



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06822

Date and time of decision: 7 August 2019 12:40:00
N Micallef, Reviewer

Decision

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

Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan citizen of Tamil ethnicity whose family originated from Vavunyia in the Northern Province of Sri Lanka. He arrived in Australia [in] May 2013 as an unauthorised maritime arrival. On 28 April 2017 the applicant lodged an application for a sub-class XE-790 Safe Haven Enterprise Visa (SHEV), claiming to fear harm in Sri Lanka on the basis of his ethnicity and imputed political opinion. After interviewing the applicant on 13 December 2018, a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this visa on 8 July 2019, on the grounds that Australia did not owe protection obligations to the applicant.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
3. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims from his SHEV application and attached Statement of Claims (SHEV statement) can be summarised as follows:
 - He is a Tamil who was born in [Location 1], in Vavunyia, in the Northern Province of Sri Lanka in [Year]. [A Sri Lankan Army (SLA) facility] was close to their house.
 - He witnessed shootings and the civil war as a child, and missed out on school because of the dangers.
 - His father was an active member of the Liberation Tigers of Tamil Eelam (LTTE), who was captured and imprisoned for a year in 1988 and then escaped from prison in 1989. The SLA burnt down their house in 1989 and the family went into hiding.
 - The family stayed alive during the fighting but in 1990 his parents took him and his siblings by boat to India, where they lived as refugees in the [Location 2] Refugee Camp. He departed from there for Australia in 2013.
 - In 2006 his [brother] and sister took their families back to Sri Lanka. They made contact with his family one month later and then were never heard from again. They are presumed killed because his brother was also an active member of the LTTE.
 - Life in India was restrictive, deprived and dangerous. They had poor sanitation, poor utilities, curfew restrictions and he feared for the safety of his three young daughters in the male dominated camp. India does not allow them permanent residency or citizenship.
 - He arrived in Australia with his wife and children and father-in-law, but is now separated from them. They have made their own separate protection visa application. He hopes to be reunited with them.
 - In Sri Lanka he will be imprisoned, tortured or killed, because of his family connection to the LTTE and because many Tamils are treated in this way upon return, including his own family members.

- He has no family or connections in Sri Lanka, having lived in India so long, and has nowhere to go and no one to help him.

Factual findings

Identity

5. Although the applicant had no identity documents from Sri Lanka, I am willing to accept that in displacement of war and moving to India as a young child, he may no longer have any such documents. I note that his claimed identity and origins are recorded on the Tamil Nadu Identity Card for Refugees from Sri Lanka and other documents from India, and that these details have been consistently claimed since arrival in Australia. I am willing to accept the applicant's identity is as claimed, and as clarified by the delegate, and that he is a Sri Lankan citizen, and a Tamil, from Vavunya in the Northern Province of Sri Lanka, where he was born in [Year].
6. There is no claim or evidence before me that the applicant has any present rights of citizenship or return entry to India and indeed he stated he did not, which is consistent with DFAT's report that Sri Lankan Tamils who fled the Sri Lankan conflict to Tamil Nadu have no pathway to citizenship in India.¹ I find that Sri Lanka is the receiving country for the purpose of the review.
7. I accept that the applicant grew up in Vavunya in civil war and experienced the dangers and displacement of that era, including having to stay home from school and sleeping in a bunker at night; and that in 1990 his parents took the family to Tamil Nadu in India for safety. I accept that since 1990 the applicant remained living in Tamil Nadu, in the [Location 2] Refugee Camp, until he departed for Australia in 2013, with his wife and three daughters. I accept that his father died of a heart attack in India when the applicant was a young child, and I accept the claims of the restrictions and hardships of life in the refugee camps in India.
8. I note that documents from India describe the applicant as a "refugee", namely, a Refugee Certificate issued in 2009, and a Tamil Nadu identity card entitled "Refugees from Sri Lanka", apparently issued, judging by the family ages listed comparative to those on the Refugee Certificate, a year or two earlier. In answer to direct questions, his SHEV application claimed he had been granted refugee status in India with his parents in 1990. These documents appear to have been issued by and for the purposes of the authorities in the State of Tamil Nadu, where the applicant has lived since 1990. They make no reference to the applicant's claims or the basis on which he was identified as a refugee and I do not consider they have any probative value on the question before me as to whether the applicant satisfies the criteria for a protection visa, including whether he is a person in respect of whom Australia has protection obligations because he is a refugee, or because there is a real risk that he will suffer significant harm.

Wife and children - Visa

9. The applicant confirmed at the SHEV interview that he has been separated from his wife and daughters (whom I note are now aged [Ages]) since 2015, that they had their own separate application, and that his SHEV application was for him alone. His migration agent asserted in the interview that the applicant's wife and children had been granted their "five-year visas",

¹ Department of Foreign Affairs and Trade ("DFAT"), "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064

and submitted to the delegate that this was significant for the applicant's future; and, if sent back, he could no longer visit his family.

10. On the applicant's evidence, he and his wife separated in Queensland in 2015 and around the time she obtained a court-ordered temporary protection order against him, which he stated was later extended by a year.² They remained separated at the time of the SHEV interview in December 2018, although he stated that the protection order had by then expired, however he stated that they were planning on reuniting. The applicant demonstrated no concrete plans in support of his claimed intention to get back together with his wife and daughters, and the timeframe varied between sometime in the New Year to when his "case matters" were finished. There is no submission or evidence before me that he has subsequently reunited with his wife and children. On his evidence they live in Queensland, far away from his home in South Australia, and maintain separate finances and he does not provide them with any financial support. Although he stated they speak regularly on the phone, he only saw them for several days' visit in June 2016 and then Christmas 2017.
11. The applicant has not claimed protection on the basis of being a member of the same family unit as his wife and/or children, and because they were not included as applicants in his application there is nothing on the face of his application to suggest he was seeking to rely on family membership. Nor has he claimed that he is dependent upon any of them, or they on him. There is no evidence before me as to the basis or bases on which his wife and daughters were granted their visas, or that their visas are of the same class as that sought by the applicant. Although I accept that he and his wife were married in India, on the evidence before me I am not satisfied that the definition of 'spouse' in s.5F of the Act is met, as I am not satisfied that they are living together or not living separately and apart on a permanent basis, or that they both have a mutual commitment to a shared life as a married couple to the exclusion of all others, or that the relationship between them is genuine and continuing. There is no evidence before me that his oldest daughter is a dependent child of the applicant, as defined in the Migration Regulations 1994. The delegate's decision was made almost seven months after the SHEV interview. On the review material before me, no further information was provided by the applicant or on his behalf to the delegate before her decision. Nor has any further information or submission been provided to the IAA. I am not satisfied that the applicant satisfies s.36(2)(a) or (aa) of the Act as I am not satisfied that he is a member of the same family unit as a non-citizen whom the Minister is satisfied is a refugee or is at real risk of significant harm, and who holds a SHEV.

Refugee assessment

12. 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.

² The delegate's decision referred to "[details deleted] - applicant subject to a domestic violence application". This information is not in the review material before me. However, as the applicant's own evidence, which I have accepted, was that he was subject to a court order to be separated from his wife and children, and that it was an offence to see them before expiration of the order, and he did not refute the delegate's reference during the interview to Queensland police having got a temporary protection order to protect his wife and child, I have not sought this material.

Well-founded fear of persecution

13. 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.

Tamil Ethnicity/ LTTE Association

14. Accepting the applicant's evidence that he grew up very close to [an SLA facility], which the ITJP reported was located in the town of Vavunya, I find that the applicant grew up in an area under Sri Lankan government control, not under LTTE control, albeit that other parts of Vavunya district, particularly the northern areas in the Vanni, were areas of LTTE control during the conflict.³

15. The applicant's evidence at SHEV interview was that the family left for India because life was bad in Sri Lanka, particularly with the SLA camp headquarters close by, and his father had problems and was tortured. I have taken into consideration country information before me of the prevalence of arbitrary and lengthy detention and physical mistreatment, during the civil war, particularly of Tamils, under the *Emergency Regulations* and *Prevention of Terrorism Act* (PTA), and that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war, reflecting both that LTTE members and supporters were almost entirely Tamil, and that support of the LTTE was sometimes imputed simply because of Tamil ethnicity.⁴ I am willing to accept that life for Tamils during the war, particularly in the northern areas and for those near SLA camps, was difficult and dangerous, with the Tamil civilians vulnerable to human rights violations by the security forces; and in that context, I am willing to accept that the applicant's father was once detained by security forces in about 1988 for questioning on LTTE suspicions and I am willing to accept that he may have suffered physical mistreatment at that time. However, the

³ [Source deleted].

⁴ DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "DFAT Country Information Report, Sri Lanka", 24 January 2017, CISED50AD105; Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; United Nations Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, CIS38A80123313; Landinfo, "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and Northern Province", 1 December 2012, CIS25286; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345

applicant's evidence of the details surrounding the detention and its aftermath was vague, shifting and unpersuasive, even having regard to the applicant's youth at that time, and the lapse of time since then.

16. The applicant's evidence about the length of incarceration varied from one year, to six months, to about three months. The SHEV statement claim that his father was an active LTTE member was not supported by the applicant's SHEV interview evidence, as when asked whether any family members were members of the LTTE the applicant made no statement to any effect that his father had been such but, instead, when asked more than once, stated first that he was not stating that his brother was an LTTE member, as he did not know if he was or not; and later stating that two uncles were LTTE members, which he knew because he saw them come and go from their house with guns and on their bikes. The applicant made no mention of his father in this context, and there is no credible evidence before me detailing any activities his father did for the LTTE or any support he gave. I do not accept that his father was an active LTTE member as claimed, or an LTTE supporter, and I do not accept that his father was detained on the basis of being an actual LTTE member or supporter. The SHEV statement claim that his father escaped from prison was inconsistent with the applicant's interview evidence that he was released; and moreover I do not consider his claim that after his father's escape they moved elsewhere to hide from the army before going to India to be credible, in light of his evidence that it was to an uncle's house in Nellkulam that the family moved, less than 25 km from T, and with whom they remained living for at least six months before leaving for India in June 1990. In those circumstances, I consider it implausible and improbable that authorities would not have been able to locate the family, if indeed the applicant's father was wanted by authorities, as a claimed escaped LTTE member.
17. I am willing to accept that the applicant's father was detained for questioning by the SLA in about 1988 and then released by the authorities after enquiries were satisfied. I am willing to accept that the applicant's mother may have sustained a leg injury during an altercation with authorities when her husband was being arrested. I consider it improbable that a broken leg required three months hospitalisation, during which time the children were left at home alone apart from the neighbours' care; and on his evidence that his father was released before his mother returned from hospital, I do not accept that his father's detention was any longer than a few weeks. I find that this detention for questioning was an experience shared by many Tamils, with many if not most Tamil men in Northern Province in the war suspected by the authorities of being LTTE supporters or having some sort of LTTE association. I am willing to accept the applicant's home was destroyed, however, I do not accept that the SLA burned it down after any escape by his father, rather than it having been a general casualty of the conflict, which the applicant described in the SHEV statement as being very close to their home, and that they sometimes slept in bunkers. I find that they moved to Nellukulam for its relative safety from the fighting, because of the conflict, before going to India in about June 1990 for similar reason.
18. I have doubts, and do not accept, that the applicant's uncles were armed LTTE members, with one having gone missing and one having been detained and then beaten to death by the army and two female relatives killed by the SLA as claimed, noting that these claims were not raised at all in the SHEV statement, which I consider they more plausibly would have been, if true, being the occasion of turning his mind for application for protection, with migration agent assistance, to the reasons why he would fear harm in Sri Lanka for an imputed political opinion of LTTE support. I am willing to accept that distant family members may have been briefly detained and questioned, or died or gone missing during the conflict of war, however, I do not accept the claims that any family members were LTTE members or personally targeted by the authorities for that reason.

19. I am willing to accept that the applicant did not have personal contact with his two older siblings after they returned to Sri Lanka in about 2006, however, I am not persuaded that this was because they had 'disappeared' after returning there because of any real or imputed LTTE association. Although he had claimed in the SHEV statement that his older brother had been an active LTTE member like their father, this likewise, was not supported by his SHEV interview evidence, which was effectively that he was not stating that his brother was an LTTE member, as he did not know if he was or not; and he gave no evidence of any activities when asked what made him think his brother was (an LTTE member) or indeed any other explanation. I do not accept that his brother, or indeed his sister, had any LTTE involvement at any stage before or after their departure from Sri Lanka in 1990 or after return there in 2006. Moreover, in the claimed context that they had both married, with children, and returned to Sri Lanka with their separate families, to their respective in-laws, I find it highly improbable and implausible that two entire families, including children, would vanish with no trace by being taken by any Sri Lankan authorities, for any reason. I do not accept that either of them was killed by the authorities or any other actor for any imputed political opinion, and I do not accept that they were taken and remain detained on that basis.
20. I have had regard to the applicant's representative's oral submissions regarding his fears in Sri Lanka, and to country information reports attached to the applicant's SHEV application, reporting on concerns of ongoing persecution of Tamils and human rights abuses in Sri Lanka since the end of the war. In light of such articles, and that the applicant has been absent from Sri Lanka since being a child there in time of war, I accept that he may have subjective fear for his future, as a Tamil, if now returned to Sri Lanka. However, for the reasons described below I do not consider such a fear to be objectively well-founded.
21. Whilst country evidence before me⁵ indicates that during and after the civil conflict Sri Lankan authorities were focused on identifying and arresting, for prosecution or rehabilitation former LTTE members or supporters, and many Tamils with any suspected LTTE links could be monitored or detained, I note that many years have now passed since the end of the civil conflict and the LTTE no longer exists as an organised force. Moreover, since the change of government in 2015, the current government of President Sirisena has prioritised human rights and reconciliation, and there has been significant progress, albeit slow in some areas, towards the stated priorities including review and release of detainees including Tamils held under the PTA, and with only very low numbers of people remaining in LTTE-rehabilitation detention and the program expected to end upon their completion. The *Emergency Regulations* were repealed in 2011, and the PTA is now suspended, pending its reform (apart from isolated, publicised arrests and charges in 2018 for political assassination plots). There has been continued significant improvement in the security situation in Sri Lanka, particularly in the north and east; the military's involvement in civilian life has greatly reduced and there has been

⁵ DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "DFAT Country Information Report, Sri Lanka", 24 January 2017, CISED850AD105; ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; United Nations Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, CIS38A80123313; Landinfo, "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and Northern Province", 1 December 2012, CIS25286; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; United Kingdom, ("UK") Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, CISED850AD3780; United States ("US") Department of State, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; US Department of State, "Country Reports on Human Rights Practices for 2018 - Sri Lanka", 13 March 2019, 20190314103240; Daily Mirror, "CID permitted to detain Indian national under PTA", 27 September 2018, CXBB8A1DA36347; Sunday Observer, "Assassination plot against Sumanithiran: Indictments to be served in Colombo High Court tomorrow", 29 July 2018, CXBB8A1DA36303

continued return of military-seized land to owners since the end of the war; Tamils now have a substantial level of political influence in Sri Lanka, and their inclusion in the political dialogue, which extends to former LTTE members, has increased since the change of government in 2015 when the TNA won 16 seats in national Parliamentary elections and the TNA's leader was appointed as the national opposition leader. Although interview submissions made brief reference to Sri Lanka then being in a political crisis that might change its situation, the US State Department reports that the political ruction between the President and Prime Minister was resolved in December 2018, with the President reinstating the Prime Minister; and there is no country information before me that the reform and reconciliation agenda of the Sirisena government has ceased or changed, or that any opposition party will overturn the agenda or reverse any reforms if successful in future presidential and parliamentary elections, due in 2019 and 2020 respectively.

22. Assessment reported by the UK Home Office indicates that the security focus of the authorities in Sri Lanka now is against those people who are, or are perceived to be, a present threat to the single, unitary state of Sri Lanka, or its government, because of their real or perceived significant role in relation to post-conflict Tamil separatism, and/or resurgence of hostilities, with such 'significant role' including the LTTE's former leadership, or former LTTE members suspected of terrorist or serious criminal acts during the conflict or to have provided weapons or explosives to the LTTE. Being of Tamil ethnicity, or having a past connection to the LTTE, would not of itself warrant international protection as a refugee without additionally having, or being perceived to have had, a significant role in the LTTE or post-conflict Tamil separatism.
23. Whilst I have accepted that the applicant's father was detained and questioned by the authorities on LTTE suspicions in approximately 1988, before being released, I have not accepted that the applicant's father or brother or any other family members were LTTE members or supporters, or had any role in the LTTE. I am not satisfied that the applicant's association to his father's detention and questioning would now, more than 20 years after that incident, and more than 10 years after the end of the war, impute the applicant with any political opinion of LTTE support, or post-conflict Tamil separatism. There is no credible evidence before me that the applicant, who was only [age] years old when they left Sri Lanka and moreover grew up in an area that was not under LTTE control but under control of the Sri Lankan government, had any involvement in the LTTE. I am also not satisfied that the applicant's ethnicity or origin or gender would impute him with any political opinion of LTTE support, or post-conflict Tamil separatism or as being of adverse concern to the national security of Sri Lanka, upon return to Sri Lanka or in the reasonably foreseeable future.
24. DFAT maintains that monitoring of Tamils in day-to-day life has decreased significantly under the current government, and that some members of the Tamil community had reportedly described a positive shift in the nature of interactions with authorities and continued to report that they felt more empowered to question monitoring activities that do occur. Whilst there are continuing reports in the country information before me of surveillance, harassment and monitoring of Tamils, particularly of men in the north and east, by security forces, the information indicates that those most at risk of this include former LTTE members and cadres, particularly of high-profile, and their families, and those who attend public gatherings and protests particularly as associated with politically sensitive issues, including missing persons, land release and memorial events, or anti-government protest activities, and particularly the organisers of these. DFAT also assesses that Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile, and notes that high profile leaders of pro-LTTE diaspora groups who have participated overseas in public demonstrations supporting a separate Tamil state in Sri Lanka may come to adverse attention, and country information indicates that Sri Lankan security intelligence extends to activities in

the diaspora.⁶ There is no claim or credible evidence in the review material before me that the applicant has ever been involved, either in India or in Australia, in any activities or groups associated with post-conflict Tamil separatism or resurgence of hostilities in Sri Lanka, or any politically sensitive activism, or that he intends to or would become involved in any such groups or activities if he were to return to Sri Lanka.

25. On his SHEV interview evidence, the applicant has not been convicted of any crime in Sri Lanka or elsewhere. I am not satisfied on any evidence before me that the applicant has ever been involved in any activities that would cause him to be imputed by the authorities in Sri Lanka to have a profile of adverse concern to the national security of Sri Lanka or to hold any political opinions of pro-Tamil separatism. I am not satisfied that there is a real chance that the applicant would be imputed with any such adverse profile upon return to Sri Lanka or in the reasonably foreseeable future.
26. I accept from the review material that reports of disappearance, arbitrary detention and mistreatment including torture, perpetrated by Sri Lankan police and security forces, continued after the war's end.⁷ However, the country information indicates that although torture might be carried out by police in Sri Lanka in regular criminal investigations, it was not ethnically biased, was primarily due to outdated policing methods, and was not endorsed by senior leadership or government; and further that descriptions of "torture" were loose and varied from forceful questioning or threats to severe ill-treatment. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reported, from a visit to Sri Lanka in early 2016, that the risk of torture for Tamils, and the severity of torture inflicted, increased when there was a perceived threat to national security, and this particularly affected Tamils arbitrarily arrested or held for lengthy detention under the PTA, but was less prevalent than it had been in the war. As previously noted the PTA has now been suspended, albeit not repealed. DFAT recently reported that less than half the reports of torture in 2016 and 2017 cited by an Associated Press news article had been documented by the ITJP, and DFAT had not been able to verify the anonymous claims. DFAT and sources reported by the UK Home Office indicate that, although once prevalent, 'white van abductions' in the sense of being taken and never seen again—presumed dead, are now rare and mostly a thing of the past, and that more recent reports of people taken in unmarked vehicles have resulted in them discovered as documented and under arrest and detention by police, who had not followed proper protocol during arrest procedures; and that such instances have largely involved those with previous LTTE profile or current anti-government profile. This is echoed in the country material accompanying the SHEV application. Overall, the country information indicates that the incidence of arbitrary detention and abuse, including extra-judicial killings or

⁶ DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849

⁷ DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, CISED50AD3780; Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project Sri Lanka ("ITJP"), "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; [reference deleted]; US Department of State, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; US Department of State, "Country Reports on Human Rights Practices for 2018 - Sri Lanka", 13 March 2019, 20190314103240; United Nations (UN) Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, CIS38A80123313; UN Human Rights Council, "Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka", 23 July 2018, CIS7B839419490; DFAT, "UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239

disappearance, that had particularly affected Tamils under the PTA, has significantly reduced over recent years and is no longer state-sponsored, with reported new cases of physical mistreatment against Tamils referring to a very small and decreasing number of people. I consider that the chance of the applicant being subjected to any kind of abduction, arbitrary detention or physical mistreatment of any kind by the authorities or any other actor on the basis of his ethnicity or gender or origins or his relationship to his father to be extremely remote and not a real chance.

27. DFAT assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity (with the low risk characterised as although aware of such incidents, there is insufficient evidence to conclude they form a pattern), identifying a higher risk for Tamils who were former LTTE combatants or those involved in forced recruitment to the LTTE or in mistreatment of Tamil civilians. There are no official laws or policies of discrimination on the basis of ethnicity and civil servants must obtain proficiency in both Sinhala and Tamil, the second official language; and DFAT assesses that historic language constraints and conflict-related educational deficiencies account for limited Tamil employment in the government sector rather than official ethnic discrimination. Whilst I have accepted that his father was detained and mistreated by authorities in 1988 and his mother's leg injured, I note that this was during the civil war, many years ago, and I do not find it indicative of the treatment that the applicant might face in Sri Lanka upon return or in the reasonably foreseeable future, in a country which has had, as I have previously described, significant change and improvement since that time.
28. I am not satisfied that the applicant would face a real chance of any harm upon return to Sri Lanka or in the reasonably foreseeable future on the basis of his ethnicity or gender or origins in the Northern Province or his association to his father or any combination of those factors.

Returnee, with no family

29. Although I have not accepted that the applicant's elder siblings and their families were 'disappeared' for political reasons, I do accept that he may not have contact with them or know their whereabouts. Accepting that the applicant's wife and children were granted a temporary visa in Australia and that his mother and younger brother remain in India, I accept that he would return to Sri Lanka without any immediate family there. He never having had a passport, I accept that the applicant's return to Sri Lanka would be facilitated with temporary travel documents, from which he might be identifiable to Sri Lankan authorities at return as a failed asylum seeker. Whilst I have, later in this review, accepted that the applicant would undergo background checks and identity processing by Sri Lankan authorities at the airport at return, DFAT reports this routinely applies to all returnees who return on temporary travel documents. Whilst there have been some reports of mistreatment of returnees and failed asylum seekers, these are of people with actual or imputed profile of security concern to the authorities; and otherwise, reports of Tamil arrests at the airport have predominantly been related to *Immigrants and Emigrants Act 1949* (I&E Act) matters, discussed later below, or of people with LTTE or adverse security profile.⁸ DFAT assesses that returnees are treated according to the

⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OGE7028826; DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064; Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; Colombo Page, "Sri Lanka police hope to complete investigations on former LTTE women sea tiger leader soon", 7 March 2015, CXBD6A0DE2613; Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamilnet, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Tamilnet, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065

standard airport procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport. DFAT notes that thousands of asylum seekers have been returned to Sri Lanka since 2008, including from Australia, with relatively few allegations of torture or mistreatment, either at the airport or after return home. In 2017 DFAT assessed the risk of harm for the majority of returnees as low and continuing to reduce and the 2018 report makes no suggestion that the risk to returnees has been elevated.⁹ Overall, the country information before me does not support that for a returnee to Sri Lanka, having lived in India or Australia or having claimed asylum here would, of itself, lead to any imputation that the person was a supporter of the LTTE or separatism or of other adverse risk to the national security of the state. In the applicant's circumstances, as I have found, I am not satisfied that he would or might be imputed with an adverse profile now or in the reasonably foreseeable future as a returning Tamil failed asylum seeker and I am not satisfied that there is a real chance that he would be subjected to any torture, arbitrary arrest or arbitrary detention or physical mistreatment on that basis.

30. I take into account anecdotal evidence cited by DFAT, from 2015 and 2017 sources, that some failed asylum seeker returnees to the north had received regular visits and phone calls from police, for purposes other than for registration. However, I also note reports that only 0.3 per cent of refugee returnees interviewed by UNHCR in 2016 indicated that they had any security concerns following their return. In light of my findings that the applicant would not be imputed with any profile of adverse concern and the country information previously discussed of significantly decreased monitoring of Tamils generally, and that systematic surveillance of returnees had reportedly decreased, I consider in all the circumstances that any such visits or contact for questioning that might occur, would be no more than very low-level, routine and limited to his initial return.
31. I accept that in the applicant's circumstances of limited close familial support in Sri Lanka and with such a long absence from there, the applicant may experience some challenges in reintegrating back into Sri Lankan life. DFAT reports that challenges that may be faced by returnees from Tamil Nadu include social stigma and linguistic challenge due to slight dialect differences between Indian and Sri Lankan Tamil, contributing to practical challenges in obtaining suitable employment and housing and meeting the cost of basic needs previously provided by the Tamil Nadu refugee camps in India. Lack of land ownership documents can hinder land reclamation. However, DFAT also indicates that difficulties in securing employment and housing in the north and east, where many returnees choose to return, is also attributable to the generally more limited job availability there, and also to delays in obtaining necessary identification documents, which can inhibit access to social welfare schemes, and employment, educational, or bank account requirements, but that these are due largely to bureaucratic inefficiencies rather than official discrimination. DFAT and UK Home Office information indicate that some returnee refugees from India, and voluntary returnees, may receive some re-integration assistance, including monetary funding for a limited period, and the DFAT report suggests that some social stigma may be attributable to that people in some communities resent the financial support provided to refugee returnees.¹⁰ However, DFAT further noted that the assistance to refugee returnees was minimal and, moreover, that failed asylum seekers only receive limited reintegration assistance. The applicant's return to Sri Lanka would not be as a refugee from India. DFAT also attributed some societal discrimination of returnees

⁹ DFAT, "DFAT Country Information Report, Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064

¹⁰ DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, CISED50AD3780 (citing International Organization of Migration)

to a sense of mistrust of returnees arising from continued surveillance of them by authorities, however, as already noted, I am not satisfied that any monitoring of the applicant, if it occurred, would be prolonged or any more than very low-level and routine.

32. Whilst it is improbable, and I am not satisfied, that there are no remaining extended family or friendship connections at all in the land where he was born and lived until age 12, nevertheless, I accept that the applicant has no immediate family in Sri Lanka as social or support network and would return to a somewhat unfamiliar environment, and may find this challenging, at least initially. I accept that the minimal opportunity of visiting his wife and children might be hard for the applicant, however, on his evidence about the family separation their visits have only been rare since the separation in 2015 and they have since then lived very far apart. There is no evidence before me that the telephone contact they have had in that time could not be maintained in the future.
33. I note the applicant currently has no Sri Lankan identity documents, however, given that he was born in Sri Lanka and attended primary school there, I am not satisfied that he is completely undocumented or unregistered in Sri Lanka such that any bureaucratic delay in obtaining a National Identity Card or identity documents in Sri Lanka would be unduly prolonged, if it were the case that he did not apply for such in Australia, of which there is no indication that he could not, as DFAT notes that Sri Lankans residing overseas can apply for identity documents from any Sri Lankan overseas mission. I note that the applicant advised in the SHEV interview that he understands both versions of Tamil and indicated in the SHEV application that he reads and writes in Tamil, and also speaks some English. I accept that the applicant is not highly educated; however, although financially supported in Australia by Centrelink I note he had a previous long work history in India. Although he claimed he stopped [work] in India due to health issues and shoulder pain in 2007, there is no medical evidence before me in the review material regarding any health issues at all or any such impediment to work and moreover, I note his claim that he had continued working until 2013 as [an Occupation]. He has demonstrated his resilience in living apart from his family, living with others in a shared house in South Australia. I am not satisfied that the applicant would not have any ability to find any employment in Sri Lanka to support himself. He is an adult man and in all the circumstances, despite his lack of familial support in Sri Lanka and long absence from there, I am not satisfied there is a real chance that his capacity to subsist would be threatened or that he would be unable to access employment and shelter. In all of the applicant's circumstances, I am not satisfied that any social stigma the applicant might face as a returning Tamil failed asylum seeker, if any at all, would be any more than low-level and for any more than an initial, limited period.
34. I am not satisfied that any described low-level official monitoring or societal discrimination, as a returning Tamil failed asylum seeker, that the applicant might experience would constitute or lead to significant physical harassment or ill-treatment of the applicant, or threat to his life or liberty, or significant economic hardship that would threaten his capacity to subsist, or denial of access to basic services or of capacity to earn a livelihood of any kind, where the denial would threaten the applicant's capacity to subsist. I am not satisfied that the applicant would face a real chance of serious harm on this basis upon return to Sri Lanka or in the reasonably foreseeable future.

Illegal Departure

35. I accept that the applicant departed Sri Lanka without a passport in 1990 and, as a returnee who may be issued temporary travel documents for return, he may be identifiable to authorities in Sri Lanka as having departed illegally.¹¹
36. DFAT reports that on arrival in Sri Lanka, returnees on temporary travel documents are processed in groups by the Department of Immigration and Emigration (“DoIE”), the State Intelligence Service (“SIS”) and a unit of the Criminal Investigation Department (“CID”) based at the airport who undertake identity, intelligence and criminal checks.¹² This process might involve contact with family or neighbours or police in the home town or village and criminal or court records and can take several hours as a returnee can only leave the airport once all group members have been processed. The purpose is to establish that false identities are not being used to conceal criminal or terrorist background and existence of any outstanding court orders or arrest warrants. There is no credible evidence before me that issues of false identity or outstanding offending arise for the applicant, or that he has been involved in any pro-Tamil or separatist or anti-government-of-Sri Lanka activities in India or Australia. I am satisfied that the routine returnee enquiries would disclose that the applicant has no adverse security profile, and although he may have no family to contact in Sri Lanka, given the applicant’s profile that I have found I am not satisfied that this background check would extend beyond the several hours that a group process enquiry might normally take, or cause the applicant to be arrested or further detained. All returnees are subject to these standard procedures, regardless of ethnicity and religion, and DFAT understands that people detained at the airport are not subject to mistreatment during processing there.
37. It is an offence under the I&E Act to depart Sri Lanka other than via an approved port of departure or without a passport. Although there is some question, noting his very young age at the time of his illegal departure, DFAT reports that children over the age of 14 can be charged under the I&E Act. DFAT reports that returning suspected offenders are investigated and arrested at Colombo’s Bandaranaike International Airport and then taken before a magistrate to determine the next steps. Such individuals can remain in police custody at the CID’s Airport Office for up to 24 hours awaiting court, or if a magistrate is not available (due to a weekend or public holiday), a person may be detained for up to two days in an airport holding cell. I accept that the applicant may be questioned and briefly held at the airport, possibly over a weekend or public holiday. The applicant may be detained in crowded and unsanitary conditions while detained.
38. Country information indicates that only those suspected of being facilitators or organisers of the people smuggling are likely to be pursued, denied bail and, if convicted under s.45C of the I&E Act, be sentenced to imprisonment, and that mere passengers on a people smuggling boat are only issued a fine, as a deterrent. DFAT reports that the Sri Lankan Attorney-General’s Department, the prosecuting authority, has claimed that no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. I note that the applicant was only a passenger on the boat, a child of about 12 at the time, and there is no indication he was involved in facilitating or organising any people smuggling. DFAT reports that for passengers a guilty plea attracts a fine, varying from LKR 3,000 (about AUD 25) for a first offence up to LKR 200,000 (about AUD 1,670), and there is provision to pay a fine by instalment. If a person pleads guilty, they will be fined and are then free to go. In most cases,

¹¹ Immigration and Refugee Board of Canada (Canadian IRB), ‘LKA106007.E 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 country illegally; factors affecting the treatment, including ethnicity and religion (2015 -November 2017)’, 10 November 2017, OG020B81694; DFAT, “DFAT Country Information Report Sri Lanka” 23 May 2018, CIS7B839411064

¹² DFAT, “DFAT Country Information Report Sri Lanka” 23 May 2018, CIS7B839411064

if a returnee pleads not guilty, they are usually granted bail by the Magistrate on the basis of a personal surety, or guarantee by a family member (which might entail some waiting for the family member to arrive at court). Bail conditions including reporting are discretionary.

39. As the applicant is now an adult, there is possibility he might be charged for his childhood departure. On the applicant's evidence of his departure, there is no claim or credible evidence before me that the applicant would plead not guilty to any relevant offence under the I&E Act, and I am not satisfied on the evidence before me that there is a real chance that the applicant would be subject to a custodial sentence for any offence under that Act. If it were to arise that bail was required, while the applicant may have no close family member in Sri Lanka, I am not satisfied on the country information, or in the circumstances of his departure as a small child in time of war, that there is a real chance the applicant would be denied bail or be unable to secure bail by personal surety or other available discretionary conditions. An accused will only need to return to court when the case against them is being heard, not resolved at first appearance, and which must be in the court located where the offence occurred.
40. Based on the country information I find that the applicant may be detained and questioned at the airport, may face a period of time held in detention, be required to appear in court and be fined for breaching the I&E Act, which may be paid in instalments, and may face possible costs associated with bail or travel to court if the matter were not resolved on the first appearance. I am not satisfied that any questioning, brief detention during processing at the airport or during procedures under the I&E Act, or fine or other possible described costs should they arise, that the applicant may be subject to would reach the necessary level of being a threat to his life or liberty, significant physical harassment or ill treatment, or would otherwise constitute serious harm under s.5J(5) of the Act. In reaching this conclusion I have had regard to the nature and gravity of the possible brief loss of liberty and other potential penalties, and considered the applicant's personal circumstances, and note that there is no credible evidence before me of personal vulnerabilities or adverse security profile.¹³ Although the applicant referred to potential shortness of breath if subjected to sudden shock, there is no medical evidence before me of any health concerns for the applicant. Furthermore, country information states that all involuntary returnees are subject to the airport questioning and processing procedures on return and that all persons who depart Sri Lanka illegally are subject to the I&E Act on return and that the procedures and law are not discriminatory on its terms. In this case, the evidence also does not support a conclusion that the procedures and law are selectively enforced or applied in a discriminatory manner. I find that the airport processing, and the investigation, prosecution and punishment of the applicant under the I&E Act would be the result of laws of general application and do not amount to persecution for the purpose of s. 5J(1) of the Act.
41. The applicant stated in his SHEV interview that he feared for the safety of his daughters in Sri Lanka and for their future security there, however, he expressly did not include them in his SHEV application and noted that his wife and children had made separate application from his. Moreover, as I have accepted that his daughters have been granted visas to remain in Australia, I am not satisfied that they would return to Sri Lanka with the applicant, and I am not satisfied that this claimed fear is well founded.
42. In his SHEV application the applicant stated, in response to background detail questions, that he was Christian; and when asked in his SHEV interview what his religion was, responded that in Australia he became a Christian, Roman Catholic with his family, since 2013. The applicant raised no claim of any harm feared on the basis of his religion in any material before me and

¹³ *MIBP V WZAPN; WZARV V MIBP* (2015) 254 CLR 610

gave no evidence of the practice of his faith at all. I do not consider this to be a claim for protection made or pursued, or raised before me.

43. The delegate's decision referred to the applicant's inclusion in a list of detainees published by the Department in 2014, but noted that the applicant had not raised any claim of harm arising from that incident, and did not assess it as a claim. There is no protection claim before me made by the applicant regarding this matter, nor arising on any evidence in the review material before raised before me.
44. In all the circumstances of my consideration of the above, I am not satisfied the applicant faces a real chance of persecution for any of the reasons claimed, or any combination thereof, if he were to return to Sri Lanka now or in the reasonably foreseeable future.

Refugee assessment

45. 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.

Refugee: conclusion

46. 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

47. 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

48. 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.

49. It is possible that as a Tamil failed asylum seeker returnee applicant may face some low-level routine monitoring, some low-level societal stigma or discrimination, and/or might encounter practical challenges reintegrating back into life in Sri Lanka given the years since he has been there and his lack of close familial support and lack of opportunity to visit his wife and children. However, having regard to the information before me, including the applicant's personal attributes and the country information as previously discussed, I am not satisfied that any such monitoring, discrimination or challenges he might encounter on any such basis, and the environment to which he would be returned, would lead to the applicant to be arbitrarily deprived of his life, have the death penalty applied, or be tortured. I am also not satisfied that through any act or omission the authorities or anyone in his community or elsewhere would intentionally inflict pain or suffering, or severe pain or suffering on the applicant such as to meet the definition of cruel or inhuman treatment or punishment, nor that they would intentionally cause extreme humiliation, such as to meet the definition of degrading treatment or punishment. I am not satisfied that there is a real risk that the applicant would be subject to acts or omissions which would constitute significant harm upon return or in the reasonably foreseeable future.
50. I have found that whilst the applicant will be required to undergo returnee processing at the airport, a brief period of detention at the airport that would occur while investigations are ongoing would not exceed the several hours that group processing might usually take. I also found that he would not face a real chance of suffering serious harm while this processing or investigation occurs. I have also accepted that on return to Sri Lanka the applicant may be investigated and potentially detained temporarily up to a number of days on an I&E Act prosecution awaiting first appearance before a magistrate or, in event of any bail need arising, for resolution of any bail conditions if imposed, possibly have associated travel or bail costs, and may be imposed with a fine on a plea. I accept that the applicant may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources.
51. I am not satisfied that the treatment the applicant will experience upon return to Sri Lanka amounts to significant harm. The processing and investigation (including background checks and questioning) of the applicant, and subsequent brief detention, is for the purpose of establishing his identity, obtaining security and criminal checks clearance and then waiting for a magistrate to authorise his release, or bail to be processed. Importantly, I am not satisfied that the acts or omissions of the Sri Lankan officials during this process, including the questioning, detention and imposition of associated costs or fine, or otherwise on return to Sri Lanka, are intended to inflict severe pain or suffering, pain or suffering which could reasonably be regarded as cruel or inhuman, or to cause extreme humiliation, as is required by the definitions of torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment in s.5(1) the Act. The treatment does not consist of the death penalty or arbitrary deprivation of life or torture. I find that this treatment does not amount to significant harm within the meaning of s.36(2A).
52. I have otherwise found the applicant would not face a real chance of harm if returned to Sri Lanka. Noting that the Full Federal Court¹⁴ has set out that the "real risk" test for complementary protection is the same standard as the "real chance" test, it follows that, based on the same information, and for the reasons stated above, I am also satisfied that there is not a real risk that he would face significant harm for those reasons if returned to Sri Lanka.

¹⁴ *MIAC v SZQRB* [2013] 210 FCR 505

Complementary protection: conclusion

53. 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

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

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.