature of the applicant's evidence and to the information set out below that the authorities remain sensitive to the re-emergence of the LTTE, are focused on those interested in Tamil separatism, and are interested in the activities of Tamils in the diaspora (DFAT 2018 and UKHO June 2017). In these circumstances, and given the authorities past interest in the applicant and his sisters and their ongoing absence from the country, I consider that it is plausible that his [Relative A] would be questioned upon reaching adulthood and accept this claim.
22. I accept that the applicant and his family remained of interest to the authorities following his departure from Sri Lanka. I accept the authorities continued to ask after the applicant and that they last visited his family home in May 2018 at which time his [Relative A] was detained, questioned and later released. The applicant's evidence was that his [Relative A] has subsequently been sent to reside with his father's friend and I accept his evidence. I also accept his claims that his [sister] was sent away to study, in part to avoid the same treatment experienced by her elder sisters. The applicant stated that his family had not been visited or further harassed since May 2018 and I accept this evidence.
23. There is no suggestion that the applicant engaged in any marches or other activities either in [Country 2] or here in Australia that would attract the adverse attention of the Sri Lankan authorities, and I find that he has not done so.

Refugee assessment

24. 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

25. 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.
26. I have accepted above that: the applicant was imputed with a pro-LTTE political profile arising from his Tamil ethnicity and participation in the march of May 2012; he was subjected to treatment amounting to serious harm in the past for these reasons; at the time of his departure from Sri Lanka he was actively of interest to the authorities; and his family remained subject to monitoring and harassment from the authorities after the departure of he and his sisters from the country with the most recent visit being May 2018. However, even accepting these matters, I have to consider whether he faces a real chance of harm on return to Sri Lanka in the future.
27. The current Sirsena government has publicly committed to allow freedom of speech and end surveillance of NGO workers and journalists (DFAT 2018). Nevertheless, there are recent examples in which the authorities have summoned and questioned human rights defenders in the North. Further, civil society groups in the North, report that while operational conditions have improved under the current government, surveillance had increased in 2017, particularly in relation to politically sensitive issues (missing persons, land release and memorial events). DFAT (2018) acknowledges reports of harassment and monitoring of government critics, particularly activists involved in protests and there are reports by Freedom House of harassment against student leaders and activists. DFAT considers that generally, the government in Sri Lanka increasingly tolerates political dissent, but notes that limits still apply.
28. Information contained in recent reports from the UKHO (June 2017) and DFAT (2018) also indicates that the overall situation for Tamils has improved since the new government came into power in 2015. The UKHO now assesses that being of Tamil ethnicity alone does not of itself warrant international protection. Nonetheless, as flagged above, both DFAT and the UKHO consider that Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. The UKHO assesses that the government's present objective is to identify Tamil activists, including those in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state and that they are focused on preventing both the resurgence of the LTTE or any similar Tamil separatist organisation and the revival of the civil war within Sri Lanka. The UKHO (June 2017) states that in post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan government.
29. The UKHO (June 2017) and DFAT (2018) indicate that the Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of individuals who have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals whom the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities. The UKHO reported that the 'watch list' comprised minor offenders. There are some reports that those on 'watch lists'

have been detained on return to Sri Lanka, but these reports have not been verified. It is accepted by both the UKHO and DFAT that those on watch lists are likely to be monitored on return to their homes.

30. In general, the UKHO (June 2017) assesses that past membership or connection to the LTTE of itself, would not warrant international protection. However, protection may be warranted where individuals have or are perceived to have had a significant role in the LTTE or if they are, or are perceived to be, active in post-conflict Tamil separatism, if they would otherwise be considered a threat to the state, or if they are on a 'stop' list, as described above, at the airport. However, the information before me, including from the UKHO also supports there is evidence that the security forces continue to detain individuals who they suspect of having LTTE connections and the UKHO emphasises that each case, and each applicant, should be considered on its own facts and on the evidence provided. The UKHO advises that any risk for those in whom the Sri Lankan authorities are or become interested exists not at the airport, but after arrival in their home area, where their arrival will be verified by the CID or police within a few days. This is supported by information from DFAT (2018) that into 2017 there were reports of regular visits, phone calls and surveillance by the CID to failed asylum seekers/returnees in the North. The UKHO also states that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.
31. DFAT (2018) assesses that the risk of torture perpetrated by military, intelligence or police forces has decreased since the end of the civil conflict. Nevertheless, DFAT acknowledges recent publications from various humanitarian agencies suggesting that torture in Sri Lanka continues, including against members of the Tamil community and primarily perpetrated by the police. DFAT cites the October 2016 HRCSL submission to the UN Committee against Torture in which it was claimed that 'torture to be of routine nature... practiced all over the country, mainly in relation to police detentions' and that police use torture during interrogation and arrest regardless of the nature of the suspected offence. The UN Special Rapporteur on human rights and counter-terrorism concluded in July 2017 that 'all of the evidence points to the conclusion that the use of torture has been, and remains today, endemic and routine, for those arrested and detained on national security grounds. Since the authorities use this legislation [the PTA] disproportionately against members of the Tamil community, it is this community that has borne the brunt of the State's well-oiled torture apparatus.' The UKHO in 2017 reported a notable reduction in torture complaints, though highlighted new cases of Tamil victims where police had resorted to violence and excessive force to extract confessions (DFAT 2018 and UKHO June 2017).
32. DFAT (2018) notes that the ITJP cited 24 cases of torture in 2016 and 2017 and refers to a November 2017 Associated Press article which claimed there had been 52 incidents of torture, including the cases reported by the ITJP. However, many of these reports had been hard to verify. DFAT (2018) notes that verification of torture claims is complex as many allegations are made anonymously, often to third parties. They often involve individuals who are outside Sri Lanka and, in some cases, individuals who are in the process of seeking asylum. DFAT assesses that reports of torture carried out by Sri Lankan military and intelligence forces during the conflict and in its immediate aftermath are credible. However, DFAT is unable to verify allegations of torture in 2016 and 2017. On the totality of the independent information before me, including the reports from DFAT, the UKHO and various humanitarian organisations, I conclude that while the risk of torture has decreased, there remains a risk of such treatment by the authorities in cases where individuals are perceived to pose a threat to national security or to the unitary Sri Lankan state.

33. The United States Department of State (USDOS) reported in 2016 and 2018 that the major human rights problems reported the most significant human rights problems were incidents of arbitrary arrest, lengthy detention, surveillance, and harassment of civil society activists, journalists, members of religious minorities, and persons considered to have links to, or sympathize with the LTTE. Severe prison overcrowding and lack of due process remained problems, as did some limits on freedoms of assembly and association, corruption, physical and sexual abuse of women and children (USDOS 2016 and 2018). I have also taken into account reports that were before the delegate concerning the mistreatment of some Tamils at the hands of the Sri Lankan authorities and reports, including from ITJP, that noted that human rights violations by the security forces continue with impunity and Tamils with tenuous links to the LTTE or low-level cadres continued to be targeted, along with their families (ITJP 2017; Freedom from Torture 2016; and UNHRC 2016).
34. In this case the applicant's actual profile is low level. He attended one march and has not claimed that he or anyone else in his family were involved in the LTTE. A fair amount of time has now passed since the events of May 2012 and I note that country information generally indicates an improved human rights situation in Sri Lanka for Tamils since the Sirisena government came to power in 2015. However, I have accepted the applicant was nonetheless targeted by the CID in the past, and attributed with a pro-LTTE political opinion and involvement in separatist activity due to his participation in the 2012 march and his Tamil ethnicity. He left the country very shortly after the events of May 2012, and at a time when the CID were still interested in determining his role in the march as well as wanting him to identify other participants in the event. His family continued to be targeted by the CID, with regular visits, harassment, and monitoring by the CID, leading his sisters to depart the country and ultimately resulting in the brief detention of his [Relative A] in May 2018, during which time the authorities asked for information about the applicant and his sisters. His [Relative A] and sister have since moved away from the family home to avoid harm. Having regard to these matters, and noting independent information that returnees are contacted by the CID on arrival, I accept that on the applicant's return to Jaffna there is real chance he will be visited, receive phone calls and be monitored by the CID. While this does not of itself amount to serious harm of the kind contemplated by the Act, having regard to his particular profile and noting the continued interest in the applicant and his family members, even taking into account his relatively low level activity and the passage of time, I accept he nonetheless faces a real chance of being detained and questioned by the CID on the basis of his past imputed pro-LTTE profile and/or separatist activity and his ethnicity.
35. DFAT (2018) have assessed that low profile supporters of the LTTE who come to the attention of Sri Lankan authorities would be detained and that Tamils with imputed LTTE links reported police monitoring and harassment in 2016. The UKHO (June 2017) have reported that the authorities are focused on identifying Tamil separatists and are interested in activities undertaken in the diaspora. The UKHO also cites evidence that the security forces continue to detain individuals who they suspect of having LTTE connections, and indicate that each case should be considered on the evidence provided. They have stated that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection. Whilst DFAT have stated that they are unable to verify allegations of torture in 2016 and 2017, the weight of country information indicates that torture against detainees (particularly Tamils suspected of certain LTTE links) continues to be a problem in Sri Lanka. I consider that in all of the applicant's circumstances, there is a real rather than remote chance, that he will face treatment amounting to serious harm during any period of detention.

36. Considering his particular circumstances and the country information as a whole, I find that there is a real chance that the applicant will be persecuted by the Sri Lankan authorities for the essential and significant reasons of his imputed political opinion and Tamil ethnicity. I find the persecution would involve serious harm (including a threat to his liberty, significant physical harassment and significant physical ill-treatment) and systematic and discriminatory conduct. DFAT (2018) have stated that Sri Lankan security forces maintain effective control throughout Sri Lanka and individuals are unlikely to be able to relocate internally with anonymity. As the harm feared is from the state, I find that the real chance of persecution relates to all areas of Sri Lanka and that effective protection measures are not available to him. He cannot be required to modify his ethnicity and his past imputed political profile is an immutable characteristic, as such I find that there are no reasonable steps available to the applicant to modify his behaviour to avoid a real chance of harm. His fear of persecution is well-founded.

Refugee: conclusion

37. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

Applicable law

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.