



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09965

Date and time of decision: 7 January 2022 10:23:00  
M Currie, 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 Sri Lankan citizen of Tamil ethnicity and an adherent of the Hindu faith. He arrived in Australia in October 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in February 2016. In that application, he claimed that he had been forcibly recruited by the Liberation Tigers of Tamil Eelam (LTTE); that only served with that organisation for a short period (less than two months); that after the end of the civil war he had been forced to undergo more than two years of rehabilitation; that he was released from rehabilitation in 2011, but that he still faces some hostility and suspicion from the Sri Lankan Government; and, that as a consequence of his rehabilitation, he had limited opportunities for employment and marriage and problems in Sri Lanka, and so he came to Australia.
2. In August 2016, a delegate of the Minister for Immigration decided under s.65 of the *Migration Act 1958* (the Act) to refuse the visa, finding that Australia did not owe protection obligations to the Applicant. [In] August 2016, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
3. An IAA reviewer affirmed the delegate's decision [in] October 2016. However, this decision was later quashed by the Federal Circuit Court of Australia (FCCA) after the Department conceded that the initial IAA reviewer had fallen into jurisdictional error by misconstruing or misapplying the term 'exceptional circumstances' in s.473DD of the Act. The Court remitted the matter back to the IAA for reconsideration of the applicant's claims for protection.
4. This is a *de novo* decision, not a review of the delegate's decision or reasoning. My task is to consider the applicants claims for protection and the materials before me afresh. I am not bound by any earlier findings by the delegate, or the IAA.

### Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the Act.
6. In September 2016, two emails were sent to the IAA on behalf of the applicant. These emails contained six attachments. Five of the attachments were images of a 2016 written statement prepared by the applicant in the Tamil language. The sixth attachment was an English translation of the applicant's written statement.
7. In the 2016 written statement the applicant restated many of his existing claims, and broadly, argued against the findings of the delegate. To the extent that the statement argues against the findings of the delegate, I have considered it.
8. The written statement also indicated that the applicant had "*not disclosed a truth*" in his earlier statements and advanced several new and revised claims which had not been made before the delegate. These claims are:
  - That he had served as a member of the LTTE between his forced recruitment in 2007, and the end of the Civil war in May 2009.
  - That during his service with LTTE, he underwent weapons training and served as a sentry at a training base and later worked with the [a specified unit]. That towards the

end of the war, he had become a member of the security detachment for the Commander of the [specified unit].

- That he and another LTTE member had surrendered to the Government together [in] May 2009.
  - That his father died [in] June 2016, and that several days prior to his death he had been taken for questioning by the Sri Lankan Police Criminal Investigation Division (CID).
  - That his remaining family still faced problems in Sri Lanka due to his profile; his mother had moved to Jaffna, and his brother has ceased his [tertiary] studies, due to their fears
9. As these new claims were not made before the delegate, they are new information. In his 2016 written Statement the applicant asserted that he had not be truthful about these new claims because of his timidity and fear, but that now, he was determined to tell the truth. He also stated that his mother did not tell him about any of his family's more recent problems in Sri Lanka because she did not want to worry him. I have considered the applicant's explanations for his new and revised claims.
10. Broadly, the applicant's new account of his life consists of a series of linked claims: the first, and principal revision of his claims is his account of his LTTE service in Sri Lanka which is now said to have lasted for approximately two years; his LTTE service is said to have led to ongoing interest in his family, which resulted in the questioning of his father in 2016, and other ongoing problems for his family. Each of these elements represents a substantial change from the claims the applicant had advanced before the delegate. His final revised claim is that his father is dead. His new and revised claims are new information.
11. Before the delegate, this applicant had asserted that he had been forcibly recruited by the LTTE in 2007 but he stated that he had escaped from the LTTE around 35 – 45 days later. He said for the brief period he was with the LTTE, he received some political indoctrination lessons (trying to persuade him to adopt the LTTE cause) and some fitness lessons. He said that he and several other forced LTTE recruits were was able to escape from the LTTE during a training run around the LTTE barracks, and that he immediately returned and resided with his family. He said that at the end of war, he had surrendered to the Government with his family, and many other Tamils because of the many problems caused by the fighting. He said that after he had completed his rehabilitation in 2011, he had returned to the family home in [Town 1], and had later moved to [Town 2] in Jaffna for work. His parents and siblings (except one brother) had also moved to [Town 2]. Regarding his father and his family, he said that his father was alive and living in Jaffna with his family and at interview he said his family had not had any problems in in Sri Lanka in the years since his release.
12. The applicant's new and revised claims all relate to himself or his family. He had knowledge of these issues at the time he lodged his Protection Visa Application since the claims relate to him personally, or his family in Sri Lanka, with whom he says he maintained regular contact. The delegate's decision was not made until August 2016, around two months after the date the applicant now asserts his father died. He had been advised during his Protection Visa Interview that he could provide further information to the Department and he had provided a post interview submission to the Department. In these circumstances, it seems clear that the applicant knew he could have provided further information to the Department before the delegate's Decision was made, and so I am not satisfied that any of these new claims could not have been provided to the delegate before the date of the s.65 Decision. In the circumstances, I am not satisfied that s.473DD(b)(i) is met for any of the applicant's new and revised claims.

13. As I have summarised, his new and revised claims clearly contradict many of his earlier claims about himself, his profile and his family. Other than the 2016 written statement itself, the applicant has not put forward any supporting evidence for any of his new and revised claims. His written statement indicates his mother received a note from a Sri Lankan Doctor regarding his father's death, but a copy of this note has not been provided; he says he was a member of the LTTE for around two and a half years, but he has not provided any other independent evidence to substantiate any of his new or revised claims about the LTTE. I observe that:
- In in 2013, when he first came to this country, he had claimed to have been held by the LTTE for around 45 days.
  - That in the 2016 Statement of Claims which accompanied his Protection Visa Application he said he was with the LTTE for around 40 days after being forcibly recruited in February 2007.
  - In his Protection Visa Interview, he said he was with the LTTE for around 30 - 35 days.
14. These accounts were provided over the period between 2013 and 2016 and are largely consistent. They indicate that the applicant was briefly a member of the LTTE after he was forcibly recruited, but that he managed to escape within two months after a brief, introductory period of training. However, he now says he was with the LTTE for more than two years, that he was a sentry, and a member of a personal security detachment. I have reviewed the applicant's revised claims, but in light of his consistent earlier information, I am not satisfied that his new and revised LTTE claims are credible information in the relevant sense, and so I am not satisfied that s.473DD(b)(ii) is met for these LTTE claims. Neither limb of s.473DD(b) is met for the applicant's revised LTTE claims. For the avoidance of doubt, I am not satisfied that the applicant's explanations, as summarised above, amount to exceptional circumstances. I am also not satisfied that there are any other exceptional circumstances to justify considering that applicant's new and revised LTTE claims and so s.473DD(a) is also not met.
15. The applicant says his father died in June 2016. He has not provided any documentary evidence for this new claim. According to the applicant's written statement, his mother told him his father died of [a condition], while a letter from a Sri Lankan doctor stated he died from [another condition]. The applicant does not know how his father died. The death of the applicant's father was around two months prior to the date of the delegate's decision. As I have indicated above, the applicant was aware he could provide further information to the delegate before his case was decided. In the circumstances, I am not satisfied that the applicant could not have provided the information about his father's death to the delegate prior to the date of the s.65 Decision and so s.473DD(b)(i) is not met for this new claim. I do accept that the death of the applicant's father is credible personal information, however, given that the applicant asserts he does not know how his father died, I am not satisfied that this information may have made a difference to the consideration of his claims for protection. I am not satisfied that s.473DD(b)(ii) is met for this new information. Neither limb of s.473DD(b) is met. For the avoidance of doubt, I am not satisfied that the applicant's explanations, as summarised above, amount to exceptional circumstances. I am also not satisfied that there are any other exceptional circumstances to justify considering that applicant's new claims about his father's death, and so s.473DD(a) is also not met.
16. The applicant now asserts that his remaining family in Sri Lanka still face problems due to his profile in that country. He says his father was questioned by the CID shortly before his death in June 2016. These claims relate to his family, with whom he maintains regular contact in Sri

Lanka. I am not satisfied that he could not have provided this information to the delegate prior to the date of the s.65 Decision and so s.473DD(b)(i) is not met for these new claims.

17. Though the September 2016 written statement says his family suffered problems in Sri Lanka, during his May 2016 Protection Visa Interview, the applicant clearly stated that his remaining family was not suffering from any problems in Sri Lanka. His 2016 written statement does not explain why he had earlier stated there were no problems. He has not explained what type of harassment or problems his family faces in Sri Lanka and has not put forward any specific details. The applicant believes that his profile as a former LTTE member, led to the CID's questioning of his father. The applicant has not provided any independent evidence to support his new claim that his father had been questioned by the CID shortly before his death in June 2016. I have already noted that the applicant was aware that he could provide further information to the delegate prior to the date of the s.65 Decision; he did not mention any of these issues at that time. In the absence of any supporting evidence about these claims and noting again his contradictory evidence about his father and family, and his failure to mention these issues before the s.65 Decision, I am not satisfied that the applicant's new claims about his father's questioning, or problems for his family are credible personal information in the relevant sense and so I am not satisfied that s.473DD(b)(ii) is met for this claim. Neither limb of s.473DD(b) is met for these claims. For the avoidance of doubt, I am not satisfied that the applicant's explanations, as summarised above, amount to exceptional circumstances. I am also not satisfied that there are any other exceptional circumstances to justify considering that applicant's new family claims and so s.473DD(a) is also not met.
18. On 26 November 2021, the IAA wrote to this applicant, and invited him to comment on of a range of country information which was published after the date of the delegate's decision. This information was sourced from two reports, a 2019 report by the Department of Foreign Affairs and Trade (DFAT) relating to conditions in Sri Lanka<sup>1</sup>, and 2021 report published by the UK Home Office, relating to issues of Tamil separatism<sup>2</sup>. At the time the IAA wrote to the applicant, full copies of both of these reports were provided to him. The country information indicated that persons of his profile were no longer of interest to the Government of Sri Lanka or to the security forces of that country. In a phone call of the same date, the applicant acknowledged to the IAA he had received a copy of this letter. The IAA correspondence indicated that the IAA required a response by 21 December, or a decision would be made in his case.
19. On 21 December 2021, the applicant sent an email to the IAA in response to the IAAs invitation to comment. In the email, the applicant acknowledged that conditions in Sri Lanka had improved, but he also stated that even so, he was unconvinced that he could live safely in Sri Lanka. He did not provide any reasons for why he believed he would be unsafe in the email.
20. Within the email the applicant also disclosed to the IAA that in August 2020 he had been married to another Sri Lankan asylum seeker, and that in mid-2021, she and he had registered a business together. His email also contained copies of several documents. These were: two Australian marriage certificates issued to the applicant and his now wife in August 2020; a document titled '*Refugee Determination Record*', which had been issued to the applicant's wife in 2015 and which indicated that she had been found to be a refugee in the Republic of Nauru [in] October 2015; an excerpt from the Australian Business Register which

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>2</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752

indicated that the applicant and his wife had obtained an Australian Business Number together in July 2021; a copy of a document titled *'Fixed Term – Residential Tenancy Agreement'*, indicating that the applicant and his wife were joint tenants at a property in South Australia; and five photographs of the applicant's wedding, showing images of himself, his wife, and various guests.

21. The information about the applicant's 2020 marriage (the 'marriage' claim), and the information about his joint business with his wife (the 'business' claim), were not claims made before the delegate, they are new claims and new information. None of the documents provided in the email of 21 December 2021 to support these claims were before the delegate, the documents are also new information.
22. I will first consider the applicant's new claim to have been married in August 2020, and the photographs, the marriage certificates, the Refugee Determination Record, and the tenancy agreement which are offered to support that new claim. These documents provide strong evidence that the applicant is now married, and that he resides with his wife. Given the marriage occurred in 2020, some four years after the date of the s.65 Decision, I am satisfied that none of this material could have been provided to the delegate prior to the date of the delegate's decision and so s.473DD(b)(i) is met for this new claim. The new information relating to the applicant's marriage is credible personal information in the relevant sense, since it relates to his personal circumstances. However, as this event (the marriage) occurred in Australia many years after his departure from Sri Lanka, it is not clear that this event may have affected consideration of his claims for protection and so s.473DD(b)(ii) is not met. Even taking into account that the applicant's present circumstances are substantially different now that he is married, I am not satisfied that there are any exceptional circumstances to justify considering the new information about the applicant's marriage in this decision, and so s.473DD(a) is not met for this new claim, or for the supporting documents.
23. The applicant's new 'business' claim is that he and his wife have started a business together in 2021. The excerpt from the Australian Business Register is provided in support of that new claim. This event occurred some four years after the date of the s.65 Decision, and I am satisfied that the new 'business' claim and the supporting document from the Australian Business Register could not have been provided to the delegate prior to the date of the delegate's decision and so s.473DD(b)(i) is met for this claim. The new claim is credible personal information, but like his marriage this new claim is, in my view, unrelated to the applicant's claims for protection in Sri Lanka. In the circumstances, I am not satisfied that the new 'business' claim may have affected the consideration of his claims for protection, and so s.473DD(b)(ii) is not met. I have considered the factors above, including the timing of this new claim, but even so, I am not satisfied that there any exceptional circumstances to justify considering this new claim and so s.473DD(a) is not met for the new 'business' claim, or the excerpt from the Australian Business Register.
24. In late December 2021, DFAT published a new report about conditions in Sri Lanka. This was an updated version of the 2019 report which the IAA had sent to the applicant in November 2021. The 2021 DFAT report superseded the DFAT report which had been published in 2019 (which itself, superseded earlier versions of the report, including one published in 2015 that had been cited by the delegate). The 2021 DFAT report provides a much more recent picture of conditions in Sri Lanka. DFAT has prepared this report specifically to assist decision makers who are making decisions in relation to asylum seekers from Sri Lanka. Given these factors, I

have decided to obtain a copy of the 2021 DFAT Report<sup>3</sup>. I am satisfied that there are exceptional circumstances to justify considering it.

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

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

- He is a Sri Lankan citizen of Tamil ethnicity. He was born in [year] in [Town 1]. A town in the Mullaitivu District of the Northern Province of Sri Lanka. He grew up in [Town 1] with his family. This was an area controlled by the LTTE.
- In February 2007, some members of the LTTE came to his home, and he was forcibly recruited into the LTTE. He was blindfolded and taken to an unknown camp in the Jungle. While he was held, he was forced to attend political classes, which aimed at indoctrinating him with the ideology of the LTTE. Around six weeks after he was able to escape from the LTTE, while he was participating in a session of physical training. After his escape, he returned to his family.
- Due to the ongoing civil in Sri Lanka, the applicant and his family faced many problems. Life in the Tamil parts of the country became difficult due to the escalating violence of the civil war. The applicant and his family became displaced from their home and had to move several times in the following years. In May 2009, they crossed into territory controlled by the Sri Lankan Army.
- Due to the difficult conditions that they had been living in, food and clean water was scarce, at the time, the applicant was unwell. He was taken to a hospital in [a location], where he was treated. He stayed in the hospital from May 2009, till September 2009.
- After the civil war ended, the Sri Lankan security forces attempted to identify former members of the LTTE. While he was in the hospital, he was questioned about his links to the LTTE.
- In September 2009, the applicant was taken to a rehabilitation camp for former members of the LTTE. Over the next two years, he lived in a series of three rehabilitation camps. During the initial period of his rehabilitation, he was questioned by the Security forces, including the Army, the Police, and the CID. During questioning he was mistreated.
- In late 2011, the applicant was released from rehabilitation. He returned to [Town 1] and lived with his family. After his release, he was required to report to the authorities on a regular basis. Formally, this reporting requirement only lasted three months, but in fact, he could be summoned by the authorities at any time.
- After his three-month period of reporting had finished, the applicant moved to [Town 2], in Jaffna in order to obtain a job. He found work in a [factory]. His family also moved to [Town 2], in Jaffna.
- While in Jaffna, he was still occasionally required to return to [Town 1] to speak to the authorities. The security forces would routinely visit his home in [Town 1], and in [Town 2]. These visits caused fear and anxiety for him, and for his family. The applicant believed that the Sri Lankan authorities were still suspicious of him. They harassed him, and he feared he would be taken back into rehabilitation or disappeared.

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<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

- His time in rehabilitation limited his career and marriage prospects in Sri Lanka. Employment was difficult to find, and families with eligible daughters would not consider him a suitable match.
- His mother made arrangements for him to depart Sri Lanka, and travel to Australia. He departed Sri Lanka in late 2012, by boat.
- He believes his past activities and links to the LTTE would mean he was still of interests to the Sri Lankan authorities.
- He believes his illegal departure from Sri Lanka and his attempt to obtain asylum in this country would lead him to be of further interest to the authorities in that country.
- He fears that if returned to Sri Lanka, he would face rehabilitation again, or worse, could be killed by the Sri Lankan security services or by armed groups allied to the security services.

### **Factual findings**

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26. As part of his SHEV Application, the applicant has provided copies of a number of identity documents in order to establish his identity. This includes a copy of his Sri Lankan Birth Certificate, his Sri Lankan National ID Card, and the biodata page from his Sri Lankan Passport. He has also provided several other documents which contain information about his identity, including Sri Lankan documents relating to his rehabilitation in Sri Lanka, a letter from the Divisional Secretary dated [in] December 2012, attesting to his residence in [his home area], and an August 2011 card from the International Organisation for Migration.
27. He has provided accredited translation for the Birth Certificate and the National Identity Card. These documents provide consistent identity information, which is also consistent with the applicant's verbal claims.
28. I have reviewed all of this material. The applicant has established his identity to my satisfaction. I accept that he is a Sri Lankan citizen, of Tamil ethnicity as he claims. I accept that he was born in [year] in [his home area] [Town 1], a town in the Mullaitivu District of the Northern Province of Sri Lanka. For the purposes of this decision, I find that Sri Lanka is his receiving country.

### **LTTE links/Rehabilitation**

29. The applicant says that his brief links to the LTTE led to him being rehabilitated after the war. He says that he was in rehabilitation from September 2009, until late 2011. During this period, he resided in three separate rehabilitation camps. Initially, he underwent questioning about his links to the LTTE, and during these sessions he faced mistreatment. As time passed the questioning ceased.
30. As evidence of his time in rehabilitation, the applicant has provided several documents. These were:
  - A Reintegration Certificate in his name, which contains his photo, and which indicates that the applicant had been 'reintegrated' [in] September 2011.
  - A copy of a card issued in his name by the International Organisation of Migration containing his name and photo which was issued in August 2011.

- A letter dated [in] September 2011, from the Bureau of the Commissioner General of Rehabilitation, indicating that the applicant had been released to his parents, having completed his rehabilitation.
31. I have considered these documents. On their face, they provide strong evidence that the applicant underwent rehabilitation as he claims. Country information before me indicates that in the years after the end of the civil war in Sri Lanka, the Government of that country committed thousands of Tamil Sri Lankans to rehabilitation centres. Those sent to rehabilitation were persons who had been identified as having links, even remote links, to the LTTE and included real, and imputed LTTE members<sup>4</sup>. During rehabilitation, these persons were held in rehabilitation camps, and these camps were controlled by the security forces. Furthermore, persons suspected of LTTE involvement, or persons who were held by the security forces for other reasons could routinely be mistreated while in custody<sup>5</sup>.
  32. After considering the applicant's claims, his evidence and the country information, I accept that this applicant underwent rehabilitation in Sri Lanka between 2009 and late 2011. I also accept that he underwent rehabilitation during this period because he had been forcibly recruited by the LTTE in 2007 and been a member of that organisation for around six weeks. Given his links to the LTTE, and his period of Rehabilitation, I am also willing to accept that he was questioned by the security forces more than once, and that he had been mistreated during questioning.
  33. The applicant says that after his release from Rehabilitation in late 2011. He was required to commence a three-month formal reporting regime which meant he had to regularly report to the Sri Lankan security forces. I also accept that this occurred. I accept that even after his formal period of reporting had finished, he remained of some limited interest to the authorities, and that occasionally, they visited his home, or summoned him for questioning.
  34. The applicant says that after his release, he found it difficult to marry, or secure employment. He says employers were reluctant to employ him, and that Sri Lankan families would not consider him as a suitable marriage prospect for their daughters. He attributes these problems to his period of rehabilitation. I am willing to accept that the applicant faced problems like this in Sri Lanka after he had been released.
  35. Nevertheless, on his own evidence, by March 2012, this applicant was able to secure a job in a [factory] in Jaffna. At interview, he said he started work as a [a certain role], but later had a management role. It would seem then, that even though he had some difficulties, the applicant was able to secure work in Sri Lanka.

## Refugee assessment

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36. 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.

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<sup>4</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>5</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019,

## Well-founded fear of persecution

37. 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.
38. I have accepted that this applicant is a Sri Lankan citizen, and that Sri Lanka is his receiving country. During his life, except for the short period that this applicant was forcibly recruited by the LTTE, and the period when he was undergoing rehabilitation, he lived with his family in various locations in the Northern Province of Sri Lanka. I conclude that if returned to Sri Lanka, he would return and reside with his family, in the Northern Province of Sri Lanka.

### *Ethnicity, residence in the North, Imputed LTTE links*

39. The applicant says that his profile, as a Tamil from the North, with links to the LTTE would lead him to being imputed as an LTTE supporter now. He says that these factors would lead to him being of ongoing interest to the authorities in that country.
40. I have accepted that this applicant had some links to the LTTE due to his forcible recruitment in 2007, and the short period he spent with that organisation. I have accepted he underwent a formal period of rehabilitation in Sri Lanka between 2009, and late 2011, and was then released and reintegrated into the Sri Lankan community. I accept that he was mistreated while he was held by the Government, and that he is a Tamil, who lived in the Northern Province of that country, and area that was largely under LTTE control.
41. Ethnicity does continue to be a source of tension in Sri Lanka and the Government of Sri Lanka remains suspicious of the Tamil population<sup>6</sup>. This is unsurprising given the long running civil war in Sri Lanka was fought along ethnic lines with the minority Tamil community seeking to establish a separate state. According to a recent census in Sri Lanka, there are 3.1 million Tamils in the country, up from 2.7 million in 1981. Tamils are the second largest ethnic group in Sri Lanka constituting approximately 15% of the Sri Lankan population<sup>7</sup>. Most Sri Lankans tend to live within their own ethnic communities, although different ethnic groups live within close proximity in major urban areas. Tamils live throughout Sri Lanka but are concentrated in the Northern and Eastern Provinces. In the Northern Province, Tamils comprise around 93%

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<sup>6</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752

<sup>7</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

percent of the population<sup>8</sup>. The Government of Sri Lanka has committed to ethnic reconciliation<sup>9</sup>.

42. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds'<sup>10</sup>. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA). Tamils faced less harassment during the 2015 presidential and parliamentary elections than in earlier elections conducted soon after the end of the war<sup>11</sup>. There has been a trend towards election of more hard-line candidates, but no return to the violence and intimidation of the past<sup>12</sup>. DFAT understands Tamils do not receive unwarranted attention from authorities because of their political involvement. DFAT assesses there are no barriers to Tamil political participation<sup>13</sup>. Even former members of the LTTE are actively engaged in the Sri Lankan political process.
43. DFAT reporting indicates that many Tamils in Sri Lanka report that the authorities continue to monitor public gatherings in Sri Lanka and conduct surveillance on persons of interest; usually people involved in politically sensitive issues such as land rights, missing persons and memorial events<sup>14</sup>. These complaints are most commonly voiced in the north of Sri Lanka where a military presence remains<sup>15</sup>. I have found this applicant would return to the Northern Province. The applicant does not claim to have had any involvement in issues such as land rights, missing persons and memorial events. His links to the LTTE, though real, were very brief, lasting only around six weeks.
44. During his Protection Visa Interview this applicant indicated he maintains regular contact with his family in his home country. I note that the applicant has not claimed that any person he knows, including his parents, or his siblings, suffers from any ongoing harm merely for being Tamil, or for residing in the Northern Province. The applicant lived in the Northern province throughout his life prior to coming to Australia. The government of Sri Lanka had resumed control of the Northern province by 2009 when the civil war ended, and the applicant did not depart for a further three years. He has not pointed to any specific incident, where his residence in the North, or his family's residence in the North was a problem for at that time. It seems unpersuasive to argue that this would be a problem now.
45. I have accepted that this applicant does have some historic links to the LTTE. I accept that during the in 2007 he was forcibly recruited into that organisation for around six weeks. In these circumstances, I would characterise his links to the LTTE as being as being fairly limited, nevertheless, I have accepted that led to some suspicion of this applicant in the past and that he was rehabilitated. However, this applicant was released from rehabilitation in late 2011, and reintegrated back into the community. Thereafter he lived with his family, finding work in a [shop] in March 2012.

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<sup>8</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>9</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>10</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>11</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>12</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>13</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>14</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>15</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

46. The applicant says that even after he was released from Rehabilitation, he suffered from harassment and suspicion from the security forces. He says he was summoned for questioning after his three-month reporting requirement had ceased, and occasionally the security forces would visit his home. Though he has not provided supporting evidence for these claims, country information does indicate that the Sinhalese majority in Sri Lanka is still retains suspicions about the Tamil separatist movement<sup>16</sup>. In the period immediately following the war, such suspicions were heightened, and I am willing to accept that in the period of 2011/12, shortly after the war finished, the security forces retained a brief interest in this applicant. In the January 2016 Statement of Claims which accompanied his Protection Visa Application the applicant asserted that the security forces of Sri Lanka still visited his home. Given that he had only been a member of the LTTE for around six weeks in early 2007, that he had completed his rehabilitation and some four years had passed since his departure from Sri Lanka, it seems doubtful they would still have been interested in him that time. In the circumstances, am not satisfied that the Sri Lankan authorities remained interested in him at that time, or that they had have further interest in him now.
47. Country information indicates that in the 12 years since the end of the civil war conditions in Sri Lanka have changed markedly. Conditions for Tamils have substantially improved over the last decade<sup>17</sup>. The Sri Lankan military presence in Tamil areas which occurred after the end of the war, has largely been removed. Military checkpoints in Tamil areas have be dismantled. Militia groups have been disarmed. Widespread political violence no longer prevails in Sri Lanka<sup>18</sup>. While the Sri Lankan Government remains sensitive to any resurgence of Tamil separatism, former members of the LTTE are now able to fully participate in society. Former LTTE members do not face legal barriers to participating in public life, including politics<sup>19</sup>. Low-profile former LTTE member, including former combatants, those employed in administrative and other roles, and those who provided non-military support to the LTTE might be monitored but would generally not be prosecuted<sup>20</sup>.
48. Returnees to Sri Lanka can expect a short period of monitoring, but only those who are deemed to have had a significant role in the separatist movement are likely to be of further interest to the government. It is unlikely that a returnee would be subject to further rehabilitation now<sup>21</sup>. Furthermore, thousands of Tamils have returned to Sri Lanka in the last decade. Returnees who departed Sri Lanka illegally, or who sought asylum overseas, but who are not of further interest, may face charges for breaches of Sri Lanka's Immigrants and Emigrants Act (1948), but in general, do not face custodial sentences in Sri Lanka and are not of other interest to the Sri Lankan Government<sup>22</sup>.
49. The applicant's November 2021 email to the IAA concedes that conditions in Sri Lanka have improved. Around 12 years have passed since the end of the civil war. The LTTE was defeated

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<sup>16</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752

<sup>17</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015 CISEC96CF14143; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

<sup>18</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019,

<sup>19</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019,

<sup>20</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019,

<sup>21</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019,

<sup>22</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019,

in 2009, and no longer exists<sup>23</sup>. Around 15 years have passed since the applicant was briefly a member of the LTTE. He did not have a combat role in that organisation, and he was not a volunteer, rather he was subjected to forced recruitment by the LTTE. In his brief time with the organisation, he was only a trainee. The country information indicates that his very limited membership and low status with the organisation means he would not be of further interest to the Sri Lankan authorities or be prosecuted in Sri Lanka now, especially given he has already undergone rehabilitation. He is not involved in any politically sensitive issue such as land rights, missing persons or memorial events. He has not been involved with the LTTE since early 2007 and is not otherwise involved in the separatist movement.

50. Though he says that he faced difficulties finding work in Sri Lanka, on his own evidence, within months of his release from rehabilitation in 2011, he had secured employment. He was later promoted to a manager's role. Though he says he faced difficulties in securing a marriage, he does not claim that all former rehabilitated persons are unable to marry. Merely that he faced difficulties in the period between his release in late 2011, and his departure for Australia in late 2012. None of the evidence before me indicates that persons who have undergone rehabilitation cannot marry in Sri Lanka. I am not satisfied he would be unable to marry if returned to Sri Lanka, and in any case, difficulties encountered in securing a contract of marriage, in these circumstances, does not amount to persecution for his race, religion, nationality, membership of a particular social group or political opinion.
51. Overall, I am not satisfied that this applicant's ethnicity, his forced recruitment, his brief membership of the LTTE, his rehabilitation, or his former residence in the LTTE controlled north, would lead to him being of renewed interest to the authorities in Sri Lanka now. I am not satisfied he would face a real chance of harm for any of these reasons. He does not have a well-founded fear of persecution on these grounds.

#### *Failed claim of asylum, illegal departure*

52. The applicant has claimed that he fears harm based upon his illegal departure from Sri Lanka and his status as a failed asylum seeker
53. I accept that the applicant departed Sri Lanka by boat without passing through normal Sri Lankan immigration and customs checks. I note that such a departure in Sri Lanka is a breach of ss.34 and 45(1)(b) the *Immigrants and Emigrants Act (1949)* which governs exit and entry from Sri Lanka<sup>24</sup>.
54. Upon return to Sri Lanka, the applicant will likely be identified at the airport. Due to the circumstances of his departure, he will likely undergo an investigative process which will likely involve a range of Sri Lankan agencies including Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department and, at times, the Terrorism Investigation Department. These agencies who will check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters<sup>25</sup>. This processing occurs in arrival groups at the airport and can take several hours. During this time, the applicant can expect to

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<sup>23</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

<sup>24</sup> DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>25</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

be held at the airport while the entire cohort of returnees is interviewed<sup>26</sup>. These processes are standardised and are applied to all returnees regardless of ethnicity or religion<sup>27</sup>.

55. Whilst the applicant does not have a current Sri Lankan passport, he does have a range of other Sri Lankan identity documents in his possession including an expired Passport, a Sri Lankan Birth Certificate and a Sri Lankan national identity card. I conclude the applicant would be able to establish his identity without difficulty if returned to his home country.
56. As the applicant departed illegally, I accept that he would likely face charges arising from his breach of the *Immigrants and Emigrants Act*. This will likely result in him being arrested and charged at the airport in Sri Lanka; police will take photographs, fingerprints and statements from him and other returnees, and further enquire about activities while abroad if returnees are former LTTE members. Some returnees from Australia have been charged with immigration offences and with criminal offences allegedly committed before departure<sup>28</sup>. Apprehended individuals can remain in police custody at the Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate’s Court, after which custody and responsibility for the individual shifts to the courts or prison services<sup>29</sup>.
57. DFAT reporting indicates the Sri Lankan government has directed that all passengers of people smuggling ventures be charged and appear in a court closest to where the offence occurred. The frequency of court appearances depends on the magistrate and vary widely, but those charged are required to return to court when their case is being heard, or if summonsed as a witness in a case against the facilitator or organiser of a people smuggling venture. There can be lengthy delays in court processes<sup>30</sup>.
58. Penalties for leaving Sri Lanka illegally in most cases result in a fine. Recent DFAT reports indicate that passengers on a people smuggling ventures are not given custodial sentences for departing Sri Lanka illegally<sup>31</sup>. Rather, fines are issued to deter people from departing illegally in the future. typically, this fine is between \$350 - \$1400 Australian dollars<sup>32</sup>. Sources suggest those who are unable to pay the fine are permitted to pay in instalments but, if still unable, may be imprisoned for 14 days. However, Prior to departure from Australia, Australian Border Force provides removed returnees with cash to assist their return to Sri Lanka. A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a passenger 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. 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>33</sup>. Bail is usually granted to voluntary returnees. Bail conditions are discretionary and can involve monthly reporting to police<sup>34</sup>.

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<sup>26</sup> DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

<sup>27</sup> DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

<sup>28</sup> DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

<sup>29</sup> DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

<sup>30</sup> DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

<sup>31</sup> DFAT, 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818; DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

<sup>32</sup> DFAT, 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

<sup>33</sup> DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

<sup>34</sup> DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

59. I accept that if returned the applicant would very likely be charged for offences related to his illegal departure from Sri Lanka. This is his first offence. I have found the applicant no longer has a profile of interest to the authorities in Sri Lanka. Having considered the information above, I conclude that the applicant would very likely face a small fine, and possibly a period of bail upon return, but would be otherwise free to go. It is possible that the applicant may be held by Sri Lankan authorities for a short period upon return to that country. While any brief period of detention may be distressing for the applicant, I am not satisfied that a short period of detention like this would amount to any harm.
60. The evidence before me indicates that the provisions of Sri Lankan immigration law are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am not satisfied that any process the applicant may face on return to Sri Lanka because of his illegal departure would constitute persecution for the purpose of the Act.
61. DFAT assesses that refugees and failed asylum seekers face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation<sup>35</sup>. Refugees and failed asylum seekers have also reported social stigma from their communities upon returning to some communities as people resent the financial support provided to refugee returnees<sup>36</sup>. DFAT assesses that returnees may also face some societal discrimination upon return to their communities, which could affect their ability to secure housing and employment. DFAT further assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities<sup>37</sup>.
62. Nevertheless, I note that the challenges outlined above are everyday difficulties faced by persons seeking to re-establish themselves after being away from the country for an extended period of time. I note my earlier finding that the applicant will return and with his family, as he did previously. In my view, the presence of family will mitigate many of these challenges. There is no information before me to suggest that Tamils who have lived abroad are facing harm at the airport or in their home areas on their return to Sri Lanka simply due to the time spent out of Sri Lanka.
63. Whilst government monitoring does continue in Sri Lanka, DFAT assesses that monitoring of Tamils in day-to-day life has decreased significantly<sup>38</sup>. I accept that if the applicant is returned to Sri Lanka and returns to the Northern Province where he previously lived, he may be the subject of monitoring for a short period by the authorities. However, I am not satisfied that he would otherwise face any real chance of harm by them. I also accept that he may experience some social stigma within his community as a failed asylum seeker and a person who has not lived in Sri Lanka for a several years. However, I am not satisfied that this treatment, if it does occur, amounts to harm. I do not accept that such challenges, any social stigma or monitoring as he may face as a returning asylum seeker from Australia constitute serious harm, individually, or taken together.
64. Overall, I do not accept that the applicant would face a real chance of any harm, or persecution arising from his illegal departure or his status as a failed asylum seeker or any combination of these or his other claims.

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<sup>35</sup> DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>36</sup> DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>37</sup> DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

<sup>38</sup> DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

## Refugee: conclusion

65. 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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66. 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

67. 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.
68. 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.
69. I have found that that due to his illegal departure, the applicant will probably be identified on arrival at the airport, arrested and charged with breaches of Sri Lanka immigration law if returned to Sri Lanka. He will likely be detained for several hours at the airport and potentially for up to two days and subject to a fine or possibly bail and associated costs. He may face a period of monitoring upon return to his home in the north of Sri Lanka. He may face some social stigma and a number of everyday challenges getting re-established. However, I am not satisfied that any of these issues, either individually or cumulatively would amount to torture, the death penalty, or would result in him being arbitrarily deprived of his life. I am not satisfied that these issues amount to cruel or inhuman treatment or punishment, or degrading treatment or punishment as defined.
70. I have otherwise found that the applicant would not face a real chance of harm arising from his ethnicity, his residence of the North, his historic LTTE links, his illegal departure or his status as a failed asylum seeker, or any other basis claimed. As 'real chance' and 'real risk' have been found to meet the same standard, it follows that the applicant does not face a real risk of significant harm on any of these bases if returned to Sri Lanka. I am also not satisfied that the applicant would face a real risk of significant harm for any other reason.

**Complementary protection: conclusion**

71. 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.