



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08581

Date and time of decision: 25 August 2020 14:53:00
J Jennings, 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. He was born in Negombo and grew up largely in [Town 1], North Western Province, and [Town 2], Northern Province, Sri Lanka. He came to Australia in 2012.
2. On 29 April 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm in Sri Lanka as a result of his support for his uncle who stood as a candidate for the Sri Lanka Muslim Congress (SLMC) in the 2011 local elections.
3. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 5 October 2016. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.
4. On 7 April 2017 the IAA affirmed the decision not to grant the applicant a protection visa. [In] June 2020 the Federal Circuit Court quashed the decision of the IAA and directed the IAA to determine the matter according to law.

Information before the IAA

5. I have had regard to the material (the review material) given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
6. The Federal Circuit Court's reasons for remitting the matter are not yet available to the IAA; however the IAA received advice from the Department of Home Affairs on 9 July 2020 in regard to the Court's decision advising that a document relevant to review was not included in the review materials given to the IAA on 7 October 2016 and that the department would now send this document and other documents that were excluded from the original review material.
7. The material subsequently provided to the IAA includes a range of material, some of which is of an administrative character and is not relevant to this review. However it is evident from this material that the applicant provided the department a number of documents and a statement as part of the 'screening' process undertaken by the department in 2013, before the visa application was lodged, and that these were translated into English. These documents are relevant to the review. They are a letter from the applicant's uncle, his uncle's election candidate card, a letter from [Mosque 1], a media article, and a statement from the applicant recounting aspects of what subsequently became his protection claims. The first two of these documents were provided by the applicant with the protection visa application and were included in the review material. They are not new information. As for the second two documents, the letter from the Mosque and the media article, it is apparent from the recording of the protection visa interview that they were given to the delegate by the applicant, or at least shown to the delegate, and were discussed at that interview. In the circumstances I do not consider these documents to be new information. Neither are their English language translations new information.¹ If I am wrong about this and these documents and their translations are new information I am satisfied that there are exceptional circumstances to justify considering them. Finally, the statement from the applicant was not in the review material, or discussed at the protection visa interview, or mentioned in the delegate's decision, and there is no other indication that it was before the delegate. Nor does it appear that the Secretary considered it to

¹ *DFS16 v MHA* [2019] FCA 944

be relevant to the review at the time the decision was referred to the IAA. I infer that it is has been provided by the Department otherwise than under s.473CB. Further, I consider it to be relevant to the review. It is new information and I am satisfied that there are exceptional circumstances to justify considering it.

8. The IAA received a submission from the applicant on 21 October 2016 comprising a statement and a number of documents. In part the applicant's statement restates the applicant's protection claims and reiterates his fear of harm in Sri Lanka. I am satisfied this is essentially argument about matters that were before the delegate and therefore not new information and I have had regard to the sections of the submission that address the decision and findings.

Statement 16 October 2016 – new information

9. This statement also raises matters that are new information. In his protection visa application and interview the applicant referred to the political rivalry between his uncle and opposition party members. He stated that the opposition party members were involved in smuggling activities and had the support of the authorities. New information in the IAA statement is that the applicant had a good relationship with navy friends and thereby came to know information about the smuggling activities, the opposition party members became aware of this and lodged a complaint with the police and the police visited his family very often to collect information about the applicant. The applicant has not explained why this information was not or could not have been provided to the Minister.
10. The new information puts forward significant claims and it is difficult to accept the applicant did not advance these claims to the Minister, if true. I take into account the applicant was not represented throughout the protection visa process; he received limited volunteer assistance to complete his application and statement of claims. However despite this he lodged a comprehensive statement of claims outlining his activities and incidents of harm in Sri Lanka. His statement of claims referred to the smuggling and illegal activities of the opposition party members and that this was supported by authorities. He referred to the opposition party members disrupting meetings and the occasion when he was taken and beaten and the unsuccessful efforts to report this to the police and to negotiate an agreement to guarantee his safety with the opposition party members. The applicant stated that as a result he moved around for several months but that his family remained in [Town 1] and "were safe". These claims were discussed in some detail at the protection visa interview and the applicant reiterated this information and the account as given in the statement of claims. He did not mention the claim now put that he had friends in the navy and through them knew about the activities or the claimed police complaint and police visits. At the protection visa interview the delegate asked the applicant how he knew about the smuggling activities and the applicant responded that as he was in the village he knew about it. While these two responses are not incompatible I consider it significant that the applicant did not at this point state that he knew this from friends in the navy but rather indicated it was generalised information, whereas the new claim is that the applicant had specific and somewhat exclusive information and I find it difficult to accept he did not declare this in response to the delegate's direct question.
11. Furthermore the response that he knew about the smuggling activities because he was in the village points to this being apparently known in the village, rather than information he was aware of from his navy friends. As such he would likely have been one of a number of villagers with this information and I am concerned that this casts doubt on the claim he was of adverse interest for being aware of this information and that consequently the opposition party members lodged a complaint to the police about him and the police visited his family.

12. At the protection visa interview the applicant referred to the authorities supporting the opposition party members and their illegal activities, he also referred to his unsuccessful efforts to lodge a police complaint because the police supported the opposition. Yet he did not mention the claim now put that the opposition party members lodged a complaint about him. The delegate asked the applicant who he feared in Sri Lanka and although he responded the politicians can influence the authorities and can have people killed he made no reference to the now claimed involvement of the police in his own case. At various points in his account the applicant has recounted incidents that would be directly relevant to the claims now put but he did not mention these new claims, despite their direct relevance to the matters discussed. I am also concerned that the claim the police visited his family to enquire about him seems to be in contrast with his statement that his family remained in [Town 1] and were safe; if the police had been visiting them in the manner now described I am surprised that he did not mention this in that statement when he referred to his family and their situation and his failure to do so casts doubt of the veracity of this claim.
13. Overall, I am concerned as to the credibility of this information. His failure to mention this earlier, particularly when addressing matters of direct relevance to the new claim or in response to the delegate's direct questions, considered together with my concerns this claim sits in contrast to his description of his family as safe, damages the believability of the claims. I am not satisfied that the new information is credible or that there are exceptional circumstances to justify considering it.

Village incident October 2016

14. A further document accompanying the submission contains information about an incident that took place in a village [near Town 2] [in] October 2016 and a link to a [named news] website article (untranslated) dated [in] October 2016 which the statement informs relate to burglary incidents in the area.
15. This information post-dates the delegate's decision. The information relates to thefts and burglaries by criminals stated to be navy officers. This information reports illegal activity by navy personnel, but I am not satisfied that it is of significant probative value. The presence of corruption and corrupt officers within various official agencies is contained in information before the Minister and included in the review material.² I am not satisfied that the new information adds substantially to the information which is already before me and is not in dispute and has been taken into account in my assessment. The applicant has related this information to his protection claims describing it as "the present situation in my area and I am afraid to go back to my family and sacrifice my life there for nothing". However it is apparent from this information that the criminals have been handed over to the appropriate authorities; and notwithstanding that one person who assisted in their apprehension was hurt it is apparent this new information relates to general criminal activity and there is no apparent link to the applicant's claims or profile supporting his uncle's political aspirations, or otherwise. I am not satisfied that there are exceptional circumstances to justify considering the new information.

Letters of support

16. The submission was accompanied by copies of four letters of support. Three of these post-date the delegate's decision and on that basis could not have been provided to the Minister.³ These letters address the applicant's claims and circumstances and seek to corroborate his claims. I am

² DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143–Danish – US dated 2016

³ IAA submission: titled [Titles]

satisfied that there are exceptional circumstances to justify the IAA considering the new information.

17. The fourth of these letters⁴ is from [Representative A] who also authored another letter (dated [in] October 2016) included in the IAA submission.⁵ No information has been provided to explain why this information was not and could not have been provided to the Minister; this letter is not dated and it is not known if it pre-dates or post-dates the delegate's submission. However I am satisfied that the information in this is letter is credible personal information, which may have affected the consideration of the applicant's claims had it been known. I am further satisfied that there are exceptional circumstances to justify considering the new information.
18. I have also obtained the Department of Foreign Affairs and Trade (DFAT), Country Report, Sri Lanka, dated 4 November 2019.⁶ This report was published after the delegate's decision and the delegate relied on the then current 2015 DFAT report for Sri Lanka which the 2019 report has updated. It has been prepared specifically for the purpose of protection status determinations. I am satisfied that there are exceptional circumstances to justify considering this new information. The previous IAA reviewer obtained the DFAT report published on 24 January 2017, being the current report at that time. As I have obtained the 2019 report which updates the 2017 report I do not consider that there are exceptional circumstances to consider the 2017 report.
19. I have also obtained the US Department of State "Country Reports on Human Rights Practices for 2019 - Sri Lanka" (11 March 2020) and The Guardian article, "Sri Lanka's Rajapaksa brothers strengthen grip in landslide election win" (7 August 2020). These reports provide updated information on the situation in Sri Lanka since the delegate's decision and I am satisfied that there are exceptional circumstances to justify considering this new information.
20. On 10 August 2020 the DFAT Country Information Report, the US Department of State Country Reports on Human Rights Practices and The Guardian article were provided to the applicant for consideration and comment highlighting potentially adverse information which may form part of my decision.
21. The applicant contacted the IAA by telephone on 21 August 2020 regarding this letter and indicated concern about compiling a response and that he felt he needed more time to read the material sent to him and submit a response. The applicant was advised it was open to him to submit an extension of time request in writing to the IAA, clearly outlining reasons for seeking additional time and the additional time required. The applicant commented that he was busy working but some minutes after this telephone conversation the applicant sent an email to the IAA stating "I need a time to respond about my documents and if it's possible to talk with my case worker It will be great... thanks". This email neither specifies reasons for seeking additional time or the additional time required and in response the IAA contacted the applicant by telephone. The applicant indicated that he needed assistance to understand the material sent to him and he would prefer to meet with the decision maker so he could talk about his circumstances instead. The applicant was advised that the IAA only holds interviews in limited circumstances. The applicant stated that he had already provided the information he wanted to provide to the IAA about his circumstances and it was explained to him that the IAA invitation letter refers to Sri Lanka country information which may be the reason, or part of the reason, for the IAA agreeing with the delegate's decision not to grant him the protection visa. In response the applicant advised what he would like to say about Sri Lanka is that at times it is safe for him and at other times not, and that following elections is most likely when the situation may change.

⁴ IAA submission: [Title]

⁵ IAA submission: [Title]

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

The applicant was advised his comments would be noted and that he can also write to the IAA to say that or provide information.

22. The IAA is a limited form of review. It does not generally conduct interviews. I have considered the circumstances in this matter, including the applicant's limited English language skills. I also note the applicant's comments that he had already provided the information he wanted to provide to the IAA about his circumstances. Overall, I am not satisfied the circumstances warrant the IAA getting new information by way of an interview.
23. I am satisfied that the applicant is aware that any information he wished the IAA to consider must have been received by 24 August 2020. In addition to the time provided to respond to the IAA letter dated 10 August 2020 I note that the applicant was initially contacted by the IAA on 17 July 2020 following the decision of the Federal Circuit Court and advised of the circumstances in which he could provide new information to the IAA. As the date to respond to the IAA's letter dated 10 August 2020 has now passed and noting his comment that he had already provided the information he wanted to provide to the IAA about his circumstances I have decided to finalise this review.

Applicant's claims for protection

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

- The applicant was born in Negombo, Western Province, Sri Lanka.
- The applicant is a Muslim.
- The applicant identifies his ethnicity as Tamil.
- The applicant and his family were displaced for a period around 1990 due to the civil war conflict. The applicant has provided a letter from [Mosque 1] confirming the applicant and his family were displaced in a refugee camp around 1990. They later moved to [Town 1], North Western Province, and then in 2009 to [Town 2], Northern Province.
- As a student the applicant was involved in protests against teacher shortages.
- He was expected to be involved in political activities. His uncle stood as a candidate for the SLMC in the 2011 local elections and he supported his uncle's campaign. This involved attending meetings and assisting with propaganda and printing campaign material at the [printers]. The applicant has provided a copy of his uncle's candidate card.
- As part of the campaign the applicant helped a protest against the presence of a navy camp in [Town 2].
- Opposition party members put pressure on his uncle not to stand for election.
- Opposition party members were involved in illegal smuggling activities and were supported in these activities by the police, navy and other officials.
- Opposition supporters disrupted his uncle's campaign and fought with the applicant and others supporting his uncle. He was injured in these fights and was beat with [implements]. On one occasion opposition supporters disturbed a meeting at the uncle's house. The applicant and others were taken in a van and beaten. The opposition supporters warned him to stop supporting his uncle's campaign. He required hospital treatment for his injuries.

- The applicant, his uncle and others attempted to lodge a complaint with the police, but the police refused to file the complaint. The police supported the opposition group.
- The applicant was concerned for his safety and travelled to Colombo and Kandy. He moved around to avoid the people he was worried would locate him and kill him.
- His uncle warned him not to return to [Town 2] as it was not safe for him. The applicant departed Sri Lanka illegally in 2012 and came to Australia.
- After his departure his family attempted to negotiate with the opposition party members to secure his safety but they refused to guarantee his safety. In 2016 one of the opposition party leaders asked the applicant's brother for information about him.
- The applicant fears that if he returns to Sri Lanka he will be harmed by the opposition party members and he fears they have links to the authorities. He cannot rely on the protection of the police and his fear extends to all of Sri Lanka. He is concerned for his safety following elections. He has provided letters of support which refer to his activities and express concern for his safety should he return to Sri Lanka, noting the application of the Prevention of Terrorism Act (PTA) in the country.
- His uncle remains politically active with the SLMC but is too scared to stand in another election.
- If the applicant returned to Sri Lanka there is "no way for him not to be involved in politics. He has to help the people in his village so there is no way for him not to support them."

Factual findings

25. The applicant has consistently claimed to be a Sri Lankan citizen and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
26. I accept that the applicant is a Muslim.
27. The applicant has declared his ethnicity as Tamil in his protection visa application. Sri Lanka is comprised largely of three ethnic groups, the majority Sinhalese and the smaller Tamil and Muslim ethnic groups. The country information before me indicates that being Muslim in Sri Lanka is in addition to being a religion viewed as an ethnicity in itself and that Muslims identify, and are identified by others, as Moors or Muslims and not as Tamils.⁷ While many Muslims are linguistically Tamil their cultural practices are distinctive from those of Tamils. As noted by the applicant in the IAA submission, and confirmed by country information, Muslims in the north were expelled by the Liberation Tigers of Tamil Eelam (LTTE) in 1990 on the basis of being Muslim. In part as a result of this Muslims largely supported the Sinhalese government, rather than the Tamil cause, throughout the protracted civil war.⁸ The applicant attended Muslim schools for his education and he and his family support the SLMC, the principal Muslim political party. However, despite these strong indications of Muslim connection rather than Tamil connection I accept that the applicant speaks Tamil and self identifies as Tamil.

⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

28. I accept that the applicant and his family were displaced around 1990; this is consistent with country information.⁹
29. I accept that as a student the applicant was involved in protests against teacher shortages. Although the standard of education in Sri Lanka is regarded by DFAT as generally very good, the shortage of teaching resources in the Tamil language and resources in general in the north is noted and as such it is plausible the applicant was involved in such protest activity.¹⁰ I also accept he was involved with a local youth group that provided charitable assistance to others. The applicant stated that because those involved in the protest were students they did not get into trouble with police and there is no indication that the protest of youth group activity would attract adverse attention should he return to Sri Lanka.
30. I accept that the applicant's uncle unsuccessfully stood for election as a SLMC candidate in the 2011 local elections. I accept that the applicant assisted his uncle with the campaign including the protest against the navy camp. The country information advises that elections in Sri Lanka have been characterised by violence and that various parties disrupted the campaigns of their opponents with the aim of hampering the campaigns of their opponents.¹¹ The Centre for Monitoring Election Violence in Sri Lanka provided comprehensive data on reported incidents of electoral violence on the day of the 2011 local elections and noted the "intimidatory presence around the polling station, the obstruction of polling agents, voters and election monitors, as well as the chasing away of voters".¹² Freedom House reported in 2012 that politicians have often protected themselves by assembling "armies of thugs" many of who are involved in the criminal underworld and "receive protection in return if their candidate wins election".¹³
31. In the context of the information regarding the conduct of elections and election campaigning the claims that the applicant's uncle was pressured by the opposition candidates in attempts to make him withdraw and that his supporters were harassed is plausible. It is also plausible that the opposition party group was involved in illegal smuggling operations and noting information reporting the presence of corruption in officials and government agencies in Sri Lanka it is also plausible members of the navy, police or other officials were involved in these activities and linked to the opposition party members.¹⁴
32. The letter from [Representative A], Attorney and Member of Parliament, dated [in] March 2015 affirms the applicant's "strong" support for [Representative A] during the 2010 general election. The extent of the strong support given by the applicant is not specified by [Representative A] and it is not indicated if this involved any activity beyond the applicant voting for [Representative A] and I note the applicant has not made any claims to have been involved in the 2010 election. [Representative A's] letter otherwise supports the applicant's involvement in the 2011 election and the threats he received. The undated letter from [Representative A] and his further letter dated [in] October 2010 provided with the October 2016 IAA submission makes similar reference to the political activities clashes with those close to the police and express the writer's concerns as to the applicant's safety in Sri Lanka because of his involvement.

⁹ *ibid*

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

¹¹ Freedom House, "Countries at the Crossroads 2012 - Sri Lanka", 20 September 2012, CX296112

¹² Centre for Monitoring Election Violence in Sri Lanka, "Local Authority Election 2011: Final Media Communiqué on Election Day", 17 March 2011, CISD9559B12449

¹³ Freedom House, "Countries at the Crossroads 2012 - Sri Lanka", 20 September 2012, CX296112

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

33. As a supporter of his uncle's candidacy and someone in attendance at political rallies it is plausible the applicant got into fights with political rivals and was physically attacked.
34. I have some concerns as to the claim the applicant and others were attacked after an opposition group threw [objects] into his uncle's house. Notwithstanding reports from Freedom House of the murder of political candidates the reports of harm to party supporters largely involves disruption at polling booths or in transits to polling, at party rallies and vandalism of posted materials. This disruption is generally conducted in public places where those seeking to harm rivals can access their intended victims and I have some concerns as to the plausibility of the applicant's account of the circumstances of the attack at his uncle's home. I also note that at the protection visa interview when asked what his uncle did after the police refused to file a complaint he responded that his uncle could not do anything as they are the ruling party. Yet it is evident that reporting of examples of political malfeasance and incidents of violence is widespread and the Centre for Monitoring Election Violence report of the 2011 election day incidents cites the then ruling United People's Freedom Alliance party as the most reported perpetrator of violence. From this report and other reporting by the Centre for Monitoring Election Violence the indications are that those involved are willing to report such incidents, including against the ruling party, and it is difficult to accept that the applicant's uncle took no further action despite the claimed violent abduction and attack of his supporters.¹⁵
35. However, the applicant was consistent in making this claim across his protection visa application and interview and first advanced this in his statement made in 2013, and noting the country information reporting violence against campaign workers I am willing to extend the benefit of the doubt and accept he was taken from his uncle's home and beaten and threatened and that the police would not file a complaint.
36. I accept that as a result of such harassment and attack the applicant was concerned for his safety but I am not satisfied that following the election he was of ongoing interest to opposition party supporters.
37. In his letter the applicant's uncle refers to the election harassment and stated that after the election "the ruling party's trouble increased day by day. I and my supporters were given threats in the street. We were threatened to be kill[ed]". I find it concerning that this account refers to threats to the uncle post-election whereas the applicant's account is that his uncle was safe because he was a public figure and in response to questions at the protection visa interview about his uncle's circumstances he gave no indication that his uncle was threatened. Noting this concern I give this letter little weight in supporting the applicant's claim of ongoing interest in him from opposition party members.
38. From the applicant's account his uncle's political rivals harassed and attacked the applicant and other SLMC supporters in attempts to disrupt his campaign and seek his withdrawal from the election. The applicant explained that because of the large size of his family and the large number of votes his family could deliver to a candidate his family was of interest to political candidates and it is evident that partly for this reason rivals sought to have his uncle withdraw. While this would account for harassment during the election campaign there is no apparent utility in his uncle's rivals continuing such harassment after the election and I am not satisfied that the applicant was of continuing interest to his uncle's rivals after the election.

¹⁵ Centre for Monitoring Election Violence in Sri Lanka, "Local Authority Election 2011: Final Media Communiqué on Election Day", 17 March 2011, CISD9559B12449; Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508; Freedom House, "Countries at the Crossroads 2012 - Sri Lanka", 20 September 2012, CX296112

39. In this regard it is important to note the extent of the applicant's involvement. His role was as a supporter, helping with organisation, printing materials, talking to people at rallies and helping at the protest against the navy base. It is apparent he was one of a number of such supporters. His role was limited to assistance throughout his uncle's campaign; there is no indication he was an ongoing member of the SLMC such that he had an influential role or any involvement in government or administration, or otherwise had a role of influence that may be of interest to his uncle's rivals following the election.
40. I also note that when asked to name the opposition political party harassing his uncle by the delegate the applicant could not do so; the applicant was able to state the party was the ruling party but could not recall the party name, although he could name the two principal political rivals. The applicant named these rivals as [Mr A], the party leader, and [Mr B], an important member of the party and an election candidate. The applicant's inability to name the opposition party, which he stated was the ruling party, indicates a very basic knowledge. I find this to be consistent with the extent of his role as a low level supporter. I note the letters of support submitted and the references to the applicant being an "ardent" supporter and "vigorously involved in the propaganda work", but from his own description of his role I find this to be of a low level.
41. The aim of the election violence which he experienced was to disrupt campaigns of political rivals and once that election was completed I do not accept the applicant was of ongoing interest to the opposition party members who harmed him previously.
42. I have some concerns as to the applicant's account that as a result of the attacks he left [Town 2] and moved around to avoid detection. The election was conducted in March 2011 and the applicant left Sri Lanka in September 2012 and in his employment history the applicant declared ongoing work as [an occupation] for a [company] during this period
43. I have accepted that the applicant was involved in the election campaign for his uncle in 2011 and that during the campaign he was harassed and harmed by political rivals. I do not accept that the applicant was of ongoing interest to these political rivals and that he moved from [Town 2] for this reason. I do not accept that his family attempted to negotiate with the opposition party members to secure his safety but they refused to guarantee his safety or that in 2016 one of the opposition party leaders asked the applicant's brother for information about him.
44. I have had regard to the letter dated [in] October 2016 from the [Leader A] of [Town 2] in which it is stated the applicant was identified as a wanted person because he was speaking Tamil and once he is suspected he will be taken and kept in custody. I have significant concerns as to content of this letter; there is no indication in the applicant's claims that he came to attention for speaking Tamil. While the country information indicates young Tamil men may have been suspected of having LTTE links, and may have been detected as such by speaking Tamil, there is no indication the applicant was stopped or of interest to the authorities or others on this basis. Similarly the letter from the [Official A] dated [in] October 2016 stated the writer is aware the applicant's name was referred to as a wanted person by the military, whereas the applicant has not indicated such in his claims. I give these documents no weight in supporting the applicant's claim for protection.

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.

Well-founded fear of persecution

46. 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.

47. I have accepted that the applicant was harmed and threatened by his uncle’s political rivals in the context of the 2011 election campaign but I have not accepted that he was of ongoing interest to them.

48. Elections held in the post-war period were characterised by the disruption and violence the applicant described,¹⁶ however the general easing of tension across Sri Lanka allowed the two major 2015 elections to be conducted without repetition of the violence of past elections and DFAT advises that the January 2015 presidential election was relatively orderly¹⁷. The US Department of State reported the election was observed by international monitoring organizations who reported “widespread abuse of state resources used for campaigning [and] consistent bias in state media toward the former government”, but that voter turnout reached 81 percent, and the Commonwealth Observer Group reported voters were able to “exercise their franchise freely and vote counting was transparent with results swiftly revealed to the public”¹⁸.

49. Similarly, the parliamentary elections held in August 2015 were relatively orderly. DFAT advises that the Commonwealth Observer Group described the August 2015 elections as “credible, met the key criteria for democratic elections, and the outcome reflected the will of the people”¹⁹. The US Department of State reported that monitoring groups observing the August elections concurred it was conducted in a fair and free manner with few reports of violence and “the EU election observation mission issued its preliminary findings stating the elections were ‘well administered and offered voters a genuine choice from among a broad range of political alternatives, although campaign rules were restrictive.’ The mission stated that freedoms of assembly and movement were respected and, despite the restrictive campaign rules, such as not

¹⁶ UN High Commissioner for Refugees, (UNHCR), “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8

¹⁷ DFAT, “DFAT Country Information Report – Sri Lanka”, 18 December 2015, CISEC96CF14143

¹⁸ US Department of State, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, GD95BE926320

¹⁹ DFAT, “DFAT Country Information Report – Sri Lanka”, 18 December 2015, CISEC96CF14143

allowing candidates to engage in door-to-door campaigning, canvass in person, or distribute leaflets, party activists and candidates campaigned vigorously.”²⁰

50. DFAT reported that independent election monitors recorded fewer violent incidents in the February 2018 local government elections compared to previous elections.²¹ Presidential elections were conducted in November 2019 and accredited domestic and international observers described the election as peaceful and technically well managed but noted that unregulated campaign spending, abuse of state resources, and media bias.²² Reporting of the results of the 2020 general election does not indicate repetition of the violence that marred past elections.²³ The SLMC is the principle Muslim political party in Sri Lanka and in 2015 was successful in being elected to a number of seats in parliament. As at November 2019, DFAT assessed that political parties in Sri Lanka were able to operate freely and contest elections.²⁴
51. The applicant stated that he would have to be involved in politics in the future and has also expressed concern as to safety following elections. There is no indication that he has been involved in any political activity since leaving Sri Lanka in 2012, but I do not discount him doing so in the future. However I find that this would be in a similar role and at a similar level to that of his previous involvement. Country information does not support ongoing harassment of people with low profile political involvement and accordingly I am not satisfied that there is a real chance he would experience harm on this basis. Taking account of the country information regarding improvements in the electoral process and the conduct of elections since the applicant departed Sri Lanka in 2012, and noting my finding that he was not of ongoing interest to his uncle’s political rivals, I find that there is not a real chance the applicant would face serious harm on the basis of his role in past elections, nor if he were to become politically active on return to Sri Lanka.
52. The applicant has expressed his concern at mistreatment of Muslims and at the protection visa interview referred to general abuse of, and threats of harm to Muslims. The applicant did not indicate he had been in harmed in Sri Lanka on the basis of his Muslim faith, beyond the fact he supported a Muslim political party. Nor did he indicate any difficulty in practising his faith. He expressed his concern as to the ability of a political person to have a rival killed and referred to media reporting of abuse of Muslims and noted if a normal person can openly threaten a Muslim in the presence of a police officer, as was reported in the media, political rivals could have someone killed. However I have not accepted that the applicant was of ongoing concern to his uncle’s political rivals.
53. The country information before me shows that there has been some friction between Muslims and Buddhists who are largely from the majority Sinhalese ethnic group. In 2015 DFAT reported that the Rajapaksa government sanctioned religious discrimination and supported the radical nationalist Buddhist Bodu Bala Sena (BBS) group. This culminated in violent riots in June 2014 in which three Muslims were killed and many injured. But as a result of the change of government in 2015 the activities of the BBS drastically reduced.²⁵
54. Since the delegate’s decision the 2109 Easter bombings occurred resulting in over 250 deaths and many injuries and these had a significant impact on the security situation in Sri Lanka, particularly for Muslims. The bombings were a coordinated terrorist attack by local Islamic

²⁰ US Department of State, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, GD95BE926320

²¹ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

²² US Department of State “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 11 March 2020

²³ The Guardian, “Sri Lanka’s Rajapaksa brothers strengthen grip in landslide election win”, 7 August 2020

²⁴ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

²⁵ DFAT, “DFAT Country Information Report – Sri Lanka”, 18 December 2015, CISEC96CF14143

extremists. The bombings targeted luxury hotels and places of Christian worship mostly in Colombo, Negombo and Batticaloa. The authorities reacted with counter-terrorism measures against the perpetrators resulting in those involved, their associates and those suspected of being involved being arrested under widespread emergency powers. However some reports are that initially up to two thousands Muslims had been questioned and many detained as extremists on the basis of limited evidence. Security measures put in place included military checkpoints on major Muslim travel routes. Large numbers of Muslims were detained under the PTA following the attacks and I note the concerns expressed in letters of support submitted by the applicant about the application of the PTA.²⁶

55. As a result of these attacks Muslims were the subject of reprisal and vilification. DFAT reports a number of serious reprisal attacks, many which include physical violence. Mosques and Muslim businesses and property were attacked by Sinhalese mobs. There was concern the authorities did not provide sufficient protection to the Muslim community and Muslim politicians and the Muslim provincial governors of the Western and Eastern provinces resigned en masse in protest at the perceived failure to protect the community. Of these most returned to their ministerial and cabinet positions after their protest.²⁷
56. Prior to the Easter attacks there had been periods of unrest in 2018; the in February where Buddhist nationalist groups perpetrated arson attacks against Muslim-owned residences, shops and a mosque in the Eastern Province following rumours that a Muslim restaurant was mixing 'sterilisation drugs' in its food to make Sinhalese women infertile. More significant violence in March by reports of a Sinhalese man being assaulted by a group of Muslims following a traffic accident. Large contingents of police were deployed in the Kandy area to manage the rioting and violence in which four people (two Muslims and two Sinhalese) were killed and dozens injured and a total of 280 people were arrested in relation to the violence.²⁸
57. DFAT assesses there is potential for more reprisal attacks against the Muslim community and broader civil unrest following the Easter Sunday terrorist attacks and I have considered if there is a real chance the applicant would face harm as a Muslim should he return to Sri Lanka.²⁹
58. In this regard I also consider it significant to take into account the election Gotabaya Rajapaksa as President in November 2019 and the results of the recent general election conducted in August 2020 in which the Rajapaksa brothers and their Sri Lanka Podujana Party (SLPP) secured a two-thirds majority in the parliament.³⁰
59. Gotabaya Rajapaksa is the brother of war-time President Mahinda Rajapaksa and he served as his Minister of Defence. The Rajapaksa regime has been criticised as perpetrating human rights abuses in the push to end the civil-war and crush the LTTE and Tamil separatism.³¹ I accept that members of the minority groups may be concerned as to the return of the Rajapaksas to power and media reporting recounts fears their majority will allow the incoming government to roll-back constitutional changes and overturn reforms made by the previous government.³² President Gotabaya Rajapaksa won the November 2019 election running a nationalist campaign with a promise of security and crushing religious extremism following 2019 terrorist attacks and

²⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; US Department of State "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020

²⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²⁸ ibid

²⁹ ibid

³⁰ The Guardian, "Sri Lanka's Rajapaksa brothers strengthen grip in landslide election win", 7 August 2020

³¹ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345; DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

³² The Guardian, "Sri Lanka's Rajapaksa brothers strengthen grip in landslide election win", 7 August 2020

the Muslim minority group that has been identified as the focus of concern by the incoming government.³³

60. However it is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the war. It was in this environment that the excesses of human rights abuse were committed and continued to be committed in the aftermath of the war in attempts to quash any resurgence of the LTTE.
61. The failure of both the previous Rajapaksa and Sirisena governments to bring perpetrators of human rights abuses to justice has been widely criticised by various agencies.³⁴ I accept that the incoming Gotabaya Rajapaksa government may continue to suppress attempts to bring human rights abusers to justice or prosecute those responsible for war crimes and take steps to roll-back past reforms in this regard but I am not satisfied that such would impinge on the Muslim population in general or Muslims with a profile similar to that of the applicant such as to amount to, or result in serious harm.
62. I have considered the country information regarding communal violence against Muslims in recent years and the incidents of anti-Muslim harassment and violence perpetrated by the BSS and other extremist Buddhist groups and the significant attacks on Muslims in the wake of the Easter attacks. I have also taken into account the return of the Rajapaksas to power. While I accept the reports of the 2018 violence and the reprisals following the 2019 terrorist attacks would be of concern the reaction of authorities to attacks included a large scale military and police deployment, blocks on instant messaging and social media to counter social media platforms inciting violence; curfews were extended and in 2018 a country wide state of emergency was imposed for ten days as a result of the 2018 attacks. In 2019 when Muslims criticised lack of effective action Muslim politicians mobilised in protest to effect greater action. Overall I find that there is not a real chance the applicant would face serious harm on the basis of being Muslim.
63. I have accepted that the applicant identifies as a Tamil and I note the 2013 Virakesari Weekly media article he provided reporting general concern as to illegal kidnapping and the situation for Tamils in Sri Lanka. During the drawn-out civil war the Tamil population was subject to scrutiny, monitoring, harassment and ongoing checks for links with the LTTE; kidnap and human rights abuses were widely reported, particularly those resident in LTTE dominated territory which includes the Northern Province.³⁵ Despite such reporting there is no indication the applicant was suspected of any LTTE connection nor has he advanced any claims to have experienced harm as a result of the general security situation and scrutiny of Tamils despite his residence in the LTTE dominated Northern Province. In response to the delegate's questions the applicant stated that neither he nor any family members had any LTTE connection.
64. Furthermore, there has been a significant change in the country circumstances since the end of the war and the defeat of the repressive Rajapaksa government in 2015. I note the PTA remains in force and there remain credible reports of ongoing arrests and disappearances in Sri Lanka, I

³³ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; US Department of State "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020

³⁴ Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

³⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

note that DFAT reports the improvement in the security situation has resulted in a decrease in Tamils held in detention and the monitoring and harassment of Tamils has decreased.³⁶

65. I accept there are reports of Sri Lankans, including Tamils, being abducted and of ongoing human rights violations in Sri Lanka, including the use of torture against suspects. However, the indications are that those involved had links with the LTTE.³⁷ The UK Home Office advises that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The UK Home Office reported the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism, journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a "stop" list of those against whom there is an extant court order or arrest warrant³⁸. Similarly, the US State Department in its recent report that reports of Tamils coming to the attention of the authorities were generally former or suspected former LTTE members as well as activists and journalists.³⁹
66. There is no indication the applicant has a real or imputed LTTE profile, or that he would be so imputed should he return to Sri Lanka and there is no indication he has been involved in Tamil separatist activities. I am not satisfied that there is a real chance the applicant would face harm in Sri Lanka on the basis of his claimed Tamil ethnicity or for being from a former LTTE controlled area.
67. I note the applicant's concern as to corruption within Sri Lankan authorities and I have accepted that the police refused to file a complaint in 2011. While I accept that corruption remains an issue in Sri Lanka the refusal by the police to act in 2011 was in the context of the post-war environment; the military remained in strict control of security issues, including civil matters, and the governorship roles in north were held by military personnel.⁴⁰ While the military maintains a strong presence in the north of the country the armed forces personnel are generally restricted to their barracks. The Sri Lankan police are now responsible for civil affairs across Sri Lanka and military governors in the Northern and Eastern Provinces have been replaced with civilians. Some of the land held by the military since the war has been returned to its former owners and overall progress has been made to curb the excesses of military power exercised under the authoritarian Rajapaksa government.⁴¹ I am not satisfied that there is a real chance the applicant would face harm on this basis.
68. On the evidence before me I am not satisfied that the applicant's status as a failed asylum seeker would bring him to adverse attention on return to Sri Lanka. I accept that there are past reports of mistreatment of returned asylum seekers who have an actual or imputed profile of concern to the authorities⁴², but I have not accepted that the applicant was so imputed or that he would

³⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143 and 2019

³⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; US Department of State "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020

³⁸ UK Home Office, "Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

³⁹ US Department of State "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020

⁴⁰ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁴¹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; US Department of State "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020

⁴² Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Freedom From Torture, 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881

be now or in the foreseeable future as a returning asylum seeker. I am not satisfied that the applicant would face any harm as a returning failed asylum seeker.

69. I accept that the applicant departed from Sri Lanka illegally as a passenger on a boat and I accept that because of his illegal departure he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return.
70. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT advises that at the earliest possibility after investigations are complete police transport persons charged under the I&E Act to the closest Magistrate's court. Persons can remain in police custody at the Criminal Investigation Department office at the airport for up to 24 hours after arrival and in cases where a magistrate is not available, such as a weekend or public holiday, may be detained at an airport holding cell for two days. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.⁴³
71. The penalties under the I&E Act for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,633). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine and the Sri Lankan Attorney-General's Department advises no fare-paying passenger on a people smuggling venture has been given a custodial sentence. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis.⁴⁴
72. DFAT advises that the Attorney-General's Department has directed that passengers of people smuggling ventures be charged under the I&E Act and appear in court. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, and may include reporting to police at the returnee's expense.⁴⁵
73. Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The frequency of court appearance depends on the Magistrate and DFAT understands that most persons charged under the I&E Act appear in court every three to six months. Cases are only progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.⁴⁶
74. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. Even having regard to general detention conditions, I do not consider that a brief period in detention would amount to serious harm for

⁴³ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁴⁴ *ibid*

⁴⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁴⁶ *ibid*

the applicant for the purposes of s.5J of the Act. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm.

75. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. That law is not discriminatory on its terms, and the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution, punishment or detention of the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

76. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka or in the reasonably foreseeable future on the bases claimed, either individually or considered cumulatively.

Refugee: conclusion

77. 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

78. 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

79. 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.

80. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

81. I accept that the applicant will be identified on return as a person who departed illegally and that he will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. 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.⁴⁷ I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm.

82. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the “real risk” test for complementary protection is the same standard as the “real chance” test,⁴⁸ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

83. 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.

⁴⁷ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

⁴⁸ *MIAC v SZQRB* (2013) 210 FCR 505

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.