



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10283

Date and time of decision: 6 June 2022 10:04:00
D Power, Reviewer

Decision

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

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

Background to the review

Visa application

1. The applicant is a Tamil male from Eastern Province in Sri Lanka. On 26 May 2016, he lodged an application for a Temporary Protection visa (TPV).
2. On 18 November 2016, a delegate of the Minister for Immigration (the delegate) made a decision to refuse to grant the applicant a protection visa. The delegate accepted that the applicant had lost members of his extended family and had been personally mistreated by government forces, or those aligned with the government, during Sri Lanka's civil conflict. The delegate also accepted that the applicant had been mistreated by members of the Sinhalese community. However, the delegate did not accept that he faced a real chance or real risk of serious or significant harm on return to Sri Lanka, pointing to considerable social and political change in Sri Lanka since the applicant's departure. The delegate also accepted that the applicant may be charged with offences related to his travel to Australia but that any resultant fine or brief period of detention would not amount to serious or significant harm. The delegate also found that the applicant did not face a real chance or real risk of serious or significant harm for any other reason including having sought asylum in Australia.
3. The IAA affirmed the delegate's decision on review. However, on 2 March 2022, the IAA's determination was quashed by a court and remitted for reconsideration.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 13 December 2016, the IAA received an email from the applicant. This email had several attachments that were new information.
6. The first attachment is labelled "PEP 032 – Evidence of property damage". It contains photos of the applicant's business in Sri Lanka purporting to show damage to the store. These photos appear to be duplicated in the third attachment labelled "[applicant name]".
7. It is not clear when these photos were taken. The applicant has provided no clarification in this regard, nor has he given any context for the photos other than labelling them to indicate that they show damage to his shop.
8. Further, I accept that the applicant's shop was damaged by intruders in 2012, as did the delegate. I am not satisfied that these photos may have affected the consideration of the applicant's claims or that exceptional circumstances exist to justify considering this information.
9. The second attachment is labelled "PEP 032 – Health documents". It contains a number of documents relating to the applicant's physical and mental health. Some of the documents pre-date the delegate's decision and the applicant has not explained why they could not have been put before the delegate. I note that the applicant did provide other documents relating to his health, namely a letter from his mental health social worker, and discussed other aspects of his health at interview. The letter from his doctor is dated 13 December 2016 and post-dates the delegate's decision, although the applicant has not explained why the information in the letter could not have been sought earlier and provided to the delegate.

10. However, the information relates to the applicant's various medical conditions and is personal information in the relevant sense. The information comes from his doctor and other health professionals, and I consider that it is credible information that may have affected the consideration of the applicant's claims. Given the applicant's age and claims he has made relating to his health, I am satisfied that exceptional circumstances exist to justify considering this information.
11. On 4 May 2022, the IAA received a submission from the applicant, prepared with the assistance of the Asylum Seeker's Resource Centre, which addresses a number of the delegate's findings. These matters may be regarded as argument rather than information to which I have had regard. The submission also reiterates claims made to the delegate.
12. However, the submission of 4 May 2022 also includes some new information.
13. In his submission, the applicant claims that in June 2018 a relative went fishing and has been missing ever since. He claims that they suspect he has been abducted or worse. This alleged event occurred more than eighteen months after the delegate's decision. Although the relative has not been identified, the information relates to a member of the applicant's extended family and I consider that it is personal information in the relevant sense.
14. However, the applicant has provided little detail about the disappearance of his relative. The applicant has not provided the relative's name or even clarified exactly how the missing person is related to him. The applicant states that the relative went fishing and has since been missing and that he suspects the relative has been abducted or worse but does not state why he suspects this. He does not give any detail about the background of his 'relative', why he would suddenly be abducted some nine years after the end of the civil conflict or who might have abducted him. Neither has the applicant provided any evidence in support of his contention that "many Tamil people have been abducted recently". If such an event had befallen one of the applicant's relatives, I would have expected the applicant to know and seek to supply as much background and information as possible about the event. Given the lack of detail regarding the missing relative, and the lack of explanation about the person's background or the basis of the applicant's alleged suspicions that he was abducted, I am not satisfied that this is credible information. In any event, given the paucity of detail about the alleged missing relative, I am not satisfied that this information may have affected the consideration of the applicant's claims or that there are exceptional circumstances to justify considering this information.
15. The applicant also alleges that his daughter physically assaulted by Sinhalese person at [a] shop 4 months ago. He also claims that his wife has been subjected to harassment and offensive remarks whenever she goes out. The applicant claims that the episode is indicative of the ongoing harassment of Tamils. The information relates to members of the applicant's immediate family and I consider that it is personal information in the relevant sense. Though the applicant has provided relatively few details about the harassment suffered by his family, these claims are nonetheless credible on their face. I also consider that had they been before the delegate they may have affected the consideration of the applicant's claims. I am satisfied that there are exceptional circumstances to justify considering this information.
16. The applicant has also submitted a good deal of recent country information which is set out below:
 - Harvard International Review, 'The Sri Lankan Civil War and Its History, Revisited in 2020', 31 August 2020

- Human Rights Council, 'Promoting Reconciliation, Accountability and Human Rights in Sri Lanka', 18 March 2022
- Human Rights Watch, 'Sri Lanka: No Justice for 'Trinco 5'', 8 July 2019
- People for Equality and Relief in Lanka, 'Sinhalaization of the North-East: Pulmoaddai', undated
- People for Equality and Relief in Lanka, 'Sinhalaization of the North-East: Seruwila-Verugal', undated
- Tamil Guardian, 'Sinhala Buddhist Monk Hurls Racist Abuse at Tamils in Trincomalee', 27 April 2022
- Tamil Guardian, 'Sinhalaization of the North-East: Seruwila-Verugal', 16 March 2020
- The BBC, 'Sri Lanka MPs Leave Gotabaya Rajapaksa-led Coalition', 5 April 2022
- The BBC, 'Sri Lanka: Reshuffle Begins After Cabinet Quits Over Protests', 4 April 2022
- The Diplomat, 'Post-War Sri Lanka: Fractured and Unjust for Tamils', 15 May 2020
- The Guardian, 'Tamils Fear Prison and Torture in Sri Lanka, 13 Years After Civil War Ended', 27 March 2022
- United States Department of State Office of International Religious Freedom

17. The additional information listed immediately above all dates from 2019 onwards and could not have been provided to the delegate before a decision was made. I accept that the undated reports were nonetheless prepared 'post-2019' given their content. Although some of the articles are predominantly general country information, they all contain references to identifiable individuals and are personal information in the relevant sense. They provide much more recent commentary on the social and political situation in Sri Lanka, such as the re-emergence of the Rajapaksas as a political force and the current economic crisis in Sri Lanka. I consider that they may have affected the consideration of the applicant's claims had they been before the delegate. I am satisfied that s.473DD(b) is met and that there are exceptional circumstances to justify considering this information (and the claims arising from them).

18. In a letter from the IAA dated 18 May 2022, the applicant was invited to respond in writing to new information, indicating that:

- Persons of his profile would not be targeted on return to Sri Lanka
- Health care and mental health services are available to all Sri Lankans, including Tamils
- To the extent that social and economic conditions in Sri Lanka are challenging or essential service difficult to access, this is a situation faced by the population generally and not just Tamils specifically

19. On 2 June 2022, the IAA received a submission from the applicant, prepared with the assistance of the Asylum Seeker's Resource Centre, which addresses the matters set out immediately above. The majority of the applicant's response may be regarded as argument

rather than information to which I have had regard. The submission also reiterates claims made to the delegate.

20. However, the submission of 2 June 2022 also includes some new information. In his submission, the applicant claims that his uncle had a 'normal' fever and attended a Sinhalese doctor, but that the uncle died two days later. The applicant puts this information forward as evidence that Tamils face discrimination. He also claims that many of his relatives have died because of incompetent medical treatment, and that Sinhalese are given preference over Tamils in access to medical care.
21. Regarding the uncle, the applicant has not explained when the incident with the fever took place or why this information could not have been put before the delegate. Even if I were to assume that the incident with his uncle took place after the delegate's decision, the applicant has not given any further background on the alleged incident. He does not explain why his uncle sought out a Sinhalese doctor rather than a Tamil doctor, what his condition was or how the doctor's negligence allegedly contributed to his uncle's death. I note that the applicant is currently [age] years old, meaning his uncle is likely to be [age] or older. There are many possible explanations as to why a man of that age who runs a fever may pass away unexpectedly. Similarly, he offers no details at all on the 'many relatives' who allegedly died as a result of a lack of medical competence, nor did he raise such an issue at interview or in his first communication with the IAA. Although this is personal information, on the basis of the details presented here I do not consider that these alleged incidents constitute meaningful evidence of discrimination against Tamils (or medical malpractice) or that they may have affected the consideration of the applicant's claims. I am not satisfied that s.473DD(b) is met or that there are exceptional circumstances to justify considering this information.
22. The applicant has also claimed that two weeks ago his family were attacked by a group of Sinhalese as they lined up at a petrol pump. The applicant claims that the episode is indicative of the ongoing harassment of Tamils and evidence that the current economic crisis has worsened tensions. The alleged incident took place only two weeks ago and could not have been put before the delegate before a decision was made. The information relates to members of the applicant's immediate family and I consider that it is personal information in the relevant sense. Though the applicant has provided relatively few details about the harassment suffered by his family, these claims are nonetheless credible on their face. I also consider that had they been before the delegate they may have affected the consideration of the applicant's claims. I am satisfied that there are exceptional circumstances to justify considering this information.
23. The applicant has claimed that the Sri-Lankan fisheries Minister recently released a statement outlining how he would only give assistance to fishing people in the Northern province, but not to those from the Eastern province where there is a Tamil majority population. The applicant has not indicated when the statement was made but any reasonable definition of recently would mean that it post-dates the delegate's decision. However, the applicant has not given any evidence or country information that such a statement was made or even quoted any text from the statement. The information is also a very general statement about 'assistance' and not personal information in the relevant sense. The applicant has particularly noted that assistance would not be given to Eastern Province where there is a majority Tamil population. As this information follows on from another anecdote related to his family apparently being attacked by Sinhalese while they waited for petrol, the applicant appears to be inferring that the distribution of this assistance is discriminatory. However, the assistance is being given to Northern Province which is also majority Tamil. It is not clear then how this incident demonstrates that the allocation of the unspecified assistance amounts to discrimination.

Given the lack of detail around the assistance, the absence of any evidence or confirmatory country information, and the fact that the assistance is apparently being rendered to majority Tamil Northern Province, I am not satisfied that this information may have affected the consideration of the applicant's claims or that there are exceptional circumstances to justify considering this information.

24. The applicant has also requested an oral hearing to present his claims to the IAA, particularly if the IAA makes adverse credibility findings.
25. The applicant was given the opportunity at his interview with the delegate to enlarge on his written claims and to put forward any additional claims. The applicant was also reminded at his departmental interview about the importance of putting forward all his claims for protection and all the information he wished to rely on as he may not have another chance to do so. The applicant was also given a further week after the interview in which to submit more information or contacted the delegate.
26. I consider that the applicant had sufficient opportunity to put forward his claims at interview, and subsequently in writing to the delegate post-interview. The applicant has also submitted a good deal of information to the IAA. His case was also remitted back to the IAA by the courts and the applicant would therefore be on notice that the IAA may decide his case without interviewing him. I note that the applicant has not specified, even in very broad terms, why an interview with the IAA is warranted or specified what additional material he would wish to put forward at interview.
27. the IAA process is a mechanism of limited review. Reviews are generally made on the papers and without the consideration of new information except in exceptional circumstances. The IAA is not bound by the delegate's findings but must consider the evidence afresh. The IAA does have a discretion to get new information, including by way of interview, but I have decided not to exercise that discretion in this instance.

Applicant's claims for protection

28. The applicant's claims can be summarised as follows:
 - The applicant's brother was kidnapped in 1990 by the Karuna group and has not been seen since.
 - The applicant ran a shop in [City 1] from 1999 until 2004. Sinhalese people would buy on credit but not settle their debts. The applicant's shop was attacked by a group of Sinhalese people and he was forced to close the business.
 - One of his sister's sons was arrested by the government on suspicion of being an LTTE member in 2000. He was detained and badly beaten. He suffered a stroke and died two years ago.
 - Another son of his sister's sons was kidnapped in 2006 by government authorities and is still missing.
 - The same sister's husband was kidnapped and murdered in 1991 or 1992 by government forces or those aligned with the government.
 - The applicant was mistreated by the Sri Lankan navy. He was captured after returning from a fishing trip and made to stand naked with a stone on his head for hours.

- The Karuna group often asked the applicant to work for them and would beat and abuse him if he refused. The applicant carried out construction work for the Karuna group. When he asked for payment, he was beaten.
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- Prior to leaving Sri Lanka, a group of Sinhalese attacked his village. The applicant was injured in this attack.
- There is no safety in the applicant's home area of [City 1]. As a Tamil, he can only live in Tamil areas where he would face the same persecution as in his home area.
- The applicant fears harm from Sinhalese people and the Karuna group because of his Tamil ethnicity.
- The government will arrest him and harm him if he goes back to Sri Lanka because they will think he is LTTE. They will consider his departure from Sri Lanka to be evidence of his LTTE links and may send him to a rehabilitation camp.
- The applicant departed illegally. He will be unable to pay the fine of 100,000 Sri Lankan rupees when he returns.

Refugee assessment

29. 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

30. 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.

31. The applicant is a Tamil Hindu from Eastern Province. The applicant has given a consistent account of his identity and provided several documents in support of that identity. He provided consistent information on his religious affiliation and ethnicity and his interview with the Department was conducted in Tamil. Although the delegate initially raised some concerns with

the applicant's Sri Lankan identity card, I am satisfied that those concerns have been addressed. I accept that his identity, ethnicity, religion and nationality are as claimed, that he is a national of Sri Lanka, and that Sri Lanka is his receiving country for the purposes of this decision.

32. The applicant was born and grew up in [City 1] in Eastern Province. His wife and family still reside there. The applicant spent his entire time in Sri Lanka living in various parts of Eastern Province. I consider that Eastern Province is the area to which the applicant would very likely return if he went back to Sri Lanka.
33. The applicant claimed that his family was directly affected by the civil conflict in Sri Lanka. In 1983, the LTTE began an armed insurgency against the Sri Lankan government in pursuit of a separate Tamil state¹. The civil conflict that followed is estimated to have cost 100,000 lives and displaced 900,000 more. The LTTE surrendered in May 2009 but not before atrocities on both sides that may have cost the lives of 40,000 civilians².
34. Although the applicant's family lived in Eastern Province during the war, he stated consistently that neither nor anyone in his family were involved with the LTTE. However, the applicant claims several members of his extended family were targeted during the war, and that some of them were killed. He stated that his brother was abducted by groups supportive of the government and was never seen again.
35. In 2000, one of his sister's sons was detained on suspicion of being associated with the LTTE. His nephew was beaten and tortured. He was eventually released but later died of a stroke that the applicant maintains was brought on by his torture. In 2006, he claims his sister's other son was kidnapped. The applicant suspects the Karuna group was involved. This nephew was never seen again. Many years before, in 1992, his sister's husband had also disappeared.
36. The applicant also claimed that in 2004, his shop was wrecked by a group of Sinhalese. He also claims that in 2012, another group of Sinhalese people attacked his village and he was injured.
37. These claims are difficult to verify. However, given the conditions in Sri Lanka during the civil conflict and its immediate aftermath, I am prepared to accept that members of the applicant's family were tortured and that others went missing. I am also prepared to accept that the applicant's shop was attacked by Sinhalese and that in 2012 there was another attack on his village by a group of Sinhalese in which he was injured.
38. However, the applicant was never arrested or charged with any offence while he was in Sri Lanka. Although he had an adverse encounter with the Sri Lankan Navy, he was never detained and interrogated by the Sri Lankan authorities. He did not claim that he or any member of his family had ever joined or been associated with the LTTE. I do not accept that the applicant was personally of any interest to the Sri Lankan authorities at the time of his departure from Sri Lanka.
39. Notwithstanding the above, the applicant is a Tamil male and would be returning to an area in Eastern Province previously controlled by the LTTE. I have therefore considered whether he would be subject to harm on account of his ethnicity or profile more generally.

¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

² Ibid

40. It is not disputed that the Tamil population suffered significantly during the civil conflict that ended in 2009 and in the years immediately following its cessation³. Multiple sources have noted widespread abuses of the Tamil population during the civil war by both government forces and non-state actors, such as militia groups⁴. Tamils were also disproportionately subject to arrest under the Prevention of Terrorism Act (PTA), even after the end of the civil conflict⁵. Abuses under the PTA have been documented by DFAT, the United Nations and other reliable sources⁶ and I do not discount the terrible toll such treatment must have taken on the individuals themselves and the Tamil community.
41. There is evidence, with the election of the Rajapaksa government, of a recent tightening in the latitude given to civil society actors and lack of progress towards reconciliation and accountability for actions carried out during the civil war⁷. As part of the submission to the IAA dated 4 May 2022, the applicant has provided to the IAA reports that indicate instances where civil society actors were harassed or intimidated⁸. The applicant has also submitted to the IAA a number of recent articles and reports that discuss, inter alia, the history of the Rajapaksas in Sri Lanka and previous human rights abuses in Sri Lanka, recent expressions of nationalist and majoritarian sentiment, and an apparent retreat from previous moves towards reconciliation⁹.
42. It is understandable that the revival of the Rajapaksa political fortunes would make many Tamils nervous who lived through the civil conflict. It is also understandable that some might raise concerns as to whether those who may have committed crimes during the civil conflict under Mahinda Rajapaksa's previous term in office will be brought to justice by any government led by a Rajapaksa or with which they are closely involved. There is also evidence that some high-profile activists have been targeted by the government, and that Tamils associated with or imputed to be part of attempts to revive the LTTE have been detained¹⁰.
43. The applicant has included an article from the Diplomat that discusses the situation for Tamils in Sri Lanka. The article appears to be an opinion piece¹¹. The author of the article refers to the Mullivaikkal massacre and to the current government's adverse attitude to LTTE commemorations. The article references Sri Lanka's previous history of discrimination against Tamils and the abuses suffered during the civil conflict¹². It also makes a case that discrimination against Tamils is ongoing, referring particularly to those seeking to commemorate the LTTE or protest against the government.
44. However, while some of these reports are sobering, there is little evidence that the Rajapaksas have sought to actively harm the Tamil minority as a whole since retaking office. I do not accept that persons with the applicant's profile and attributes are currently subject to detention or torture by the government.

³ Ibid

⁴ Ibid

⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁶ Ibid

⁷ Human Rights Watch, 'Sri Lanka: No Justice for 'Trinco 5'', 8 July 2019; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁸ Human Rights Council, "Promoting Reconciliation, Accountability and Human Rights in Sri Lanka", 18th March 2022; The Observer, "Tamils fear prison and torture in Sri Lanka, 13 years after civil war ended", 27 March 2022

⁹ Harvard International Review, "The Sri Lankan Civil War and Its History, Revisited in 2020", 31 August 2020

¹⁰ The Observer, "Tamils fear prison and torture in Sri Lanka, 13 years after civil war ended", 27 March 2022

¹¹ Visvajit Sriramrajan, "Post-War Sri Lanka: Fractured and Unjust for Tamils", The Diplomat, 15 May 2020; Al Jazeera, "Trouble brews in post-election Sri Lanka", 9 December 2019

¹² Visvajit Sriramrajan, "Post-War Sri Lanka: Fractured and Unjust for Tamils", The Diplomat, 15 May 2020

45. As discussed, more Tamils were detained under the PTA during the civil conflict than any other ethnic group. In its most recently country report on Sri Lanka, DFAT does note that up to 60 Tamils are currently detained under the PTA and acknowledges that some of those appear to be held on charges where the nexus to terrorism is unclear¹³. This includes offences such as sharing a photo of the Prabhakaran (the deceased leader of the LTTE) or other offences seen to promote separatist or LTTE causes¹⁴. However, DFAT also stated that it was not aware of returnees from Australia to Sri Lanka being charged under the PTA¹⁵.
46. As noted above, DFAT does state that some Tamils have been arrested in 2021 under the auspices of the PTA¹⁶. However, those arrests appear to have been related to persons celebrating or promoting the LTTE or promoting separatist causes¹⁷. DFAT states that security forces are most likely to monitor people associated with politically sensitive issues, including those related to the war, such as missing persons, land release and memorialisation events¹⁸. DFAT also assesses that physical violence against those monitored is not common, and that ordinary Tamils living in the north and east of have a low risk of official harassment¹⁹.
47. The applicant has never claimed to have any involvement in LTTE commemorations or celebrations here in Australia or to have been involved in any sort of diaspora activities. The applicant has not indicated that he has ever been politically active or involved in issues such as land release. Neither has the applicant expressed an intention to pursue such activities or be active in promoting separatist causes on return.
48. The UK Home Office echoes the DFAT report in noting that those who are active in pursuing separatists causes or who actively participate in diaspora activities expressing criticism of the government may be at risk of persecution²⁰. It also notes that those who have not taken a “significant role” in Tamil activism may be monitored on return but that this will not generally amount to persecution²¹. It also notes that even the monitoring undertaken in regard to individuals on watch lists would not ordinarily amount to persecution²².
49. However, as set out above, I do not consider that the applicant would be of interest to the Sri Lankan authorities on his return or that he is on a watch list. The UK Home Office finds that where individuals are not on a watch list, they can return to their home area without being subject to further action by the authorities²³.
50. Country information indicates that the situation for Tamil political parties has changed significantly during the time that the applicant has been in Australia. Country information confirms that Tamil political parties remain active and hold seats in parliament²⁴. DFAT states that independent election monitors found that both the 2019 presidential elections and 2021 Parliamentary elections, held while the Rajapaksas were candidates and after they had assumed power respectively, were free of security concerns despite COVID restrictions in place

¹³ DFAT, “DFAT Country Information Report - Sri Lanka”, 23 December 2021, 20211223094818

¹⁴ DFAT, “DFAT Country Information Report - Sri Lanka”, 23 December 2021, 20211223094818

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ UK Home Office, “Country Policy and Information Note. Sri Lanka - Tamil Separatism”, Version 7.0, 17 June 2021, 20210624114752

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ DFAT, “DFAT Country Information Report - Sri Lanka”, 23 December 2021, 20211223094818

at the time²⁵. DFAT also notes that domestic and international observers deemed the 2020 parliamentary elections to be mostly credible, despite some reported incidents of voter intimidation²⁶.

51. Although the applicant may face a brief period of questioning on return to Sri Lanka as discussed further below, these are standard procedures and DFAT's understanding is that detainees do not face mistreatment during processing at the airport²⁷. DFAT's understanding is that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis²⁸. There is no suggestion that returnees such as the applicant who have no prior criminal record or significant LTTE involvement, have been physically detained, confined or restricted in their movements or otherwise subject to an intrusion by authorities that would amount to an arbitrary deprivation of liberty.
52. I have noted the evidence in the sources before me that some high-profile activists and journalists have allegedly been the subject of harassment and intimidation. However, DFAT notes that despite some self-censorship, even journalists in the North and East continue to openly criticise the government and security forces²⁹. Although some journalists reported monitoring and harassment such as anonymous telephone calls, they are not subject physical violence³⁰. The Office of the High Commissioner for Human Rights (OHCHR) also noted that while the government successfully sought some injunctions to stop anti-government protests during the COVID-19 pandemic, there were also several occasions where the courts also refused to grant injunctions to stop protests requested by the police, citing the right to freedom of expression or peaceful assembly³¹.
53. Further, the applicant is not a journalist, nor has he ever been involved with the media. He has not indicated that he has ever been involved in any political activities in Australia, let alone diaspora activities such as championing Tamil causes or advocating for Tamil separatism. The applicant has not claimed to have had any involvement with remembrance or celebrations of the LTTE or the civil conflict, either in Sri Lanka or here in Australia.
54. The applicant claimed that he was targeted by members of the Karuna group while in Sri Lanka. In his written statement lodged with his protection visa application, he claimed that the Karuna group would force him to do work for them and beat him if he refused. He also claimed that the Karuna group were responsible for kidnapping his brother. He claims the group still exists and that they remain a powerful force in Sri Lanka.
55. I accept that the former Karuna Group was active in the applicant's area at one time. There are also allegations that during the civil conflict, that Karuna was responsible for serious crimes³². However, DFAT states that the Karuna Group has become a political party - the Tamil Makkal Viduthalai Pulikal (TMVP)³³. DFAT previously stated that the TMVP renounced its paramilitary activities³⁴. Although the applicant claims that the Karuna group and the EPDP are operating 'under the radar' and that people are too scared even to mention their name, he has put forward no evidence in support this assertion. Rather than targeting former LTTE members,

²⁵ Ibid

²⁶ Ibid

²⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Human Rights Council, "Promoting Reconciliation, Accountability and Human Rights in Sri Lanka", 18th March 2022

³² DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

³³ Ibid

³⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143

DFAT quotes sources as saying that monitoring of former LTTE members was less extensive in the Eastern Province, given that many LTTE members there had defected towards the end of the civil conflict and aligned with the Government as part of the Karuna Group/TMVP³⁵.

56. Nothing in the information before me supports the view that the former Karuna group / TMVP represent anything other than a political force in Sri Lanka at present. The TMVP, in combination with another Tamil party, control just three seats in parliament, as opposed to ten seats for the Tamil National Alliance (TNA)³⁶. I do not consider that the available country evidence indicates that the Karuna group or its political predecessor, The TMVP, pose a risk to the applicant or to Tamils in general.
57. The applicant has also provided evidence of an increasing Sinhalese presence in Eastern province. He has also claimed that his family members have faced ongoing harassment from Sinhalese people in the area.
58. The US State Department noted concerns by civil society groups that the Sri Lankan Government's Task Force for Archaeological Heritage Management was using its authority as a pretext to force minorities off their land³⁷. The applicant also included a report from the Office of the High Commissioner for Human Rights (OHCHR) stating that there had been a trend of land disputes related to the conservation of Buddhist heritage or forestry protection³⁸. It noted a number of instances where land previously held or claimed by Tamils had been reallocated for Buddhist religious purposes or designated as archaeological sites³⁹. However, that same report noted that between 2009 and 31 October 2021, 92.42 per cent of the land previously taken by the military has been returned⁴⁰.
59. People for Equality and Relief in Sri Lanka (PEARL) describes itself as a non-profit advocating for justice and self-determination for the Tamil people in the North-East of Sri Lanka. It notes a number of specific instances where Buddhist temples and Sinhala settlements have been set up in Tamil areas or military bases established in those areas⁴¹. The applicant also included a Tamil Guardian article summarising PEARL's findings and indicating instances where Tamil villages allegedly had their names changed to Sinhalese alternatives⁴². I accept that there is evidence of Sinhalese encroachment into formerly Tamil areas. However, the evidence that the area has seen an influx of Sinhalese or that this has led to ongoing harassment of Tamils is less clear.
60. A table in one of the PEARL reports, apparently sourced from the 2012 Census, indicates that Seruwila is majority Sinhalese, with a Sinhala population of 69% and a Tamil speaking population of 31%⁴³. However, neighbouring Verugal, an area [close to the applicant's home area], is noted as having a 100% Tamil population.
61. I note the applicant's concerns about the presence of Sinhalese in Eastern province and the alleged preferential treatment given to them. However, I note that the applicant's wife and

³⁵ Ibid

³⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

³⁷ US Department of State, "2020 Report on International Religious Freedom: Sri Lanka", 12 May 2021, 20210513111450

³⁸ Human Rights Council, "Promoting Reconciliation, Accountability and Human Rights in Sri Lanka", 18th March 2022

³⁹ Ibid

⁴⁰ Ibid

⁴¹ PEARL, "Sinhalaization of the North-East: Pulmoaddai", undated; PEARL, "Sinhalaization of the North-East: Seruwila-Verugal", undated

⁴² Tamil Guardian, "Sinhalaization of the North-East: Seruwila-Verugal", 4 May 2022

⁴³ PEARL, "Sinhalaization of the North-East: Seruwila-Verugal", undated

children, as well as the rest of the family, continue to reside in Eastern province. He did not indicate that they had been forced or pressured to move.

62. The applicant has provided an article from the Tamil Guardian regarding an incident in which a Buddhist Monk directed threats and racist epithets towards worshippers attending a Tamil Hindu shrine⁴⁴. However, the article notes that the worshippers continued to attend the shrine. There is nothing in the report to suggest that any worshippers were attacked or constrained from attending the shrine, and the police were present.
63. The applicant claimed that his daughter was assaulted by a Sinhalese man at a [shop], and that her clothes were ripped during the incident. The applicant claims that the episode was “clearly an act of discrimination”. The applicant also claimed, without providing further details, that his wife was subject to “harassment and offensive remarks” whenever she went out in public.
64. In regard, to the attack on his daughter, the applicant states that “they” said the man was insane. Clearly, the applicant was not present at the attack. However, he puts forward another explanation for the attack reported by those who were present, that the man involved had mental health issues. He also notes that others quickly intervened. The applicant did not indicate that there had been a repeat of the incident with his daughter, or that there had been previous incidents. I am not satisfied that this apparently isolated incident with his daughter, one open on the face of it to multiple explanations, is indicative of ongoing persecution and harassment of Tamils in his local area.
65. The applicant also claimed that his family were attacked by a group of Sinhalese while lining up for petrol. In response to many of the issues raised previously by the delegate or in his responses to the IAA, the applicant has subsequently put forward instances in which family or relatives were allegedly subjected to adverse behaviour. These are impossible to verify. However, I note that the incident above occurred at a time of severe shortages in Sri Lanka and while people were waiting in a queue. As the applicant noted, no-one was hurt and the police attended the scene.
66. I accept evidence that the Rajapaksa government has made remarks that appear antipathetic to the Tamil minority and designed to inflame tensions. I also note evidence of apparent ‘Sinhalisation’ of Tamil areas and moves to ensure the primacy of the Buddhist faith. I also note the incident in which a Buddhist monk confronted Tamil worshippers at a Hindu temple.
67. DFAT notes that Eastern Province has a more diverse population with sizeable populations of Tamils (39.2 per cent), Muslims (36.9 per cent) and Sinhalese (23.2 per cent). Although the applicant has claimed that Sinhalese attacked his shop in 2012, I note that the applicant did not report ongoing harassment of his family members at his protection interview in 2016, when residual tensions from the civil conflict were arguably more in evidence. Evidence could not be found in the available country information to support the view that Tamils in Eastern Province, a diverse region where Tamils are in the majority and Sinhalese the minority, are subject to the sort of daily harassment that the applicant has claimed.
68. I note evidence that at the time of the last census, [Verugal] had an entirely Tamil population⁴⁵. I do not accept as plausible the applicant’s account that Sinhalese persons regularly harass and intimidate Tamils in what appears to be a Tamil stronghold. I note that although the applicant has submitted a significant volume of information to the IAA, including information showing

⁴⁴ Tamil Guardian, “Sinhala Buddhist Monk hurls racist abuse at Tamils in Trincomalee”, 27 April 2022

⁴⁵ PEARL, “Sinhaling of the North-East: Seruwila-Verugal”, undated

apparent 'Sinhalisation' of Tamil areas, he has not produced any reports that demonstrate the sort of constant Sinhalese harassment of individual Tamils in his area that he claims.

69. DFAT assesses that Tamils face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access employment or housing⁴⁶. Although it notes some members of the Tamil community reporting employment discrimination, other sources suggested it is because Tamils speak neither Sinhala nor English⁴⁷.
70. I note also that at one point in his protection interview the applicant appeared to express a willingness to return to Sri Lanka if only he was able to get a visa for three years and earn some money by working. Although the applicant later claimed that he said this out of frustration, he made further comments at various points in the interview that seemed to underline his willingness to return if he could only earn some money before he departed. Although I do not place undue weight on these utterances, I find that they do add in some measure to my doubts about the genuineness of the applicant's claimed fear of returning to Sri Lanka.
71. For the reasons set out above, and taking into account the available country information, I do not accept that the applicant's family members have been the subject of ongoing harassment and abuse by Sinhalese or that he will face such harassment on return.
72. The applicant has claimed that he has mental health issues and has been seeing a counsellor. He also claims that ongoing health issues continue to affect his ability to work and would make it very difficult to do the jobs he previously performed in Sri Lanka. He has put forward a number of documents relating to his health in support of this claim.
73. DFAT states that Sri Lanka's health care system "has a long record of strong performance" and that Sri Lanka offers free universal health care⁴⁸. It does note that health outcomes are worse in the North and East, but attributes this to delays in rebuilding destroyed infrastructure and otherwise recovering from the effects of war⁴⁹.
74. I am mindful of the resourcing and infrastructure constraints in the Sri Lankan health sector, particularly in the North and East, that are noted above. Nonetheless, government spending on health has increased since the war⁵⁰. DFAT also notes that improving access to mental health services, particularly at the community level, is a government priority⁵¹.
75. DFAT notes local sources as saying that mental health issues carry a stigma in Sri Lanka and often elicit pity for those concerned⁵². However, DFAT also notes that, overall, the stigma around mental health has "declined considerably", with Sri Lankans now accessing counselling services (where available) more freely than in the past⁵³.
76. Mental Health has begun to receive more attention in Sri Lanka, with DFAT quoting local sources as suggesting that the health system has a strong mental health focus with a good cohort of trained counsellors⁵⁴. District hospitals have mental health facilities and NGOs

⁴⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁴⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

provide mental health support to women, including in Tamil populated areas⁵⁵. As noted above, the Sri Lankan public health system offers free universal health care⁵⁶. The World Health Organisation (WHO) states that access to all 'required medicines' in the state system is given free of charge⁵⁷. DFAT also notes that returnees are provided with cash to assist their return⁵⁸.

77. The applicant made a very general statement in his response to the IAA that Sinhalese are given priority over Tamils when accessing healthcare. However, no country information or evidence in support of that statement was put forward to the IAA.
78. I also consider that on the evidence before me, the applicant's health issues appear to be adequately managed at present.
79. The applicant has provided a letter from his doctor that gives a brief summary of his medical history. This letter is dated 13 December 2016. The applicant's doctor notes that he was referred to a counsellor, although no evidence or reporting from the counsellor has been provided. However, the applicant previously provided the delegate with a letter from his mental health social worker dated 7 November 2015.
80. I note that in his most recent submission to the IAA the applicant has not provided any evidence from a medical professional relating to his mental health, or his health concerns more generally. Although the applicant claims that his [Body part 1] injury still affects his mobility and that he finds it difficult to [deleted], no evidence has been provided to support this assertion.
81. The hospital admission form for the applicant's [Body part 1] injury notes that the [injury] occurred to just [a specified location]. It also indicates that the applicant was admitted to hospital on [date] June 2015 and discharged the following day. It does not appear to indicate that there were any complicating factors.
82. I note that even the note from his doctor, which almost is five years old and written when his [Body part 1] injury was a much more recent occurrence, does not indicate that the applicant cannot work or is restricted in the work that he can perform. Similarly, although I accept that the applicant consulted a mental health social worker at one time, no further updates on his mental health from any mental health professional have been provided since the letter dating back to November 2015.
83. The Sri Lankan health system faces significant resourcing pressures, especially with the ongoing economic crisis⁵⁹. Access to health services varies by regions and DFAT notes that health outcomes are lower in the North and East. However, on the evidence before me, there is nothing before me to suggest that the applicant would be prevented from accessing such health services (including mental health services) as are available if he became unwell. Moreover, I do not accept that the applicant currently requires a significant level of support or intervention due to his health, including his mental health. I also do not accept that the applicant has significant ongoing health concerns (including mental health issues) or that these prevent him from working or limit the work he can do.

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁵⁸ Ibid

⁵⁹ BBC, "Sri Lanka MPs leave Gotabaya Rajapaksa led coalition", date not specified

84. In his submission to the IAA, the applicant has referred to the current economic crisis in Sri Lanka and has put forward a number of articles that discuss the fallout from the crisis. The Sri Lankan economy is facing significant headwinds and shortages of essential supplies are widespread⁶⁰. Many cabinet ministers have resigned and a new finance minister has been sworn in⁶¹. Sri Lanka is in negotiations with the International Monetary Fund (IMF), but there is little doubt that Sri Lanka is facing one of severest economic declines in its post-war history⁶².
85. The protests against the government over the economy have united groups between whom there have sometimes previously been tensions⁶³. The economic crisis appears to have been brought on by a number of factors, including collapsing global demand for Sri Lankan goods and services, rising government debt, and arguably ill-conceived changes to its agricultural sector⁶⁴. There is no suggestion that the crisis has been brought on deliberately (notwithstanding that it might have been foreseeable) nor is there any suggestion that it has been targeted at minorities. I consider that the widespread protests around the country (not just in minority areas) and the fact that disparate groups have come together to challenge the government strongly infers that the impacts of the economic problems have been felt by all groups in Sri Lankan society. To the extent that Sri Lanka is facing economic and social pressures, I consider that these are challenges faced by the population generally and not any one minority, or by the applicant personally. I also note that, to the extent that the Rajapaksa clan are seen as antipathetic to the Tamil minority, the economic crisis appears to have badly damaged their support and political 'brand'⁶⁵.
86. The applicant is no longer a young man. However, he has worked in Sri Lanka where he ran his own business, and worked as [various occupations]. He has also worked for some years in [specified countries]. He currently works as a [Occupation 1] in Australia. The applicant's visa application indicates that he speaks Sinhala, as well as speaking, reading and writing Tamil and English. Despite his age, I consider that he is well-placed to obtain such work as is available in Sri Lanka or become self-employed. As noted above, I do not accept that his health issues would constrain him in finding employment.
87. The applicant will be returning to Sri Lanka after a long absence. He claims that he will be targeted by authorities on his return because of his Tamil ethnicity. He also claimed that he will be targeted because the Sri Lankan authorities will assume that he has told people of his mistreatment at the hands of the government.
88. The relevant sections of the Immigrants and Emigrants Act (I&E) Act make it an offence to depart Sri Lanka from other than approved port of departure, usually a seaport or airport⁶⁶. The applicant did not indicate in his entry interview that he had any involvement in crewing the vessel that brought him to Australia. There is nothing before me to suggest that he was involved in facilitating that journey. There is no evidence he has been charged with any immigration offences in Sri Lanka nor is there any evidence he ever faced such charges in Australia.

⁶⁰ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; BBC, "Sri Lanka: Reshuffle begins after cabinet quits over protests", date not specified

⁶¹ BBC, "Sri Lanka: Reshuffle begins after cabinet quits over protests", date not specified

⁶² Ibid

⁶³ The Conversation, 'Sri Lanka's protests show a fragile unity – for now', 3 May 2022

⁶⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁶⁵ BBC, "Sri Lanka MPs leave Gotabaya Rajapaksa led coalition", date not specified

⁶⁶ Ibid

89. DFAT does indicate that the I&E Act carries penalties of up to five years imprisonment for more serious offences, although it is unaware of a prison sentence being imposed merely for illegal departure⁶⁷. DFAT also states that it is not aware of any mistreatment of returnees during the entry procedure on return to Sri Lanka⁶⁸. Although custodial sentences are theoretically possible, in practice a fine is invariably imposed for illegal departure instead⁶⁹. I note that there is no indication (nor has the applicant claimed) that he ever left Sri Lanka illegally prior to coming to Australia and that this would therefore be the applicant's first offence. A guilty plea will attract a fine which can be paid by instalment and then the defendant is free to go⁷⁰. A plea of not guilty will usually lead to the grant of bail. Although bail may continue for many years, the end result is again usually the payment of a fine⁷¹. The applicant has not given any indication that he would not plead guilty and accept a fine. The applicant currently works in Australia as a [Occupation 1]. DFAT also confirms that returnees also go back with at least some cash assistance⁷². He also remains in contact with his family and has not given any indication that he could not rely on at least their practical support when he returns. I do not consider that the applicant would be unable to pay such a fine as was imposed.
90. As noted above, there is nothing to suggest the applicant had any involvement in crewing the vessel or facilitating that journey that brought him to Australia. Although returnees may be interviewed to determine whether they have a criminal record, outstanding warrant or similar matters⁷³, the applicant has not indicated that he has ever committed or been charged with a criminal offence either in Australia or Sri Lanka.
91. The applicant has claimed that he would be questioned by authorities about his extended stay in Australia and his previous interactions with authorities, and that he would suffer harm as a result. As set out above, the applicant was never arrested, charged or even detained for questioning, even at the height of the civil conflict. I do not accept that the applicant would be of any interest to the Sri Lankan authorities on return. DFAT states that it is not aware of any mistreatment of returnees during the entry procedure on return to Sri Lanka⁷⁴.
92. DFAT states that is not aware of returnees in 2021 being detained for matters other than illegal departure (such as former membership of the LTTE)⁷⁵. Former asylum seekers, including Tamil asylum seekers, have been returned to Sri Lanka in significant numbers and there is nothing in the information before me to suggest that seeking asylum in Australia or spending an extended period elsewhere overseas has attracted the adverse attention of authorities⁷⁶. DFAT also assesses that returnees do not face societal discrimination for having sought asylum elsewhere⁷⁷.
93. I am not satisfied that the applicant faces a real chance of harm from the Sri Lankan government, including any branch of security or law enforcement, or from any non-state actor. I am not satisfied that the applicant faces a real chance of harm due to the fact that he departed the country illegally, his capacity to subsist, his health, ethnicity, or on any other account.

⁶⁷ Ibid

⁶⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁶⁹ Ibid

⁷⁰ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

Refugee: conclusion

94. 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

95. 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

96. 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.

97. 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.

98. I accept that the applicant will very likely be detained briefly at the airport on arrival, where he is likely to pay a relatively small fine or, alternatively, be released on bail, which may incur costs (and involve additional court visits or procedures)⁷⁸. Information from DFAT quoted above does not indicate that returnees are subject to mistreatment during entry procedures or during the brief period the applicant may be questioned on return before being released. The country information before me does not include any accounts indicating that there is any intention to inflict severe pain or suffering, or pain and suffering that could reasonably be regarded as cruel and inhuman, or extreme humiliation. Nor I am satisfied there is a real risk of the death penalty being carried out, the applicant being arbitrarily deprived of his life or tortured in these circumstances.

99. As noted above, I have considered whether the applicant is likely to be monitored on return and consider such a prospect to be remote. Even if such monitoring or questioning was to occur, I am satisfied that, while possibly unwelcome, it would not rise to the level of significant harm.

100. I also note the applicant's evidence regarding his health issues. However, while the level of medical care in Sri Lanka may not be on a par with that of Australia, I consider that Sri Lanka does have facilities to assist with the applicant's health (including his mental health) if that became necessary. There is nothing before me to suggest that he would be discriminated

⁷⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

against or refused access to such services as exist for whatever reason, or that he would be denied treatment with the intention of causing him harm.

101. I also consider that the evidence suggests that the applicant's health issues have been adequately managed and stable for some time. The applicant is also Tamil and would be returning to Eastern Province which has a large Tamil population and to a culture with which he is familiar⁷⁹. He would also be returning to his wife and family. These factors are likely to assist him on his return to Sri Lanka, particularly the support of his family.
102. Similarly, I note the economic issues currently facing Sri Lanka. However, I consider that this is a situation faced by the population generally rather than by the applicant personally. There is nothing to suggest, nor has the applicant demonstrated that the applicant that he would be targeted in the economic crisis with the intention of doing him harm. I also consider that with a long and varied work history, an ability to speak Tamil, Sinhalese and some English, and existing ties in the Tamil-majority Eastern province, the applicant is relatively well-placed to find work and subsist.
103. In respect of the remainder of his claims I have otherwise found that the applicant does not face a real chance of any harm. Based on the same information, and for the reasons set out above, I find that the applicant does not have a real risk of suffering significant harm on return to Sri Lanka in connection with those claims.
104. After having regard to all the applicant's circumstances, and the country information noted above, I am not satisfied that he faces a real risk of suffering significant harm on return to Sri Lanka.

Complementary protection: conclusion

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

Decision

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

⁷⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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