



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA20/08817

Date and time of decision: 22 January 2021 19:38:00  
L Hill, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He arrived in Australia in July 2013 and applied for a Safe Haven Enterprise Visa (protection visa) on 16 June 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 16 December 2019.

### Information before the IAA

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

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - He is a Tamil male born in [Village] in the Northern Province of Sri Lanka, and a citizen of Sri Lanka.
  - Between his birth in [Year] and April 2009, he and his family were displaced to different areas in the Northern Province including areas controlled by the Liberation Tigers of Tamil Eelam (LTTE). In 1993, his brother was killed by Sri Lankan security forces when fishing.
  - in 2006, for approximately 40 days, along with other students, he was given physical training without weapons by the LTTE at his school.
  - In 2008, he was forcibly recruited by the LTTE. He was taken to the LTTE camp and trained. After three months he escaped and returned to his parents.
  - Between 2007 and 2009, his brother, 'J' was a member of the LTTE. J was also forcibly taken by the LTTE. At the end of the civil conflict, J served a period of rehabilitation.
  - In 2009, as the fighting between the LTTE and the Sri Lankan security forces intensified, he and his family tried to escape but were intercepted by the Sri Lankan Navy and surrendered. They were taken to an internally displaced persons (IDP) camp. While at the camp he was questioned by the Sri Lankan security forces about his involvement with the LTTE. He did not tell them about his training with the LTTE. After several months, they released him from the IDP camp and returned to [Location 1].
  - In 2010, the applicant was stopped by Criminal Investigation Department (CID) and Eelam People's Democratic Party (EPDP) and taken to the [Location 1] Army camp. He was questioned about his involvement with the LTTE. He denied being involved. He was released after two days with the condition that he had to report fortnightly to the [Location 1] Army camp.
  - When he reported, he was assaulted by the CID. When he was unable to report he would be later taken to the camp and severely assaulted for his failure to comply.
  - In August 2012, he went to India by boat as he wanted to travel to Australia. He was found by Indian fisherman and handed to the Indian police and jailed for two months. He was then sent back to Sri Lanka.

- In 2013, he was [doing a task] in [Location 1], when a bomb exploded. CID officers attended and he and other Tamils were arrested. He was taken to the [Location 1] Army camp where he was held for six days.
  - He was then transferred to the [Location 2] camp where an EDPD informer, who was an LTTE member and knew of his membership, identified him. He continued to deny his membership out of fear.
  - After nearly one month he was released with the condition that he had to report each alternate day. His parents, villagers, and church fathers warned him if a further incident took place and/or he failed to report he would be killed.
  - In July 2013, he departed Sri Lanka illegally by boat and travelled to Australia.
  - After his departure to Australia, the CID has gone to his home and harassed his parents and sister about his failure to report. They have been told he is in Australia. They warned his family he would be harmed or killed for his failure to report.
  - For the past seven years, individuals from Sri Lankan Army (SLA), CID and EPDP have frequently visited his home and enquired about him. They are actively looking for him because they know he was in the LTTE and didn't go into detention.
  - The other Tamils that were arrested with him in 2013 are now missing.
5. The applicant fears on return to Sri Lanka he will be harmed by the Sri Lankan authorities including the CID, EPED, SLA on the basis of his ethnicity, actual and imputed political opinion arising from his forced recruitment by the LTTE, former residence in Northern Province including in former LTTE controlled areas, familial relationship to his brother who was an LTTE member and because he has left Sri Lanka illegally while subject to reporting and/or sign in requirements and has sought asylum.

### **Refugee assessment**

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6. 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**

7. 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.
8. I accept, on the evidence the applicant has provided, that his identity is as claimed. I accept the applicant is a Tamil from the Northern Province of Sri Lanka, and a Sri Lankan citizen. Sri Lanka is the receiving country for the purpose of this assessment.
  9. I accept that between his birth in [Year] and April 2009, the applicant and his family were displaced to different areas in the Northern Province. I accept during this period he and his family lived in areas controlled by the Liberation Tigers of Tamil Eelam (LTTE). I accept that in 1993, his brother was killed by Sri Lankan security forces when fishing.
  10. I accept that in 2006, for approximately 40 days, the applicant along with other students, was given physical training without weapons by the LTTE at the playground in his school. I accept this training was compulsory as the school area was under the control of the LTTE.
  11. I accept that in 2008, the applicant was forcibly recruited by the LTTE. He was taken to the LTTE camp in [Location 3]. I accept he was trained how to use a weapon. I accept during the final phases of the civil conflict, he was put in a bunker and shown how to shoot. I accept he shot his weapon. I accept he feared that if he refused to cooperate with the LTTE, he would be killed. I accept he served three months with the LTTE, before he escaped and returned to his parents.
  12. These aspects of the applicant's claims were presented in a cogent and compelling manner and have been generally consistent between his interactions with the Department since his arrival in Australia. While the applicant made no mention of his involvement with the LTTE at the arrival interview, I am of the view that the explanation provided for his non-disclosure, that being that he feared he would be treated differently because he had received training from a terrorist organisation, was convincing. The applicant's claims regarding his forced recruitment by the LTTE are also plausible when considered against the country information indicating that the majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course and that the LTTE was supported by foreign funding and both voluntary and forced recruitment of Tamils.<sup>1</sup>
  13. I accept that in 2009, as the fighting between the LTTE and the Sri Lankan security forces intensified, the applicant, his family and others tried to escape by sea. I accept they were intercepted by the Sri Lankan Navy and surrendered. I accept they were taken to an IDP camp in [Location 4]. I accept that at this camp the Sri Lankan security forces would come and tell him and his family that they had received training from the LTTE they had to voluntarily surrender. I accept the Sri Lankan security force questioned him about his involvement with the LTTE. I accept he did not tell them about his involvement with the LTTE. I accept that after several months they were released from the IDP camp and returned to [Location 1]. The Return Form provided in the review material corroborates this.
  14. I accept that in 2010, the applicant was stopped by Criminal Investigation Department (CID) and Eelam People's Democratic Party (EPDP) and taken to the [Location 1] Army camp. I accept that at the camp he was physically assaulted and questioned about his involvement with the LTTE. I accept he was released after two days. I accept that a condition of his release was a

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<sup>1</sup> Department of Foreign Affairs and Trade, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

requirement to regularly report, at least once a fortnight, to the [Location 1] Army camp. I accept when he reported, he was assaulted by the CID. I accept when he was unable to report, because he was out at sea fishing, he would be later taken to the camp and severely assaulted for his failure to comply.

15. These aspects of the applicant's evidence were presented in a convincing manner and have been consistently provided throughout his interactions with the department, including at his arrival interview. While this event was not recorded in the written record of this arrival interview, I have listened to the recording and he did make reference to it when he was asked if he had ever been arrested or detained by the police or security organisations.
16. I do not accept however that while detained at the [Location 1] Army camp he denied and/or did not confess and/or admit to his involvement and/or forcibly recruitment by the LTTE to the Sri Lankan security forces. I am of the view that this aspect of the applicant's evidence is problematic when considered against his other claim, which I have accepted, that a condition of his release was a requirement to regularly report to the [Location 1] Army camp. The UK Home Office and DFAT reports indicates that while the Sri Lankan security forces questioned or monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment, it was former LTTE members who were required to register with the Civil Affairs Office of their local military unit and may be subject to monitoring and reporting requirements, the level of which would depend on the degree of their assessed LTTE involvement, in the years after the civil conflict ended.<sup>2</sup>
17. In this case, I am satisfied that the applicant was released by the Sri Lankan authorities and required to regularly report because he admitted to and/or confessed to having been involved and/or forcibly recruited by the LTTE to the Sri Lankan security forces. Various sources report that that suspects were detained for years in prisons and military-run detention centres while cases were being examined and I am satisfied that he was released after a short period of time, that being two days because the Sri Lankan security forces became aware of the extent of his involvement with the LTTE, that being his 40 days training while at school in an LTTE controlled area and his forced recruitment for no more than three months at the end of the war, and had determined that it did not warrant further investigation, detention or rehabilitation. If it had, various reports including DFAT, UK Home Report suggests he would have been at a real and serious risk of being detained for further detention, more in depth interrogation, rehabilitation processes, or subject to harsher treatment, including indefinite detention and torture, as was the case for many Tamils who were seriously suspected of having links to the LTTE.<sup>3</sup>
18. I accept that in August 2012, the applicant went to India by boat as he wanted to travel to Australia. I accept he was found by Indian fisherman and handed to the Indian police. I accept he was jailed for two months before being sent back to Sri Lanka in October 2012.

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<sup>2</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; Department of Foreign Affairs and Trade, "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105; Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244.

<sup>3</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; Department of Foreign Affairs and Trade, "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105; Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244.

19. The applicant has not claimed that he exited Sri Lanka illegally or that on return he was charged with an offence under the I&E Act.<sup>4</sup> On the material before me, at the time of his exit he was in possession of a valid passport. The bio-data page of the applicant's passport states it was issued in August 2010. The applicant's evidence was that to apply for his passport he had to first register with the local village office, he then travelled to Colombo to obtain it. I am satisfied that there was not any bribery or corruption involved in its issue. In light of the foregoing, I am satisfied that the applicant exited and re-entered Sri Lanka legally through an approved port, such as an airport or seaport in 2012.
20. The applicant has not claimed that on re-entry to Sri Lanka he was stopped, questioned or detained by the Sri Lankan authorities. Nor has he claimed that on return to his home area in [Location 1], he was stopped, questioned or detained for any reason including for his failure to comply with any reporting requirements. Rather, on the evidence before me, the applicant's next interaction with the Sri Lankan authorities was not until six months later in April 2013 (discussed below). In light of the foregoing, I am satisfied that the applicant was not of interest or concern to the Sri Lankan authorities including the CID or EPDP or any other groups or individuals or that he was the subject of any reporting and/or sign in requirements at the time of his exit or re-entry to Sri Lanka in 2013.
21. I am also prepared to accept like the delegate, that in 2013, the applicant was undertaking volunteer work with others, in which they were [doing a task] in [Location 1] when a bomb exploded. I accept that a white van with CID officers attended and he was arrested along with other Tamils. I accept he was taken to the [Location 1] Army camp. These aspects of his claims have been consistently provided since his arrival in Australia, including at his arrival interview.
22. However, I consider there to be several issues with the applicant's narrative of what happened after he had been taken to the [Location 1] Army camp which raises serious concerns. Firstly, there are anomalies in the applicant's evidence regarding the period of his detention and the frequency of his reporting requirement on release. At the arrival interview, when speaking about this event, he stated that he was taken and beaten for two days, and after that he had to report and sign in three times a week. However, at the protection visa interview, he stated that he was held for six days at the [Location 1] Army camp before being transferred to the [Location 2] camp where he was detained for nearly one month before being released with a requirement to report each alternate day. Secondly, I am of the view that the applicant's evidence that at the [Location 2] camp that he was identified as a former LTTE member by an EPDP informer, who was also a former LTTE member, to be unconvincing. Apart from the applicant having made no mention of such a claim at his arrival interview, an inconsistency in his evidence which is significant, and I find it highly improbable that it would take at least four years after the civil conflict had ended, for the applicant's former involvement with the LTTE to become known by the Sri Lankan authorities, particularly given the various reports regarding the intense scrutiny and regularly monitoring of the Tamil population and former or suspected former LTTE members by the Sri Lankan authorities, at that time.<sup>5</sup> Finally, the applicant's evidence, that he had become aware that the EPDP and CID had a cunning plan to kill him makes no sense in the context of his release by these same groups; and his new claim at the

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<sup>4</sup> Immigrants and Emigrants Act (Sri Lanka), No. 20 of 1948 (1 November 1949), CISBE8E6BE638 and Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244.

<sup>5</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; Department of Foreign Affairs and Trade, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244.

protection visa interview, that some of the Tamils who were arrested with him have gone missing, I consider to be a recent invention by the applicant to embellish his claims for protection.

23. Overall, I found the applicant's evidence in his protection visa statement and interview about what happened after he had been taken to the [Location 1] Army camp unreliable, and I am not satisfied that the applicant is a truthful witness; his evidence in part lacked consistency and plausibility. It follows, that I do not accept the applicant's claims regarding the events at the [Location 1] Army and [Location 2] camps including that he was held in these camps for six and one month respectively or that he was identified by an EPDP informer or denied his former LTTE membership out of fear.
24. In this case, I am satisfied that the applicant was released from the [Location 1] Army camp after no more than a relatively short period, two days as indicated at his arrival interview and given that I have found that his involvement and/or forced recruitment by the LTTE was known to the Sri Lankan security forces since 2010, I do not accept that he was subject to the regular and on-going reporting and/or sign in conditions for his release, nor do I accept that he was subject to any such reporting and/or sign in conditions for the whole period of time after he was released until his departure from the country or that such conditions meant that he was unable to earn his livelihood as a fisherman.
25. I accept that the applicant departed Sri Lanka illegally by boat in July 2012.
26. In the protection visa statement, the applicant claimed that since his arrival in Australia, the CID has gone to his family home and harassed his parents and sisters about his failure to report. His parents and sister told them he was in Australia. They asked for his Australian contact details. They warned his family that he would be harmed and killed for his failure to report.
27. At the protection visa interview, the applicant claimed that recently in October 2020, plain clothes individuals whom he believed to be from paramilitary group EPDP, had attended his family home and made enquiries about him. They spoke broken Tamil. They asked his mother where he was. His mother told them he had not been there since 2013. His mother called and told him this. He further claimed that for past seven years, individuals from SLA, CID and EPDP have frequently visited his home and enquired about him. His mother told him that they are trying to locate him and find where he is. They say he was in the LTTE and because he didn't go into detention, they are actively looking for him. He has told her to go to the police and report this.
28. At the protection visa interview, the delegate put to the applicant that the country information indicated that the EPDP had been disarmed and was no longer a paramilitary group. He responded that the EPDP had put down their arms (weapons) but then the government had given them weapons and that the EPDP was involved in politics and armed. It was further put to the applicant that country information indicated that the EPDP was now a Tamil political party and that this raised concerns about his statements that the individuals who visited his home recently spoke in broken Tamil. He responded that it was his understanding that EPDP had learnt Sinhalese and their Tamil was now weak. He indicated that is why they spoke broken Tamil to them. He stated that when he was taken and beaten and asked if he was a supporter of the LTTE by the EPDP, the language they used was different. I have considered the applicant's explanations however I am unpersuaded by them. Instead, I agree with the delegate, and consider the applicant's claims regarding the EPDP visits and their language are

implausible when considered against the country information, and the reports that the EPDP is now a Tamil political group.<sup>6</sup>

29. Finally, I have rejected the applicant's claims that he was subjected to any reporting and/or sign in conditions as a condition of his release in 2013 and for the whole period of time after he was released until his departure from the country and it follows that I do not accept that on this basis the Sri Lankan authorities have sought his whereabouts. I have also found that since 2010, the Sri Lankan security forces were aware of his involvement and/or forced recruitment by the LTTE and it follows that I do not accept that for the past seven years, individuals from SLA, CID and EPDP have frequently visited his home and enquired about him because they now believe he was in the LTTE and hadn't gone into detention. There is no other credible evidence before me to suggest that the Sri Lankan authorities or any groups or individuals would be more recently interested in seeking the applicant's whereabouts and I am not satisfied that his version of events since he departed Sri Lanka are true.
30. I do not accept that since the applicant's arrival in Australia, the Sri Lankan authorities including CID, EPDP, SLA or any other groups or individuals have visited the applicant's family home and harassed his family, enquired about him, sought his whereabouts or are actively looking for him.
31. I accept that in 2007, his elder brother, 'J' was forcibly recruited by the LTTE. I accept between 2007 and 2009, J was a member of the LTTE. I accept J was involved in armed conflict and fighting. I accept as the civil conflict escalated; J escaped the LTTE. I accept that at the end of the conflict, J surrendered to the Sri Lankan security forces and was sent to rehabilitation. I accept J has completed his rehabilitation and is living in [Location 1]. I accept J owns his own fishing boat and works as a fisherman. The applicant's claims regarding his brother's LTTE membership have been spontaneously provided since his arrival in Australia and are plausible when considered against the country information that the LTTE was supported by both voluntary and forced recruitment of Tamils and that at the end of the conflict, the majority of LTTE members who were arrested by Government security forces following their surrender or capture were sent to Government-run rehabilitation centre.<sup>7</sup>
32. I do not accept that as claimed by the applicant, that since his arrival in Australia his brother, J has been arrested and detained on three occasions, injected with something and cannot leave his place and is constantly monitored. This claim was not part of the protection visa statement. At the beginning of the protection visa interview, the circumstances of his family in Sri Lanka were discussed yet he made no mention of these claims. He stated that his siblings were all married and lived in [Location 1], in their own homes, and that his brothers including J worked as fisherman on boats that they owned. These claims were only raised by the applicant when it was suggested that his own evidence regarding the circumstances of his brother, J indicated that after serving a period of rehabilitation, J had been able to live freely and work as a fisherman in the North. His evidence also lacked any specific details such as when or why his brother, J was arrested. His evidence that his brother was injected with a substance and continues to be monitored, has also not been mentioned previously. I am of the view that these are significant claims, and had they had any plausible basis he would have provided them earlier.

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<sup>6</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928 and Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244.

<sup>7</sup> Department of Foreign Affairs and Trade, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.



33. The applicant fears on return to Sri Lanka he will be harmed by the Sri Lankan authorities including the CID, EPED, SLA on the basis of his ethnicity, actual and imputed political opinion arising from his forced recruitment by the LTTE, former residence in Northern Province including in former LTTE controlled areas, familial relationship to his brother who was an LTTE member and because he has left Sri Lanka illegally while subject to reporting and/or sign in requirements and has sought asylum
34. Tamils are the second largest ethnic group in Sri Lanka (15.3 per cent of the population). According to the most recent census, the Tamil population was 3.1 million in 2012, compared to 2.7 million in 1981. Tamils live throughout Sri Lanka but are concentrated in the Northern and Eastern provinces. Various sources indicate that there has been a significant opening of civic space since 2015, with a corresponding increase in public confidence to criticise or challenge authorities.<sup>8</sup> However, reports of monitoring, surveillance, intimidation and harassment of Tamils in day-to-day life by security forces in the north and east of the country persist and have increased since 2019 – particularly since the election of Gotabaya Rajapaksa as president in November.<sup>9</sup> Credible sources state that Tamils with certain profiles – such as political activists and journalists – are more likely to attract the attention of authorities.<sup>10</sup> In 2019, DFAT assessed that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing.<sup>11</sup> More recently, the UK Home Office stated that available evidence suggests whilst Tamils may sometimes be subjected to discrimination, they are unlikely to face persecution based on their ethnicity alone.<sup>12</sup>
35. I have accepted the applicant is a Tamil male who has resided in areas in the Northern Province including in former LTTE controlled areas. However, as noted above, most sources indicate that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil. Nor is there any independent information before me, which suggests that absent any other concerns, arising from a person's gender or residence in the Northern Province including in former LTTE controlled areas they would be imputed with an adverse profile and harmed on this basis on return. I am satisfied that the applicant will not be imputed with any type of profile because he is a male Tamil who resided in the Northern Province including in former LTTE controlled areas on return now or in the reasonably foreseeable future.
36. DFAT has continued to report that the LTTE no longer exists as an organised force,<sup>13</sup> and only a few incidents involving former LTTE members have been recorded since the end of the war.<sup>14</sup> Nevertheless, the Sri Lanka government is sensitive to the potential re-emergence of the LTTE,<sup>15</sup> and former LTTE members may be monitored.<sup>16</sup> In 2020, UK Home Office reported that local sources from the Northern Province allege that there has been an increase in intimidation

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<sup>8</sup> OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928.

<sup>9</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928; OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652.

<sup>10</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

<sup>11</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>12</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

<sup>13</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>14</sup> Colombo Page, "Ex-LTTE cadre, wife and sister arrested with firearms, explosives", 13 October 2019, 20191014130858; Asian Tribune, "An Accidental Bomb Blast Identified an Active LTTE Intelligent Agent", 07 July 2020, 20200709151217.

<sup>15</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244.

<sup>16</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

towards ex-LTTE members by security services since President Rajapaksa's Sri Lanka Podujana Peramuna (SLPP) swept local government elections in February 2018.<sup>17</sup> DFAT has indicated that the extent of monitoring typically depends on an individual's seniority within the LTTE; ongoing involvement with politically-sensitive issues, including protests relating to disappeared persons; and links to the Tamil diaspora, particularly elements considered radical by the government.<sup>18</sup> For example, in June 2020 a prominent Norway-based activist was reportedly detained at Colombo's airport when seeking to leave Sri Lanka – he was released after questioning.<sup>19</sup>

37. According to DFAT, the authorities distinguish between so-called 'low profile' and 'high profile' former LTTE members when assessing their potential security risk; 'low-profile' former LTTE members include former combatants, those employed in administrative or other roles, and those who may have provided a high level of non-military support to the LTTE during the war.<sup>20</sup> Low-profile LTTE members who come to the attention of the Sri Lankan authorities – particularly if they are suspected of having a combat role during the war – would likely be detained for questioning and may be sent for rehabilitation.<sup>21</sup> Following their release, a low-profile former LTTE member may be monitored but would not generally be prosecuted.<sup>22</sup> The number of high-profile former LTTE members living in Sri Lanka is assessed to be small and the vast majority have already come to the attention of authorities.<sup>23</sup> Any remaining high-profile former LTTE members who came to the attention of the authorities would likely be arrested, detained and prosecuted.<sup>24</sup> Over 12,000 ex-LTTE members have undergone rehabilitation since the program began in 2009 – the last individual was reportedly released in late 2019 but authorities retain the option of using rehabilitation in future.<sup>25</sup> Authorities maintain 'stop' and 'watch' electronic databases that contain information about individuals suspected of involvement in terrorism or serious criminal offences.<sup>26</sup>
38. I have accepted that the applicant was forcibly recruited by the LTTE. However, I have found that the applicant's involvement with the LTTE was for approximately 40 days when at school and as a forced recruit for a period of no more three months at least eleven years ago and prior to the civil conflict ending, and I am satisfied his involvement was low-level and known to the authorities. I have rejected the applicant's claims that he was subjected to any reporting and/or sign in conditions as a condition of his release in 2013 and for the whole period of time after he was released until his departure from the country. I have also rejected the applicant's claims that since his departure the Sri Lankan authorities including CID, EPDP, SLA or any other groups or individuals have visited the applicant's family home and harassed his family, enquired about him, sought his whereabouts or are actively looking for him. However, I have accepted that in 2010, he was detained, questioned and on release required to regularly report, but I have concluded that these reporting requirements had ceased by the time he exited Sri Lanka in August 2012. I have also accepted that in 2013, he was detained and questioned for a relatively short period, no more than two days, before being released. As discussed above, the country information in the review materials indicates that this was routine for individuals who had low-level involvement with the LTTE, and I am not satisfied that such short periods of detention,

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<sup>17</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928.

<sup>18</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>19</sup> Asian Tribune, "Key LTTE activist in Norway - Nadaraja Sethuparan arrested at BIA", 23 June 2020, 20200624105850.

<sup>20</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>21</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>22</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>23</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>24</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>25</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

<sup>26</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

questioning and past reporting requirements, which I have found ceased by August 2012, indicates that the Sri Lankan authorities had serious suspicions or that it is indicative of the treatment he would receive now, particularly having regard to changed country conditions. He has not committed any terrorist or criminal acts or been involved in any LTTE or Tamil separatist activities since the civil conflict ended. There is no information to suggest that the applicant is on either the stop or watch lists. He did not have, and nor do I accept he would be perceived to have had a significant or a high-level role in the LTTE on return. Furthermore, the applicant's brother's forced recruitment and membership of the LTTE ceased at least eleven years ago and I do not accept that arising from this familial relationship, which I am satisfied was also known by the authorities prior to his departure, even taking into account his background he would be perceived to have heightened association or a high level profile with the LTTE.

39. Having regard to all the evidence before me, I am not satisfied that the applicant will be imputed with any type of profile arising from his or his family's past circumstances on return to Sri Lanka. I am not satisfied that as a male Tamil male who resided in the Northern Province in former LTTE controlled areas, his involvement with the LTTE including as a forced recruit, or his familial relationship to his brother, who was also a former LTTE member and served a period or rehabilitation that he will be perceived to have an pro-LTTE or pro-Tamil or anti-Sri Lankan government political opinion, on his return to Sri Lanka. I am not satisfied the applicant faces a real chance of harm as a Tamil, or because of any actual or imputed pro-LTTE, pro-Tamil or anti-Sri Lankan government political opinion, on his return to Sri Lanka now or in the reasonably foreseeable future.
40. I accept the applicant left Sri Lanka illegally and he would very likely return to Sri Lanka on a temporary travel document. I accept he has applied for asylum and would be returning to Sri Lanka after a prolonged period of time living in Australia and having made an asylum application and that the Sri Lankan authorities may know or infer that he has made claims for protection in Australia.
41. Different agencies, including the Department of Immigration and Emigration, the State Intelligence Service, the Criminal Investigation Department and sometimes the Terrorism Investigation Division process returnees upon arrival at Colombo airport.<sup>27</sup> These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters.<sup>28</sup> For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records.<sup>29</sup>
42. I accept, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will very likely become aware of the applicant's past circumstances. However, as discussed above, I am not satisfied that the applicant will be perceived to be a person of concern. There is no credible evidence before me that he has outstanding court orders or arrest warrants or criminal background or that his name is on any

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<sup>27</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244 and UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

<sup>28</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>29</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

lists. There is also no independent information before me to suggest that absent any other concerns, individuals who return to Sri Lanka after having spent period of time living in Australia are imputed with an adverse profile and I do not accept that he will be. I am satisfied that it would be quickly determined that the applicant has no adverse profile or other profile of interest.

43. DFAT advises that returnees are treated according to standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing at the airport.<sup>30</sup> Processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths and staffing constraints. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed, although returnees are free to go to the bathroom and to talk to one another during this time.<sup>31</sup>
44. The information before me is that the processing of returnees at the airport is not applied in a discriminatory manner or selectively enforced and nor are returnees mistreated. Overall, I am satisfied that any period of detention that would occur while these investigations are ongoing will be brief and would not exceed the several hours that group processing generally takes.
45. Failed asylum seekers who depart Sri Lanka irregularly by boat are generally considered to have committed an offence under the Immigrants and Emigrants Act. Under the Act, Sri Lankan citizens must only leave Sri Lanka from approved ports of departure using a valid Sri Lankan passport.<sup>32</sup> DFAT understands the Police Airport Criminal Investigations Unit at Bandaranaike International Airport makes most arrests. In the process, police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are suspected to be former LTTE members. At the earliest available opportunity returnees are transferred to the closest Magistrates Court. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained in an airport holding cell for up to two days. DFAT is not aware of mistreatment of returnees during this process.<sup>33</sup>
46. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine.<sup>34</sup> However, Sri Lanka's Attorney-General's Department, which is responsible for the conduct of prosecutions, claims that no returnee who was merely a passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally (as distinct from facilitators or organisers). However, fines may be issued to fare-paying passengers act as a deterrent towards joining boat ventures in the future.<sup>35</sup>
47. The applicant has not claimed, and there is no evidence before me to indicate that the applicant would be perceived or treated as anything other than a passenger on the people smuggling vessel. I am not satisfied that there is a real chance the applicant will be given a custodial sentence.
48. If the passenger returnee pleads guilty to departing illegally, he will be required to pay a fine (which he can be done by instalment) and will subsequently be free to go. Where a passenger

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<sup>30</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>31</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>32</sup> Immigrants and Emigrants Act (Sri Lanka), No. 20 of 1948 (1 November 1949), CISBE8E6BE638 and Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244.

<sup>33</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>34</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928.

<sup>35</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court.<sup>36</sup> Anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine.<sup>37</sup> Passenger returnees who plead not guilty will only need to return to court when their case is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a people smuggling venture. DFAT has continued to report that the fines issued for passengers of people smuggling ventures was often low, but that the cumulative costs associated with regular court appearance over a protracted length of time can be high.<sup>38</sup>

49. The applicant has not claimed, and there is no evidence before me to suggest that he would plead not guilty. Nor is there anything to suggest that if he did plead not guilty that he would not be granted bail on the basis of personal surety or guarantee by a family member. Having regard to the particular circumstances of this applicant, I am not satisfied that the conditions of detention for a brief period at the airport, a fine and if he plead not guilty the costs associated with bail and regular court appearances, if required, amounts to serious harm.
50. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any investigation, prosecution and punishment would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
51. DFAT reported that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. The Sri Lankan Government has consistently stated that refugees are welcome to return and, in August 2016, released a 'National Policy on Durable Solutions for Conflict-Affected Displacement'. During a visit to Australia in February 2017, Prime Minister Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka.<sup>39</sup>
52. Despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Failed asylum seekers receive limited reintegration assistance and many returnees have difficulty finding suitable employment and reliable housing on return. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. DFAT noted that some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province had told them that they were able to reintegrate into their communities and find employment.<sup>40</sup>
53. UK Home Office and DFAT have reported that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID.<sup>41</sup> DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing

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<sup>36</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>37</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>38</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064 and Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>39</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019

<sup>40</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>41</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928 and UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.<sup>42</sup>

54. DFAT has also reported that some refugees and failed asylum seekers reported social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had not experienced societal discrimination following their return.
55. In the present case, I accept the applicant would return to the north and may be identifiable as someone who has sought asylum. The applicant's evidence is that his six siblings and his parents all reside in their own homes in [Location 1]. He previously worked as a fisherman in Sri Lanka. His brothers are also fisherman. They have their own boats however he indicated that there are restrictions in place and his brothers are given instructions such as when and where they must launch their boats from and when they must return. DFAT indicates that agriculture and fishing dominate the economies of the Northern and Eastern provinces and while the government has overseen the return of most land occupied by the military during the war, the military continues to occupy some fertile farming land in the north and restricts access to some fishing areas.<sup>43</sup> I accept that access to some fishing areas in the north may still be restricted, however the applicant's own evidence does not support that such restrictions have stopped his brother's from fishing or impacted on their ability to subsist. I do not accept that such restrictions would affect the applicant's ability to recommence work as a fishman. Having regard to the circumstances of this applicant, I am satisfied that the applicant will not have any difficulties with accommodation or obtaining employment on return. Nonetheless, I accept that on return he may be the subject of some monitoring by the Sri Lankan authorities for a period and possibly societal discrimination from his community; however I am not satisfied this would be at a level that would threaten his capacity to subsist or otherwise amount to serious harm.
56. I am not satisfied that, as a Tamil asylum seeker with his background who departed illegally and resided in Australia for an extended period, he faces a real chance of persecution on his return to Sri Lanka, now or in the reasonably foreseeable future.
57. I am not satisfied the applicant has a well-founded fear of persecution.

### **Refugee: conclusion**

58. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

### **Complementary protection assessment**

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59. 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

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<sup>42</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

<sup>43</sup> Department of Foreign Affairs and Trade, "DFAT Country Information Report Sri Lanka", 04 November 2019.

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**

60. 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.
61. 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.
62. I accept the applicant would return to Sri Lanka (whether involuntarily or otherwise) on temporary travel document. I accept he may be detained at the airport for processing on return and questioned. I also accept he may be arrested and charged with departing Sri Lanka illegally and detained briefly at the airport if a magistrate is unavailable, fined and possibly incur costs associated with bail and regular court appearances. It does not amount to the death penalty, an arbitrary deprivation of life or torture. Further, on the information before me, I am not satisfied it amounts to pain or suffering that may be described as cruel or inhuman in nature, severe pain or suffering or extreme humiliation, whether intentionally inflicted or otherwise. The country information does not indicate that there is an intention to inflict pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or an intention to cause extreme humiliation. I am not satisfied there is a real risk of significant harm on this basis.
63. I accept that as a returning failed asylum seeker who would return to the north and may be identifiable as someone who has sought asylum, and may be the subject of some monitoring by the Sri Lankan authorities for a period and possibly societal discrimination from his community; however I am not satisfied that this treatment constitutes significant harm as defined. It does not amount to the death penalty, arbitrary deprivation of life, or torture. Nor am I satisfied that constitutes pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.
64. Having regard to the evidence as a whole, I am also not satisfied that the treatment he faces on return collectively amounts to significant harm. It does not amount to the death penalty, arbitrary deprivation of life, or torture. It does not constitute pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment.
65. For the reasons provided above, I have otherwise found the applicant does not face a real chance of harm on any of the bases claimed now or in the reasonably foreseeable future. As

'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

**Complementary protection: conclusion**

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

**Decision**

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



## Applicable law

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

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

In this Act, unless the contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
  - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
  - (c) for the purpose of intimidating or coercing the person or a third person; or
  - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
  - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.  
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.  
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

#### *Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

#### *Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.