



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA22/10327

Date and time of decision: 3 August 2022 11:38:00  
J Jennings, 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 Tamil from Mannar District, Northern Province, Sri Lanka. He is a Catholic and was involved in church activities in Mannar. On 4 December 2015 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm in Sri Lanka from the authorities as a Tamil and because he supported the protest activity of Bishop Rayappu Joseph who was outspoken about Tamil human rights.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 29 August 2016. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.
3. On 15 November 2016 the IAA affirmed the decision not to grant the applicant a protection visa. [In] May 2022 the Federal Circuit and Family Court of Australia by consent quashed the decision of the IAA and directed the IAA to determine the matter according to law. The Court Order noted the IAA found that new country information provided was generalised in nature rather than particular to the applicant and was not satisfied it met the requirements of s.473DD(b)(ii). The Order advised the Minister conceded the information provided by the applicant was not relied upon as generally corroborative country information, but rather to make good a specific claim about the Sri Lankan authorities' interest in an identified individual being Bishop Joseph.

### 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. The IAA received submissions from and on behalf of the applicant in 2016 and 2022 and noting the passage of time since the delegate's decision I have also obtained new information.
6. In the 2016 submission the applicant stated he believed he should be afforded the opportunity of an oral hearing, particularly if the IAA makes adverse findings as to credibility. The IAA is a limited form of review and does not conduct hearings. It does have the discretion to get new information from an applicant, including by way of interview. However the applicant has had the opportunity to present information and I have considered the information provided. There is no explanation before me to explain why an interview was requested, or to specify what further information the applicant wished to provide at an interview that could not be provided in writing. Nor have I made adverse credibility findings. I do not consider the circumstances warrant getting new information by way of an oral hearing.

### Obtained own information

7. The delegate's decision was made almost six years ago and since that time there have been significant changes in Sri Lanka, including the return to power of the Rajapaksa family, the current political crisis and the collapse of the economy. I have obtained new information which updates that before the delegate and reports on the situation since the return to

power of the Rajapaksas and on the current situation in the country, and on the situation for returnees who left the country illegally. I consider that there are exceptional circumstances to justify considering the following new information:

- Department of Foreign Affairs and Trade (DFAT) reports: “DFAT Country Information Report – Sri Lanka”, 23 December 2021, and “Country Information Report – Sri Lanka”, 4 November 2019
- UK Home Office reports: “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928, and “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020
- UK Upper Tribunal (Immigration and Asylum Chamber), “KK RS and Secretary of State for the Home Department”, 27 May 2021
- United Nations High Commissioner for Human Rights, “Report of the United Nations High Commissioner for Human Rights”, 25 February 2022
- The Economist, “In with the old - Sri Lanka picks a new president to replace the one that fled”, 21 July 2022
- International Crisis Group, “Sri Lanka’s Uprising Forces Out a President but Leaves System in Crisis”, 18 July 2022
- BBC, “Sri Lanka: Forces raid anti-government protest camp”, 22 July 2022

#### *2016 submission*

8. The submission dated 16 September 2016 was made by the applicant with the pro bono assistance of [Organisation].
9. The applicant’s submission in large part addressed the delegate’s decision and findings and stated why the applicant disagreed with these. I am satisfied this is essentially argument about matters that were before the delegate and not new information and I have had regard to the sections of the submission that address the delegate’s decision and findings.
10. In part the applicant’s submission expands on claims already made by providing further detail. While he stated this should not be considered new information I consider the extra detail to be new information. However I am satisfied that this information meets the requirements of s.473DD(b) in that it is personal information that had it been known may have affected the consideration of the applicant’s claims, and as it responds to the findings made by the delegate which were not previously put to the applicant I am satisfied that this is information that could not have been given to the delegate. On the same basis and for the same reasons I am satisfied that exceptional circumstances exist that justify the IAA considering this information.
11. The submission also addressed the applicant’s claims to fear harm because of his support of activities conducted by the church to support Tamils and in particular because of his association with Bishop Joseph. In his protection visa application the applicant outlined the fractious relationship between the authorities and the church in general and Bishop Joseph in particular and in the IAA submission he addressed relevant country information. Some of this

information was not before the delegate and is new information.<sup>1</sup> I have considered the s.473DD(b) matters in regard to this information.

12. The new information cited in the submission was published before the date of the delegate's decision. The submission cited the information at footnotes 1, 2 and 5 in the discussion about Bishop Joseph and in some of the information he is named and his activities are reported. He is not specifically name in the Freedom House report but this report noted the monitoring of individuals critical of the government in the manner of the Bishop's own activities. As the Court Order stated, this new information was provided to make good a specific claim about interest in Bishop Joseph; an identified individual. I am satisfied that had this information been known it may have affected the consideration of the applicant's claims. Although it is now somewhat dated this information has relevance to the changed circumstances in Sri Lanka and reports of harassment by the recent Rajapaksa regime of people critical of the past Rajapaksa regime (2005 to 2015) which I discuss further below. I am satisfied that exceptional circumstances exist that justify the IAA considering the new information from Amnesty International (footnote 1), BBC News (footnote 2), and Freedom House (footnote 5).
13. Other information was cited at footnotes 6 to 8 and 10. In the submission the applicant links this to concerns expressed about the military presence in the north, the occupation of Tamil land, his parents' fear and reports of abuse and torture committed against returnees to Sri Lanka. These reports were all published before the date of the delegate's decision. Unlike the information provided in regard to supporting the claim about interest in Bishop Joseph, this information is not about an identified individual. I am not satisfied that this information meets the provisions of s.473DD(b). Furthermore this information is now five or more years old and reflects the situation in Sri Lanka at that time. As noted above I have obtained new information which reflects recent events in Sri Lanka and reports on the recent human rights situation in the country. As such I am not satisfied that there exceptional circumstances to justify considering the information cited at footnotes 6 to 8 and 10.

#### *2022 submission*

14. The IAA received further submissions on 27 June 2022 from the applicant's current representative. This submission largely comprised two parts. The first part is discussion of the applicant's claims and the previous IAA decision and the decision of the Court. The latter part of the submission can be characterised as addressing the situation in Sri Lanka for Tamils following the change of government in Sri Lanka, however in some part the discussion does also address claims already made.
15. The IAA contacted the representative's office on 27 June 2022 and advised of the five-page limit for making submissions to the IAA and that submissions had been made to the IAA in 2016 and that these would be taken into account when considering if the submissions were compliant with the Practice Direction for Applicants, Representatives and Authorised Recipients (the Practice Direction).<sup>2</sup> The representative responded by email later that day advising they had not acted for the applicant before the IAA earlier and therefore any previous were filed by his previous lawyers and that they, the current representative, were filing submissions on behalf of the applicant for the first time. I have noted this, but that the current representative is making submissions for the first time is irrelevant in the terms of the

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<sup>1</sup> The US Department of State report (footnote 3) and the Amnesty International report provided with the post-interview submission (footnote 4) were before the delegate and are not new information.

<sup>2</sup> Under the Practice Direction any submissions (statements giving reasons why the delegate's decision is disagreed with; or outlining any claim or matter which was overlooked by the delegate) must be concise and should be no longer than five A4 size pages.

Practice Direction and the IAA is not required to accept any new information that fails to comply with the Practice Direction. As the 2016 submissions are not withdrawn they must be taken into account when addressing the five-page limit set out in the Practice Direction.

16. Turning to the first part of the 2022 submission, as noted this is discussion of the applicant's claims, the previous IAA decision and the decision of the Court and on face value this may amount to submissions for the purpose of the five-page limit. But, while I have had regard to the Court decision and reasons, this is a de novo review of the delegate's decision, and the previous IAA decision which has been quashed is largely irrelevant, as are the representative's comments about that decision. As such I am satisfied that considered overall the submissions to the IAA addressing the delegate's decision and any matters the applicant believes the delegate overlooked do not exceed the Practice Direction allowance.
17. The latter part of the submission can be characterised as addressing the situation in Sri Lanka for Tamils following the change of government in Sri Lanka, however in some part the discussion does also address claims already made. Although not identified as such in the submission this is new information and not subject to the five-page limit laid out in the Practice Direction for submissions. As this is commentary that refer to events that post-date the delegate's decision this information could not have been provided to the Minister. It is not personal information.
18. This information is linked to the applicant's Tamil based claims, his links to leading clergy in Mannar and claims of harm to critics of the government, but it is no more than a very basic commentary of events in Sri Lanka based on sources not identified. To the extent that the comments in the submission regarding the election of Gotabaya Rajapaksa as President and the "present day ... political turmoil", and those regarding the economic situation, displacement and land occupation, the 2019 Easter bombing, and public demonstrations, is new information, this information is evident in the new country information I have obtained (outlined above). The new information I have obtained also reports on the human rights situation in Sri Lanka for Tamils and on the treatment of critics of the government in the context of the current environment and current economic situation. I have considered the submission but I am not satisfied that the asserted conditions as broadly outlined in the submission add materially to the information I have obtained. I am not satisfied that exceptional circumstances exist that justify considering the new information contained therein.

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

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19. The applicant's claims can be summarised as follows:
  - The applicant is a Tamil born in the Mannar District, Northern Province, Sri Lanka.
  - He is a Catholic and a member of the Catholic congregation in Mannar.
  - His area was controlled by the Liberation Tigers of Tamil Eelam (LTTE). In 1999 his area was affected by the civil war fighting and came under the control of the government forces.
  - The family was displaced, and they were assisted by the church to resettle in a settlement on church land. The applicant has provided documentary evidence supporting his claim.

- When they revisited their property toward the end of the civil war, they found it had been damaged and they remained living in the church resettlement housing.
- From the time the area came under government control the applicant and Tamils in the area were subject to constant harassment and interrogation by security agencies and the military.
- On an occasion in July 1999 the applicant was taken by the security forces to a military camp where he was detained for two days and questioned and physically mistreated. He was released following the intervention of the Bishop but the navy officials took his photograph and fingerprints and told him these would be sent to security agencies around the country and that he would be monitored.
- The harassment became worse between 2005 and 2009 and as a young male the applicant was constantly subjected to roundups and investigations to identify LTTE fighters and members. Tamils in the area disappeared.
- In 2008 he travelled to India for five months on a religious pilgrimage. On his return to Sri Lanka he was stopped at the airport by two people who took his passport and made a copy and stated their intention to arrest him. He explained his reason for being in India was a religious pilgrimage and was then allowed to leave but warned he could be taken from his home at any time.
- Tamils continued to be rounded up after the end of the civil war in 2009 and people were frightened they may be identified as former LTTE members and restricted their movements to within the area owned by the church. In 2011 the army established a new base near the church settlement where the applicant lived and people faced constant harassment by the soldiers who wanted to make their presence felt in the Tamil community.
- In 2010 the applicant's family lodged a complaint about being displaced and about the damage to their property in 1999 and he has provided a copy of the relevant Extract from the police Information Book. The complaint states it has been lodged to obtain government assistance or compensation but the authorities did not look into the matter and did not help them.
- Bishop Joseph and other senior church figures spoke up for the Tamil people and there was a deep animosity between the authorities and the church. The applicant provided a copy of the submission made by the Diocese of Mannar to the Lessons Learnt and Reconciliation Commissions (LLRC) in January 2011. He assisted with this submission which outlined a number of concerns including enforced disappearances, extra-judicial killings among a range of issues relating to the Tamil community.
- The applicant supported the actions of Bishop Joseph and the church to support the Tamil people and protest against the persecution of Tamils. He attended demonstrations and signed petitions and assisted welfare activities supporting Tamils harmed by the conflict. He was constantly warned by the authorities not to associate with Bishop Joseph.
- In 2012 Bishop Joseph was accused of being an LTTE supporter and working for a separate Tamil state. The applicant was concerned for his safety as a Tamil and Catholic and decided to leave Sri Lanka. He departed illegally by boat in August 2012.
- After his departure the Criminal Investigation Department (CID) visited his family home and enquired about his whereabouts.

- The applicant fears that if he returned to Sri Lanka he would be detained and mistreated because he is a Tamil from Mannar; a failed asylum seeker who left illegally; a Catholic active in church activities and demonstrations. He also fears harm because his family has been displaced since the war and his family home at the Catholic settlement is near an army base.

## **Refugee assessment**

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20. 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**

21. 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.
22. The applicant has consistently claimed to be a Tamil from Mannar District and has provided identity documents in support of his claimed identity. I accept the applicant’s identity and nationality as determined by the delegate and that Sri Lanka is the receiving country for the purpose of this review.
23. I accept that the applicant is a Catholic and has been an engaged member of the church in Mannar; the applicant provided letters from the church that attest to his relationship with the church.
24. I accept his claim to have been involved in church activities which included protesting and advocating for Tamil rights, assisting the submission to the LLRC, and providing material support to Tamils. The country information, including that provided with the 2016 IAA submission, demonstrates that the church was vocally critical of mistreatment of Tamils and that as a result church leaders were suspected of supporting the LTTE and Tamil separatism.<sup>3</sup> In this environment, and noting the authorities’ attempts to suppress the general Tamil

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<sup>3</sup> 2016 IAA submission: Amnesty International, “Sri Lanka: Suppressing Calls for Justice”, 2014

population at the time, I accept that the applicant was warned by the authorities not to be involved with the church.

25. I accept that the applicant came from an LTTE controlled area in Mannar. Based in the north of the country Mannar and surrounding areas had been an important LTTE stronghold and in 1999 the Sri Lankan army launched major offensives in the north against the LTTE and took control of large parts of the north, including Mannar. Fighting to gain control of the area was fierce and I accept that as a result the family was displaced; many thousands of Tamils were displaced at this time and in the fighting leading up to the ceasefire in 2002 and there has been ongoing criticism of the extent of such displacement and the impact on those affected, the vast majority of whom were Tamils, and about occupation of Tamil land by the military.<sup>4</sup> I accept that this would have been a stressful experience for the applicant and that as a result of their displacement the family resettled in an area provided by the church and have decided to remain there and that there is a military camp in the vicinity.
26. In his 2016 IAA submission the applicant outlined the further stressful experience of crossing into government-controlled territory in 1999. The applicant was [Age] years of age at the time and his account that he and his brother were separated from the family and taken into a military camp where they were questioned, photographed, fingerprints taken and mistreated is consistent with the accounts of Tamils who were taken by the authorities and investigated for any LTTE links. Young Tamil men like the applicant and his brother were viewed as being of fighting age and were particularly targeted in this manner and suspected of having LTTE links. The country information supports his claim he was beaten and mistreated in the manner described.<sup>5</sup>
27. I accept this claim and that he was released following the intervention of the Bishop. I accept that from this experience and the threats on his release that he would be monitored the applicant had ongoing concerns for his safety, but that he was released indicates that following their questioning/investigation the authorities did not view the applicant as an ongoing security concern. Had he been so I am not satisfied that he would have been released and allowed to live in the general community.
28. The applicant's description of being stopped in roundup exercises and questioned and examined by the authorities was indicative of the stringent security checking arrangements in place in the north at the time. The applicant described this harassment as becoming worse between 2005 and 2009 which is consistent with the break-down of the peace treaty from 2005, the election of the Mahinda Rajapaksa government in the same year, and the resumption of fighting in 2006.<sup>6</sup> The submission by the church to the LLRC noted the atrocious attack in 2006 on the Pesalai church (in Mannar District) where unarmed civilians had sought refuge from the fighting and where they were then allegedly fired upon by navy personnel and police. The OHCHR report discussed this attack and the failure of investigative bodies to conduct effective enquiries into the matter. The OHCHR described the increased tensions between the civilian population and the navy detachment in the area at the time of increased military operations between the LTTE and the military in the areas and that "navy officers

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<sup>4</sup> UK Home Office, "Country of Origin Information Report Sri Lanka", March 2012, 3523; Post-interview submission; UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015

<sup>5</sup> UN High Commissioner for Refugees, (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; UK Home Office, "Country of Origin Information Report Sri Lanka", March 2012, 3523; Post-interview submission; UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015

<sup>6</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Post-interview submission; UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015



reportedly came to surrounding villages, threatened and assaulted them, asking if they were passing information to the LTTE”.<sup>7</sup>

29. In this civil war environment and also continuing into the post-civil war period the authorities maintained strict control of the Tamil community in part by conducting widespread exercises to identify those with LTTE links or supporting the LTTE, and as the applicant described “to make their presence felt”. The applicant described young men being lined-up and checked for LTTE links and that he was also told to stop associating with church leader and the country information confirms that the authorities suspected all Tamils of possibly having connections with the LTTE and conducting enquiries in this manner.<sup>8</sup> But, notwithstanding that the experience itself may have been distressing, I am not satisfied that this indicates the applicant was of adverse interest to the authorities. Being a Tamil and a young man from a former LTTE area I accept he was subject to such checks but, had he been considered to be a security concern I am not satisfied that he would have been allowed to continue to go about his business and live in the community following these enquiries.
30. In this regard I also take into account that the applicant was able to travel to India in 2008. That the authorities were willing to allow him to leave the country in 2008, a period in which the civil war fighting had intensified, and to travel to India, a country from which there was concern the LTTE gained financial and material support, indicates that he was not viewed as being of a security concern.<sup>9</sup> I note the account he was spoken to on return and his passport was copied and that he was told he was to be arrested, but from his account when he explained the purpose of his visit he was allowed to leave the airport and return home. I also note this did not prevent him being issued a further passport in 2009.
31. I accept that the applicant’s experiences and interactions with the authorities may have been alarming and that accounts of the disappearance of other Tamils were of concern, but I am not satisfied that he had a profile of concern with the authorities. Nor am I satisfied that his connection to Bishop Joseph or involvement in church activities caused him to be viewed as a security concern. I have accepted that he was warned not to be involved with church activities but, beyond the roundup/investigation exercises already discussed, there is no indication he came to harm because of these activities, even considered together with him being a Tamil and a young man.
32. Bishop Joseph and other leaders came to attention because of their outspoken criticism. While the government had an aversion to criticism the indications are that those targeted by the authorities were the leaders who publicly advocated for Tamil rights. I accept that the applicant assisted with the LLRC submission, noting that he was displaced and his family property was damaged I accept that he may have been able to contribute to the overall submission, but there is no indication that he came to attention at the time for doing so. Similarly there is no indication that he or his father who lodged the property damage complaint in 2010 came to adverse attention for doing so. I accept that the family may be disappointed that they received no assistance despite their complaint of property damage, but I am not satisfied that this indicates any adverse interest in them or the applicant but is

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<sup>7</sup> SHEV application: “Submission by the Catholic Diocese of Mannar to the Lessons Learnt and Reconciliation Commission”, 8 January 2011; Post-interview submission; UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015

<sup>8</sup> UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8; DFAT, “Country Report, Sri Lanka”, February 2015, CISEC96CF1164

<sup>9</sup> DFAT, “Country Report, Sri Lanka”, February 2015, CISEC96CF1164; Post-interview submission; UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015

simply indicative of the huge scale of displacement and property damage due to the conflict and the slow pace of bureaucracy and ineffectual compensation/reparations arrangements.<sup>10</sup>

33. I accept that the applicant may have an ongoing fear of harm as a result of his past experiences. It is also important to note that his experiences from 2005, and the mistreatment of the Tamil population in general which he has also outlined, occurred under the repressive Mahinda Rajapaksa government and I accept that he may be concerned about the return to power of the Rajapaksa family following the election of Gotabaya Rajapaksa as President in 2019.
34. I accept there is credible reporting of the brutality of the government of past President Mahinda Rajapaksa in which human rights abuses were committed both during the civil war and in the immediate aftermath. Many agencies and the general Tamil community have expressed concern as to the return of the Rajapaksas to power, along with their support base, including Ranil Wickremesinghe as Prime Minister and now President, particularly noting the Rajapaksa rhetoric of Buddhist/Sinhala nationalism which was somewhat heightened by the 2019 Easter attacks.<sup>11</sup>
35. The Rajapaksas and their supporters have remained concerned about accusations of war crimes and have been alert to those, such as Bishop Joseph, who have advocated for recognition of the war crimes and human rights abuse that occurred, and for reparation for victims and prosecution of perpetrators. Amnesty International have set out the cycle of impunity that has existed and which has hampered real effort to investigate crimes and abuses dating from the civil war and immediate aftermath.<sup>12</sup> Both the past Rajapaksa regime and the recent one have generally suppressed efforts to achieve reconciliation and reparation; Amnesty International reported that in 2013 nationalist Buddhist groups opposed a visit by the then UN High Commissioner on Human Rights after she called on the Sri Lankan authorities to conduct a “credible investigation” into alleged war crimes. Gotabaya Rajapaksa was at that time Sri Lanka’s Defence Secretary and he reacted to the proposed visit by accusing the Commissioner of being influenced by the LTTE. It is reported that at successive UN Human Rights Council sessions in Geneva Sri Lankan authorities have attempted to prevent information about human rights violations from reaching the UN and have tried to discredit activists who speak out about these violations or advocate for greater accountability.<sup>13</sup>
36. It was in this context the Catholic church made its submission to the LLRC in 2011 and expressed disappointment that previous commissions of enquiry had “failed to establish the truth into human rights violations and extrajudicial killings” and called on the LLRC to “give high priority to establish in public the truth of what has happened in the course of conflict and war”. Bishop Joseph was one of the signatories of the submission. But although then President Mahinda Rajapaksa set up the LLRC Amnesty International reported later in 2011 on the “shortcomings” of the LLRC and was critical of failures to pursue serious violations uncovered by witness testimony and of Commissioners who strongly challenged expert testimony when it was perceived to be critical of the state and Commissioners who on

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<sup>10</sup> Post-interview submission; UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015

<sup>11</sup> BBC, “Sri Lanka: Forces raid anti-government protest camp”, 22 July 2022, 20220722093257; UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928; Post-interview submission; UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015; Integrated Regional Information Networks, “Sri Lanka war crimes in the spotlight as UN rights chief visits”, 9 February 2016

<sup>12</sup> Post-interview submission: Integrated Regional Information Networks, “Sri Lanka war crimes in the spotlight as UN rights chief visits”, 9 February 2016

<sup>13</sup> 2016 IAA submission: Amnesty International, “Sri Lanka: Suppressing Calls for Justice”, 2014

occasion were openly sceptical about the validity of witness statements. In summary Amnesty International expressed concern “the Sri Lankan government refused to make a credible effort to seek accountability. Instead, as it has done often in the past two decades, the Sri Lankan government has established an ad hoc special commission, ostensibly to investigate and address wrongdoing, but in fact to deflect international pressure and silence internal critics.”<sup>14</sup>

37. The Amnesty International report noted that in 2014 Bishop Joseph was subjected to a police complaint from nationalist Buddhists accusing him and the Bishop for Jaffna of providing the US Ambassador-at-Large for War Crimes Issues, what they called “false information” about alleged crimes committed during the civil war.<sup>15</sup> Freedom House similarly reported monitoring of individuals known to be critical of the government.<sup>16</sup>
38. While this reporting dates from the earlier Rajapaksa regime the Rajapaksa family returned to power in 2019 and they resumed a similar program of suppression. Although the election of the coalition Sirisena government in 2015 saw a significant shift in respect for human rights for Tamils, notwithstanding criticism of the slow pace of reform as outlined in the post-interview submission, the steps that government took to engage in reconciliation and accountability have been to an extent undone by the Rajapaksas. The Office of the United Nations High Commissioner for Human Rights noted in 2022 a pattern of surveillance and harassment of civil society organizations, human rights defenders and victims has continued, particularly for those in the country’s north and east and that they continue to receive allegations of intimidation, monitoring and surveillance by security services against human rights defenders, civil society representatives, journalists and families of the disappeared.<sup>17</sup>
39. The post-interview submission drew attention to commentary from the International Truth & Justice Project and other agencies reporting cases of mistreatment of Tamils by the authorities.<sup>18</sup> While I note these concerning reports of the harassment of civilians by various of the security agencies, considering a range of country information from more current and reputable sources as discussed below I am not satisfied that there is a real chance the applicant would be similarly harmed now or in the reasonably foreseeable future should he return to Sri Lanka, or that he would be imputed as being pro-LTTE and/or anti-government.
40. The indications are that since the election of President Gotabaya Rajapaksa in 2019 and the success of his Sri Lanka Podujana Peramuna party (SLPP) in the 2020 elections those of interest to the incoming government are Tamils with certain profiles such as political activists and journalists, particularly those critical of alleged war crimes.<sup>19</sup>
41. The UK Home Office has also commented on the profile of Tamils or returning asylum seekers who are of interest to the authorities and noted that the Sri Lankan government’s concern

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<sup>14</sup> 2016 IAA submission: Amnesty International, “When will they get justice? Failures of Sri Lanka’s Lessons Leader and Reconciliation Commission”, 2011

<sup>15</sup> 2016 IAA submission: Amnesty International, “Sri Lanka: Suppressing Calls for Justice”, 2014

<sup>16</sup> 2016 IAA submission: Freedom House, “Freedom in the World”, 19 June 2015

<sup>17</sup> United Nations High Commissioner for Human Rights, “Report of the United Nations High Commissioner for Human Rights”, 25 February 2022, 20220303152645

<sup>18</sup> Post-interview submission: International Truth & Justice Project, “Silenced: survivors of torture and sexual violence in 2015”, January 2016; The Guardian, “Torture of Tamil detainees in Sri Lanka has continued says charity”, 13 August 2015; Human Rights Watch, “Australia: Stop Forced Returns Without Proper Screening”, 10 December 2014; Canada: Immigration and Refugee Board of Canada, “Sri Lanka: Treatment of suspected members or supporters of the Liberation Tigers of Tamil Eelam (LTTE), including information about how many are in detention; whether the government continues to screen Tamils in an attempt to identify LTTE suspects (2011-January 2015)”, 11 February 2015, LKA105041.E

<sup>19</sup> United Nations High Commissioner for Human Rights, “Report of the United Nations High Commissioner for Human Rights”, 25 February 2022, 20220303152645

has changed since the civil war ended and the government's objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. I note submissions drawing attention to the UNHCR Guidelines but it is important to note these were issued in 2012; based on more contemporary country information the indications are that being of Tamil ethnicity in itself would not warrant international protection, nor would being from the north. Those of concern are past members of the LTTE or those with a connection to the LTTE who are active in post-conflict Tamil separatism. Specifically the UK Home Office report identified those of interest to the authorities and indicates that this is "individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka".<sup>20</sup>

42. The 2021 determination by the UK Upper Tribunal in KK, RS and Secretary of State for the Home Department advised that this previous guidance remained broadly accurate. The Upper Tribunal went on to note whether a person "has, or is perceived to have, undertaken a 'significant role' in Tamil separatism" in the "evaluative judgment" taken by the Sri Lanka authorities is "to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam".<sup>21</sup>
43. I note that Bishop Joseph and other church leaders have come to notice and I note the reports of attacks on church figures and I have considered, that should he return, if the applicant may be of interest to the authorities because of his connections with Bishop Joseph and other senior church figures or for his own activities or the property damage complaint, together with him having been a young Tamil male from Mannar. I note the sensitivity of the current regime to criticism and, although Gotabaya Rajapaksa has now resigned as President and his brother has vacated the post of Prime Minister, the SLPP remains in power and their closely linked ally Ranil Wickremesinghe has been voted in as President by the SLPP dominated parliament. Although community dissent with the regime has surfaced the SLPP swept the 2020 parliamentary elections and has a stranglehold on parliament and the indications are that the now Wickremesinghe led administration will continue the general program of the past administration. President Wickremesinghe is expected to remain in this role until the end of the Presidential term in 2024.<sup>22</sup>
44. In the context of the situation and noting the profile of those who have come to notice I am not satisfied that there is a real chance the applicant has a profile that would attract adverse attention or that he would face harm should he continue to act in a similar manner or again support the bishops as stated in his 2016 IAA submission. I accept he may be concerned by the presence of a military base in the vicinity of the family residence and be concerned that the authorities view those living on the church grounds as a threat but I note that despite this he was able to live and work in the community and travel overseas and obtain a further passport in 2009. I accept that at the height of tension in the area he was subject to roundups and regular checking and cautioned about associating with church leaders but I am not satisfied that he has a profile that would be of adverse interest to the military or other authorities should he return to Sri Lanka. As noted above the Office of the United Nations

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<sup>20</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

<sup>21</sup> UK Upper Tribunal (Immigration and Asylum Chamber), "KK RS and Secretary of State for the Home Department", 27 May 2021, 20210601113225

<sup>22</sup> The Economist, "In with the old - Sri Lanka picks a new president to replace the one that fled", 21 July 2022, 20220722101909; International Crisis Group (ICG), "Sri Lanka's Uprising Forces Out a President but Leaves System in Crisis", 18 July 2022, 20220719124014; BBC, "Sri Lanka: Forces raid anti-government protest camp", 22 July 2022, 20220722093257

High Commissioner for Human Rights has reported human rights defenders, civil society representatives, journalists and families of the disappeared as being of interest to the authorities.<sup>23</sup>

45. I have taken into account the recent political turmoil and anti-government protests and the reports of protests being raided and broken up and concern of harm to those protesting. The indications are that these protests are largely centred in Colombo and the south of the country and that those protesting are mostly disaffected members of the Sinhalese community, rather than Tamils in the north. I am not satisfied that this activity and the reaction of the regime and the authorities to this gives rise to a real chance the applicant would be harmed should he return to Sri Lanka.<sup>24</sup>
46. Noting his comments in the 2016 IAA submission regarding restrictions on Christians I have considered if the applicant's religion may give rise to a real chance he may be harmed in Sri Lanka. While the Constitution guarantees freedom of religion there have been attacks on Christians by Buddhist extremists and the 2019 Easter bombings included Christian targets. The United Nations High Commissioner for Human Rights has expressed concern that actions by the government during the past year (2021) have "reinforced the nexus between Sinhalese nationalism, Buddhism and the state, increasing the sense of marginalisation and anxiety among Tamil, Muslim and Christian minority communities, and undermining the prospects for reconciliation". The same report noted Incidents of attacks targeting Christian evangelical and non-denominational churches have continued to be reported, including intimidation or harassment of pastors by public officials or members of other creeds, and disturbance at places of worship.<sup>25</sup> Sri Lanka's National Christian Evangelical Alliance of Sri Lanka reported 50 incidents in 2020 of attacks on churches, intimidation of and violence against pastors and their congregations, and obstruction of worship services, including groups led by Buddhist monks accosting evangelical Christians on their way to church or interrupting church services.<sup>26</sup> The indications are that attacks by Buddhist extremists largely target evangelical Christians and occur mostly in the Buddhist-majority regions in south and central Sri Lanka.
47. The 2019 Easter bombings were perpetrated by local Islamic extremists and three churches were amongst the targets resulting in many deaths of Christian worshippers.<sup>27</sup> Although the authorities acted quickly to identify and arrest those responsible and to increase security for churches there has been criticism of the slow pace of prosecutions and of the role of the security establishment leading up to and in response to the attacks. The church community was also disturbed in January 2022 by an incident when an unexploded hand grenade was discovered in the church in Borella days before an inter-faith event was due to be held as part of the campaign for justice. The police made initial arrests of some people present at the church, but the investigation to date has been criticised as ineffectual and incomprehensive.<sup>28</sup>

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<sup>23</sup> United Nations High Commissioner for Human Rights, "Report of the United Nations High Commissioner for Human Rights", 25 February 2022, 20220303152645

<sup>24</sup> The Economist, "In with the old - Sri Lanka picks a new president to replace the one that fled", 21 July 2022, 20220722101909; International Crisis Group, "Sri Lanka's Uprising Forces Out a President but Leaves System in Crisis", 18 July 2022, 20220719124014; BBC, "Sri Lanka: Forces raid anti-government protest camp", 22 July 2022, 20220722093257

<sup>25</sup> United Nations High Commissioner for Human Rights, "Report of the United Nations High Commissioner for Human Rights", 25 February 2022, 20220303152645

<sup>26</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818

<sup>27</sup> *ibid*

<sup>28</sup> United Nations High Commissioner for Human Rights, "Report of the United Nations High Commissioner for Human Rights", 25 February 2022, 20220303152645

48. Notwithstanding the 2019 Easter terrorist attacks, DFAT assesses that Christians face a low threat of violence from homegrown Islamic extremist groups, although this could change if such groups were to expand in membership and strengthen their international links. As I have noted the Sri Lankan constitution provides for freedom of religion and around seven percent of the population are Christians. There is no restriction on Christian worship, although there have been reports of violence and intimidation against Christians mostly by hard-line Buddhists but also Hindus. DFAT assesses that evangelical Christians may face a moderate risk of societal discrimination, but that the number of incidents targeting evangelical Christians has remained largely static over recent years. But the applicant has not indicated he follows an evangelical faith or would do so in Sri Lanka. Notwithstanding complaints regarding slow progress with prosecutions and concerns regarding the role of security agencies leading up to the 2019 Easter attacks, following these attacks the authorities set in place security measures to quell future attacks and vigorously pursued and detained the perpetrators to quash any repetition.<sup>29</sup> Considered overall I am not satisfied that there is a real chance the applicant would face harm in Sri Lanka now or in the reasonably foreseeable future on the basis of religion.
49. The applicant has expressed concern that he faces harm as a failed asylum seeker who left Sri Lanka illegally. I accept as plausible that after he left Sri Lanka the CID visited his family home and enquired about his whereabouts but there is no indication that they made any threats to harm him or indicated he was of interest for any security reasons or other profile of concern. Considering the country information before me, discussed below, I am not satisfied that there is a real chance the applicant would face harm on the basis of being a failed asylum seeker or for his illegal departure.
50. I accept that the applicant departed Sri Lanka as a passenger illegally when he left in 2012. I accept that he would be subject to the provisions of the Immigrants and Emigrants Act (I&E) Act which regulates entry and exit to and from Sri Lanka. Under that Act it is an offence to depart Sri Lanka from other than an approved port of departure.
51. Information from DFAT and the UK Home Office outlines the process involved for returnees, including returnees being held while questioned and possibly being detained while awaiting court appearance. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival. As part of this process checks are made to identify those suspected of concealing a criminal or terrorist background. DFAT advice is that it is not aware of mistreatment of returnees during the entry procedure on return to Sri Lanka, nor is there any indication not being able to speak Sinhala leads to any harm. The UK Home Office in discussing returnees do not reference instances of abuse of returnees or failed asylum seekers in the return process.<sup>30</sup>
52. I accept that the applicant may be questioned and detained as outlined in the country information, but I do not accept he would attract adverse attention or any mistreatment from the authorities. In the context of returning asylum seekers the UK Upper Tribunal in KK, RS and Secretary of State for the Home Department outlined that those of interest to the authorities included those involved with particular diaspora organisations, involved in fundraising for such organisations, who had attended commemorative events, meetings

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<sup>29</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818, DFAT, "Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

<sup>30</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818, DFAT, "Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

and/or demonstrations and particularly whether they played a prominent part or have been holding flags or banners displaying the LTTE emblem; social media activity or publishing and those signing petitions perceived as being anti-government.<sup>31</sup> But the applicant does not claim to have been so involved.

53. The I&E Act sets out penalties for infringements and passengers on people smuggling ventures mostly receive a fine. DFAT reports the possible protracted legal process and possible repeated court appearances, and I take into account this impost and that some returnees have reported to DFAT the difficulty and stress of having to return periodically to Colombo for hearings in a case where they were uncertain of the outcome. The measures as outlined are part of the Sri Lankan authorities' program of controlling and regulating the movement of people and irregular migration and the indications are that fines as penalties are issued to act as a deterrent towards further illegal departures.<sup>32</sup>
54. On the evidence before me there is no indication that laws regarding illegal departure are selectively enforced or are discriminatory or are applied in a discriminatory way. Accordingly, in the circumstances of this case, I find that any arrest, detention and subsequent prosecution and punishment of the applicant by the Sri Lanka law enforcement and judicial systems does not amount to persecution for the purposes of s.5J of the Act.
55. The applicant may be subject to these security checks on arrival and the country information advises this may involve interviewing the returnee or checking with local police and that checks may take several hours to complete, and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. The information before me indicates all returnees and based on the country information I am not satisfied that these procedures involve any discrimination.
56. I accept that the country is undergoing an economic crisis, but these conditions apply across the country and I am not satisfied that any difficulties the applicant may face on this basis would be for a s.5J reason or amount to persecution.<sup>33</sup>
57. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka or in the reasonably foreseeable future on the bases claimed, either individually or considered cumulatively.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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59. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a

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<sup>31</sup> UK Upper Tribunal (Immigration and Asylum Chamber), "KK RS and Secretary of State for the Home Department", 27 May 2021, 20210601113225

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

<sup>33</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818; International Crisis Group, "Sri Lanka's Uprising Forces Out a President but Leaves System in Crisis", 18 July 2022, 20220719124014

necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

### **Real risk of significant harm**

60. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
61. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
62. The applicant has expressed concern he may be detained in prison or detention conditions that are so poor it would amount to torture and cruel, inhumane and degrading treatment and punishment. I have not accepted the applicant would experience serious harm during the return process and during any questioning or investigation as to his identity or other checks. Nor do I accept that this would amount to significant harm. Such questioning or investigation and being held briefly while checks are conducted does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this amounts to significant harm.
63. I have noted the difficult economic situation in Sri Lanka but I am not satisfied that any difficulties the applicant would face on this basis would amount to significant harm as defined.
64. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test, and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

### **Complementary protection: conclusion**

65. 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.