



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA23/10459

Date and time of decision: 26 May 2023 15:50:00  
M Oakman, 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 of the Hindu faith from Sri Lanka. He arrived in Australia on 4 November 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 28 September 2016. On 19 May 2017 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. On 14 August 2017 the IAA affirmed the delegate's decision not to grant the applicant a protection visa.
2. The applicant sought judicial review of the IAA's decision. On 29 March 2023 the Federal Circuit and Family Court of Australia set aside the IAA's decision and remitted the matter to the IAA for the review to be determined according to law.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The now referred material also includes copies of the applicant's consular access form (dated 14 November 2012), detention notice (dated 14 November 2012), Case Assessment form (undated) and a covering email with copies of identity documents supplied to the Department by the applicant attached (email dated 26 January 2013). Except for the biodata page and some stamped pages of his 2004 issued Sri Lankan passport, the identity documents (or an English translation thereof) attached to the covering email were included in the applicant's SHEV application and I am satisfied they were before the delegate. The delegate makes no mention of the other documents in his decision record, including the applicant's passport pages, and I am satisfied they were not before the delegate. The first two documents (and the covering email) are administrative in nature and are not relevant to assessing the applicant's protection claims. The Case Assessment form and the pages from the applicant's passport are potentially relevant to the applicant's protection claims and I am satisfied there are exceptional circumstances to consider that new information.
5. On 15 June 2017 the IAA received an email from the applicant's former legal representatives containing submissions and further information. On 4 and 18 May 2023 the IAA received emails from the applicant's current legal representatives containing submissions and/or further information. In the email of 18 May 2023, the applicant's current legal representatives confirm that the submissions dated 15 June 2017 are withdrawn. To the extent the 2023 submissions refer to information that was before the delegate, refer to legislation, and contain argument, I consider this does not constitute new information and I have had regard to it.
6. The material also contains further information some of which was not provided to the delegate. It consists of:

#### *Provided in 2017*

- A death certificate (dated [September] 2006) and letter from a council (dated [October] 2006) in relation to the death of "[Mr A]". These documents were not considered by the delegate, and it is new information ([Mr A]'s death documents new information).

*Provided in 2023*

- Applicant's statutory declaration dated 18 May 2023. The statutory declaration provides a mix of information that was before the delegate and additional details about his activities on behalf of the LTTE. The additional details about his activities on behalf of the LTTE was not before the delegate and is new information (*2023 statutory declaration new information*).
  - Country information reports dating from 2021 in relation to Sri Lanka. This country information was not before the delegate and is new information (*2023 new country information*).
7. The [Mr A]'s death documents new information confirms the death of [Mr A], a friend of the applicant and who it is claimed, among other things, was a recruiter for the Liberation Tigers of Tamil Eelam (LTTE) and got the applicant involved with the LTTE. The documents pre-date the date of the delegate's decision. However, from the SHEV interview recording the applicant endeavoured to present some documents to the delegate during that interview and which the delegate may have refused to accept (the recording is not clear on that point) and are not in any event referred to in the delegate's decision record. As such, I am satisfied the documents could not have been given to the delegate prior to a decision being made. On its face, the two documents are credible personal information, in that they are capable of being believed. The applicant's involvement with [Mr A] and the LTTE is material to his protection claims and these documents may have affected consideration of those claims. I am satisfied that s.473DD(b) is met and there are exceptional circumstances to justify considering the [Mr A]'s death documents 2017 new information.
  8. The 2023 statutory declaration new information relates to events that occurred before the applicant left Sri Lanka for Australia. It was submitted the new information could not have been provided before the decision was made by the delegate as the applicant was fearful of the ramifications for him if he disclosed his involvement with the LTTE. Notwithstanding his claimed fear, the applicant was prepared to disclose other information about his LTTE involvement during the SHEV application process, including discussing it at length at his SHEV interview. On that basis, I am not satisfied that this new information could not have been given to the delegate prior to a decision being made. However, on its face the new material is credible personal information, as it is capable of being believed. The new information in relation to the extent of his involvement with the LTTE may have affected consideration of his claims in relation to his risk profile if returned to Sri Lanka. I am satisfied that s.473DD(b)(ii) is met and that there are exceptional circumstances to justify considering the statutory declaration 2023 new information.
  9. The 2023 new country information all post-dates the delegate's decision. They are much more recent country information reports than the material considered by the delegate in 2017, some six years ago. There have been significant developments in Sri Lanka since the delegate's decision, particularly from 2019 onwards. I am satisfied that s.473DD(b)(i) is met and that there are exceptional circumstances to justify considering the 2023 new country information.
  10. I have also obtained a country information report on Sri Lanka which was not in the review material and is new information. The delegate, among other material, considered reports from the Department of Foreign Affairs (DFAT), the US Department of State (USDOS), and the UK Home Office (UKHO). Since the delegate's decision, updated versions of these reports were issued by DFAT, USDOS and UKHO. The new information provided by the applicant, and which I have accepted and considered, includes the most recent reports on Sri Lanka from

DFAT and UKHO.<sup>1</sup> I have obtained the most recent USDOS report on Sri Lanka.<sup>2</sup> I consider the USDOS (together with DFAT and UKHO) to be a reliable and authoritative source of country information. This information is more recent than the USDOS reports considered by the delegate. As such, I am satisfied there are exceptional circumstances to justify considering this new country information.

11. In the submission, it is stated that it is open to the IAA to interview the applicant in the interests of justice and in obtaining further information about his role in the LTTE and his fears of harm on return. The legislative framework governing the IAA provides for an exhaustive statement of the natural justice hearing rule. The IAA is required, subject to Part 7AA, to review a matter without accepting or requesting new information and without interviewing the applicant (s.473DB). The IAA can obtain new information from an applicant, including at an interview, but can only consider that information in exceptional circumstances. The IAA is considering the submissions made by the applicant in 2023, as well as a range of new information provided by the applicant, including the applicant's statutory declaration dated 18 May 2023. It is not apparent why he could not provide any further or additional details about his role with the LTTE or fears if returned in writing as part of the submissions made, or why he was unable to provide such information in the 18 May 2023 statutory declaration. I have decided not to exercise my discretion to interview or obtain further information from the applicant.

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

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12. The applicant's claims can be summarised as follows:
  - He is afraid that the Criminal Investigation Department (CID) or the Sri Lankan Army (SLA) will abduct, torture, or kill him because they believe he was a member of the LTTE. This has happened to him in the past and he fled the country in defiance of reporting conditions.
  - In 2011, soon after he fled, the authorities went to his home in Colombo and asked his wife where he was. She told them he had gone overseas. He is afraid that because they knew about him before he fled the country he will be seriously harmed on return.
  - He is also afraid of being sent back as a failed asylum seeker because of his past experiences. If deported the CID and authorities will have all his details and suspect that he is against them because they believe he was in the LTTE. If deported from Australia he will be detained, imprisoned, and tortured in prison because of his past.
  - He asks for protection in Australia because of these reasons.

### **Factual findings**

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#### **Receiving country**

13. Based on the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka. I find that the applicant's receiving country is Sri Lanka.

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<sup>1</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; and UKHO, "Country Policy and Information Note - Sri Lanka: Tamil Separatism", 25 August 2022, 20220930153437.

<sup>2</sup> USDOS, "Country Reports on Human Rights Practices 2022 - Sri Lanka", 20 March 2023, 20230321155722.

## Background

14. The applicant was born in [Year] and grew up in Central Province, Sri Lanka. He has lived in a number of other locations in Sri Lanka including Colombo, [City 1] and [City 2]. He lived and worked in [Country] from April 2007 to May 2009 and from April 2012 to October 2012. He married in [Year] and they have a daughter born in [Year]. His wife and daughter live in Colombo. His father and [brothers] live in Sri Lanka. His mother is deceased. He has remained in regular contact with his family. He attended school in Sri Lanka up to Year 7 ([Year]-[Year]). He worked in Sri Lanka in [Work sector 1] for two years and in [Work sector 2] for many years. In [Country] he worked in [Work sector 2]. He has worked in Australia since he has had work rights, and at the time of his May 2023 statutory declaration described himself as [an Occupation]. He reads, writes, and speaks Tamil and speaks Sinhala, Malayalam, and Hindi. He is Tamil and Hindu.

## Problems in Sri Lanka

15. In summary, the applicant claims he became friends with [Mr A] who worked as a recruiter for the LTTE and started to do construction work for the LTTE in [City 1] in 2005 cutting trees, building sheds, and digging bunkers. Because he could speak Sinhala, he was approached by the LTTE, and agreed, to escort LTTE members through SLA checkpoints including to Colombo. Shortly after he was married in [Year], he was stopped at a checkpoint to Colombo and because he didn't have all the required papers he was detained and questioned for a day until his parents and a brother came and vouched for him. On [Day] September 2006 he and [Mr A] were travelling on a motor bike when they were shot at by men from the EPDP, a government aligned paramilitary group. The applicant managed to escape but [Mr A] was killed. Shortly after the shooting he moved to Colombo and after making the necessary arrangements for a passport and visa he left for [Country] in 2007 for his safety. He returned from [Country] in 2009. He thought he'd be safe but soon learnt that the CID were looking for him. As a result, they left [City 1] and moved addresses while hiding. After a few months things appeared to have settled down. But then in around May 2011 the CID were looking for him again. He moved to Colombo but within two weeks he was asked to go to the police station where the CID detained, beat, and questioned him. The CID mentioned [Mr A] and accused the applicant of working for the LTTE. He was released after four days and told to report to the police every two days. Sometimes when he reported he was beaten. He eventually fled to Galle and other named locations and hid for five months while arranging to return to [Country]. After several months in [Country], where conditions were tough, he returned to Sri Lanka to see if things had cooled down. He couldn't go home because the CID had made enquiries about him, so he hid elsewhere for two weeks until he was able to arrange to get a boat to Australia.
16. DFAT notes that a UN report covering the period 2002 to 2011 found frequent occurrences of extrajudicial killings, disappearances and kidnappings, particularly in the north and east. The UN report largely attributed these to government forces, the LTTE and paramilitary groups. Many Tamils, particularly in the north and east, also reported being monitored, harassed, arrested or detained by security forces during the war and in its aftermath. DFAT also assessed that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. The UNHCR also confirmed that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east. The Sri Lankan authorities possessed extensive powers to arbitrarily detain and arrest people under the Emergency Regulations (Sri Lanka) and under the Prevention of

Terrorism Act 1979 (Sri Lanka) (PTA), and those powers were in wide use by the authorities during the war and in its aftermath.

17. In assessing the applicant's evidence, I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin. I also accept that the applicant's claims, on their face, are not inconsistent with the country information above. However, at the outset I should indicate that, like the delegate, I hold significant concerns about the credibility of the applicant and some of the claims he has made.
18. In particular, I am concerned he did not disclose until his May 2023 statutory declaration that, in addition to his claimed construction work for the LTTE, he also escorted LTTE members through SLA checkpoints to locations including Colombo. The explanation he gave for not disclosing this other, more significant work for the LTTE was substantially the same as the explanation he gave in his September 2016 statutory declaration for not revealing his doing construction work for the LTTE – he was scared to talk about his involvement with the LTTE when interviewed on Christmas Island as he feared the Australian government would detain him and send him back to Sri Lanka. He also said he wanted to provide this information to the IAA as new information because his life remains in danger. Even if his stated fear about being detained and returned to Sri Lanka if he disclosed his LTTE connection is accepted in relation to his delay in disclosing doing construction work, it does not explain why he then waited almost seven years after his SHEV application to raise his claim about escorting LTTE members through checkpoints. I do not consider it credible that, if true, he would not have revealed his work escorting LTTE members while discussing his LTTE links in his statutory declaration in 2016 which was prepared, along with the rest of his SHEV application, with the assistance of a lawyer. I do not consider it credible that, if true, he did not reveal this information during his SHEV interview. Although I acknowledge he attended that interview without a representative, the delegate indicated at the start of that interview that this was his opportunity to raise all his protection claims and provide supporting evidence; that it was important he told the truth and provided complete and accurate protection claims; that he may not have another chance to provide further information if his visa was refused; that if he had not provided some information or wanted to correct the previous information supplied he should do so during the interview; and asked the applicant if there was anything he wanted to change or add in relation to his protection claims and the applicant said no. Additionally, at the end of the interview, after the delegate had flagged he had some concerns about the applicant's claims, the delegate gave the applicant a final opportunity to tell him anything he hadn't told him about what had happened to him or in relation to his protection claims. I also do not consider it credible that, if true, the applicant failed to make any mention of this claim when it was initially referred to the IAA in 2017 and he provided submissions and other material through his (then) legal representatives. The applicant's failure to mention his new claim about assisting LTTE members to pass through SLA checkpoints (including an additional incident where he was detained and questioned by the authorities) until his May 2023 statutory declaration reflects very poorly on both the credibility of the new claim and his overall credibility.
19. I have other concerns in relation to his claims:
  - I do not consider it credible that the applicant, by his account, was of sufficient interest for the EPDP to attempt to shoot him in 2006 and for the Sri Lankan authorities to make enquiries about and search for him in 2006, 2009, 2011, and 2012, but not of sufficient interest for him to have any difficulty in leaving or returning to Sri Lanka on his own passport when he travelled to and from [Country] in 2007/2009 and again in 2012. Nor

do I consider it credible that the authorities would be sufficiently interested in the applicant to detain him for four days in May 2011, release him on a reporting condition, and then after he evaded that reporting condition, and being told when his wife was asked about his whereabouts that he had gone overseas, that he would be able to travel in an out of Sri Lanka to [Country] in 2012 on his own passport. Nor is it credible, given the claimed level of interest from 2006 to 2012, that the authorities do not appear to have made any enquiries about the applicant with his family after he left Sri Lanka for Australia in October 2012.

- I do not consider it credible that, if the applicant genuinely feared harm from the Sri Lankan authorities, and they had been searching for him at the various times as claimed, he would decide to return to Sri Lanka from [Country] in both 2009 and 2012 to, in effect, see if things were now okay for him. I also do not consider it credible that on both occasions he returned, when apparently no active enquiries were being made about him at those times, but soon after he returned the enquiries coincidentally began again.
  - I do not consider it credible that when discussing his reporting obligation after his release in 2011, he variously claimed he had to report every two days (2016 statutory declaration); every day (at one point in the SHEV interview); and weekly (also during the SHEV interview).
  - The applicant claimed in his 2016 statutory declaration that he was in hiding after the September 2016 shooting incident and before he left for [Country] while it took him several months to arrange a passport. This is clearly a lie as his passport biodata page shows it was issued in [2004].
  - The applicant claimed at the SHEV interview that he also returned to Sri Lanka from [Country] in 2012 because he had to arrange for secure, safe accommodation for his family and set up a bank account, to which his brothers contributed some funds. I do not consider it credible that he had to return to Sri Lanka to do so, given his wife, father and brothers were in Sri Lanka, rather than the applicant who claims to have feared harm at the hands of the authorities.
  - I do not consider it credible that the documents he provided to establish [Mr A]'s death give different dates ([Day 1] or [Day 2] September 2006) for [Mr A]'s death. I do not consider it credible that, if the EPDP was trying to shoot and kill the applicant in September 2006, that they would be unable to locate the applicant in the four days after the incident when he stayed in [City 1] with his family (whether at his aunt's place or elsewhere) before they relocated to Colombo. I also note in relation to this claim that the delegate who discussed the September 2006 [Mr A] shooting incident with the applicant at his SHEV interview and had the advantage of observing the applicant in person at that interview, did not consider this claim to be credible.
20. The issues identified above in relation to his evidence go beyond minor errors and discrepancies that could be attributed to factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, and a lack of cohesive narration due to trauma or the passage of time. Overall, I am not satisfied that the applicant has provided a truthful account of events involving any adverse interactions between him and his various family members and the Sri Lankan authorities in Sri Lanka up to 2012. I am not satisfied that the applicant did any work for the LTTE; that [Mr A] and the applicant were involved in a September 2006 shooting; that the Sri Lankan authorities, the EPDP, or anyone else, has detained, questioned, mistreated, or made enquiries about, the applicant, including in about May 2011; that the applicant was required to report to the Sri Lankan authorities; that the applicant was ever in hiding from the Sri Lankan authorities or anyone else; that the Sri

Lankan authorities, the EPDP or anyone else suspected the applicant was a member of the LTTE; and that his family, friends, and neighbours in Sri Lanka have, whether before he left for Australia in 2012 or afterwards, ever been asked about the applicant or his whereabouts. I am prepared to accept, based on country information, that he may have been stopped, questioned, and harassed in minor way from time to time by the Sri Lankan authorities, when passing through checkpoints or in other day to day contacts with the authorities.

21. The applicant provided a generally consistent address, education, employment, and family histories throughout the visa application process, and I am prepared to accept those details, including that he is a Tamil and Hindu, as set out in the SHEV application, except to the extent that they reflect matters related to adverse actions with the authorities etc, such as him being in hiding at various times.

### **Asylum Seeker and return to Sri Lanka**

22. The applicant claims to have left Sri Lanka in October 2012 to travel to Australia in a boat organised by a smuggler. I find that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker by the Sri Lankan authorities. His passport, since expired, was left in Sri Lanka.
23. The applicant's family live in Colombo. Prior to his journey to Australia, he spent several years, at various times, in Colombo. He remains in regular contact with his family. There is an international airport near Colombo. Given those factors, I am satisfied that the applicant will very likely return to Colombo, if he returns to Sri Lanka.

### **Refugee assessment**

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24. 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**

25. 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.
26. Country information indicates that Tamils have maintained they were subjected to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.<sup>3</sup> Incidents of extrajudicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath, and many Tamils, in the north and east in particular, reported being monitored, harassed, arrested or detained by security forces during the war and under the previous Rajapaksa government. The previous Rajapaksa government ended in 2015 with the election of (now former) President Sirisena.<sup>4</sup>
  27. In its most recent report,<sup>5</sup> DFAT said that the Sirisena government promised a new era of corruption free government and embarked upon a path of reconciliation with the Tamil minority that appeared to make some progress. However, in November 2019, Gotabaya Rajapaksa was sworn in as Sri Lanka's President, choosing his elder brother Mahinda Rajapaksa (the former President until 2015), as his Prime Minister. DFAT notes that the OHCHR in a January 2021 report expressed concern that while Sri Lanka seemed to be on a new path towards advancing reconciliation, accountability and human rights, the developments since November 2019 had reversed that direction and, instead, threatened a return to patterns of discrimination and widespread violations of human rights experienced in past decades. Notwithstanding the OHCHR's concerns about the possible future direction, the report from DFAT, overall, suggests that conditions for Tamils in Sri Lanka have substantially improved since the applicant was in Sri Lanka.
  28. Despite the general improvements in conditions for Tamils in Sri Lanka, DFAT confirms<sup>6</sup> that the Sri Lankan authorities remain concerned about the potential re-emergence of the LTTE, and separatist tendencies in general, and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE, and other separatists. The UKHO is of the view that although many Tamils may face official discrimination and harassment, in general that treatment is not sufficiently serious by its nature and/or repetition to amount to persecution based on ethnicity alone. The UKHO also indicates that a significant role in Tamil separatist and/or LTTE activities is likely to be of adverse interest to the Sri Lankan authorities, and a number of factors need to be considered in determining what may be viewed as significant.<sup>7</sup> The USDOS in its most recent report on human rights in Sri Lanka indicates that Tamils throughout the country, but particularly in the north and east, reported security forces regularly monitored and harassed members of the Tamil community, especially activists, journalists, NGO staff and former or suspected former LTTE members.<sup>8</sup>
  29. Since the DFAT and UKHO reports were published, there have been recent major developments in Sri Lanka. In the face of the collapsing economy, from March 2022, Sri Lankans united from various socioeconomic, cultural, ethnic, and religious backgrounds in a

<sup>3</sup> USDOS, "Country Reports on Human Rights Practices 2022 - Sri Lanka", 20 March 2023, 20230321155722.

<sup>4</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

<sup>5</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>6</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>7</sup> UKHO, "Country Policy and Information Note - Sri Lanka: Tamil Separatism", 25 August 2022, 20220930153437.

<sup>8</sup> USDOS, "Country Reports on Human Rights Practices 2022 - Sri Lanka", 20 March 2023, 20230321155722.

mass protest movement to demand greater transparency, accountability for corruption and economic mismanagement and increased participation in democratic life. The Prime Minister, Mahinda Rajapaksa, resigned in May 2022 after his supporters attacked peaceful protesters in Colombo. This was followed by widespread violence against government supporters throughout the country in which seven people were killed and the houses of about 70 parliamentarians were burned or damaged. After months of countrywide protests, at a massive demonstration in Colombo on 9 July 2022, thousands of protestors stormed and occupied the offices and official residence of the President. Mr. Rajapaksa resigned on 14 July 2022, after fleeing the country, but returned on 2 September. Ranil Wickremesinghe, who had been appointed Prime Minister after Mahinda Rajapaksa, was made Acting President and then elected by Parliament as the new President on 20 July 2022, according to the constitutional process. Although the President enjoys the support of the previous ruling party, he has sought to establish an all-party Government. The new President has appealed for the unity of Sri Lankans across all ethnic communities and affirmed the place of all religions, languages, and traditions. He recognized the transformative power of the protest movement, in particular the role of youth, promised constitutional reforms and proposed a people's assembly as a consultative mechanism to guide political and social reforms. He committed to combating corruption and establishing a new social justice commission to ensure that economic reforms benefited all sectors of society. At the same time the Government has sent mixed signals that appear to reflect a continuity with the former Gotabaya Rajapaksa government.<sup>9</sup> Other country information provided by the applicant suggests the same.<sup>10</sup>

30. DFAT assesses that the risk of torture perpetrated by the authorities has decreased since the end of the war and, although still used, Sri Lankans face a low risk of torture overall. In the case of individuals detained by the authorities, DFAT assesses the risk of mistreatment to be moderate. Sources told DFAT that the police routinely mistreat suspects during criminal investigations, including the use of torture to extract confessions.<sup>11</sup> The UKHO notes that the expert evidence points to the conclusion that detention will give rise to a real risk of ill-treatment.<sup>12</sup> The USDOS notes human rights and civil society organisations alleged that torture and excessive use of force by police, particularly to extract confessions, remained endemic; as in previous years, arrestees reported torture, mistreatment and forced confessions; the Human Rights Commission of Sri Lanka had documented 291 complaints about torture, for the year up to 30 September 2022; and the National Police Commission reported it received 1200 complaints against police during the year.<sup>13</sup> A UN report provided by the applicant notes a number of torture allegation in 2021, particularly in the context of those in custody.<sup>14</sup>
31. The applicant is Hindu, but he did not make protection claims, or claim to fear harm, on account of his Hindu religion.
32. I am not satisfied that the applicant's fear of harm in Sri Lanka, whether on account his Tamil ethnicity and background, or for any other reasons, is well-founded. As discussed above, I

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<sup>9</sup> UNHRC, "Situation of human rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5 - Advance Edited Version", 4 October 2022, 20221007144505.

<sup>10</sup> "Human Rights Watch World Report 2023", Human Rights Watch (HRW), 12 January 2023, 20230112144355 – including observations on the new government's continued lack of accountability for violations during the civil war and the unsatisfactory nature of recent amendments to the PTA.

<sup>11</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>12</sup> UKHO, "Country Policy and Information Note - Sri Lanka: Tamil Separatism", 25 August 2022, 20220930153437.

<sup>13</sup> USDOS, "Country Reports on Human Rights Practices 2022 - Sri Lanka", 20 March 2023, 20230321155722.

<sup>14</sup> A/HRC/49/9 – Promoting Reconciliation, accountability and human rights in Sri Lanka Report of the United Nations High Commissioner for Human Rights, 18 March 2022.

accept the applicant is a Tamil who has lived for periods in the North of Sri Lanka, including in areas that were at times occupied by the LTTE during the war. He would also have been stopped, questioned and subject to minor harassment from time to time by the authorities. However, having regard to the information before me, I am not satisfied the applicant faces a real chance of harm in relation to those matters now or in the reasonably foreseeable future.

33. First, the more recent DFAT, UKHO and USDOS reports do not suggest that being of Tamil ethnicity, including being from a former LTTE area, would by itself give rise to a need for protection. At no time was the applicant, on my findings, arrested, charged, taken to court, or detained under the PTA. Although he would have been stopped, questioned, and subjected to minor harassment from time to time at checkpoints and in other day to day interactions with the authorities, the country information indicates that such incidents were, unfortunately, not uncommon at that time as part of the widespread monitoring and harassment of Tamils. Such incidents as the applicant would have experienced were similar to those experienced by many other Tamils in the north and east, and I am not satisfied that they indicate the authorities held any interest in the applicant beyond the general harassment and monitoring of Tamils that was occurring at the time. Additionally, the Sri Lankan authorities, on my findings, did not show any other adverse interest in the applicant, while he remained in Sri Lanka and have not shown any further adverse interest in the applicant since he left Sri Lanka in October 2012.
34. Further, the weight of the more recent country information before me indicates the Sri Lankan authorities have shifted their focus or concern, from those with (former) real or suspected links to the LTTE etc, to those they consider to be involved in attempts to re-establish the LTTE or otherwise promote Tamil separatism. The applicant has not been involved in any pro-LTTE or Tamil separatist activities in Australia. Given both the passage of time since he departed in October 2012, together with his not engaging in any activities in Australia that could bring him to the adverse attention of the Sri Lankan authorities, and the country information regarding persons of interest, I am not satisfied that he would be of any ongoing adverse interest to the Sri Lankan authorities, or others, if returned to Sri Lanka.
35. It is now more than ten years since the applicant left Sri Lanka for Australia and during that time the general situation and country conditions for Tamils in Sri Lanka have substantially improved.
36. As discussed above, the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and to separatist tendencies in general. UKHO indicates that a significant role in sur place Tamil separatist activities is likely to be of adverse interest to the Sri Lankan authorities, and a number of factors need to be considered in determining what may be viewed as significant; and suggests that only returnees on a watch list are likely to be monitored.<sup>15</sup> DFAT assesses the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their security risk profile and assesses that those with leadership positions in Tamil diaspora groups, among others, would be of particular interest to the authorities. DFAT understands from multiple sources that some returnees have been subject to monitoring, involving visits to returnees' homes and telephone calls by the CID, especially those in the north and the east with suspected LTTE links, but DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT that they had no protection concerns, had

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<sup>15</sup> UKHO, "Country Policy and Information Note - Sri Lanka: Tamil Separatism", 25 August 2022, 20220930153437.

not experienced harassment by the authorities nor received monitoring visits.<sup>16</sup> The USDOS notes Tamils reported the Sri Lankan authorities regularly monitored and harassed members of the Tamil community, particularly those with certain profiles,<sup>17</sup> but none of which apply to the applicant. The applicant has not been involved with Tamil diaspora groups in Australia (nor for that matter while he was in [Country]). Although I am not satisfied that the applicant has a profile that will be of ongoing interest to the authorities now or in the reasonably foreseeable future if returned to Sri Lanka, I accept based on the DFAT and other country information that it is possible he may be subject to a short period of monitoring as a returnee. I note case law suggests monitoring and reporting requirements, in general, are non-persecutory conduct.<sup>18</sup> In the particular circumstances of this case, I do not consider that such monitoring and surveillance would amount to serious harm for the purposes of s.5J of the Act.

37. That aside, the applicant does not have a profile that country information suggests would lead to a real chance of harm, for his Tamil ethnicity and background, or for any other reason, if returned to Sri Lanka, now or in the reasonably foreseeable future.
38. The applicant submitted that with the worsening economic, political and security situation in Sri Lanka, and given the resulting prevailing current climate, it was open to the IAA to find that entrenched patterns of abuse define the country's current crisis and there is a real chance of the applicant suffering serious harm by reason of his race and actual/imputed political opinion and involvement with the LTTE. I accept that Sri Lanka is experiencing major political and economic problems. As discussed above, the UNHRC recently reported that the new Wickremesinghe Government made several positive policy announcements and commitments, but at the same time has sent mixed signals that appear to reflect a continuity with the former Gotabaya Rajapaksa government. Also, as discussed above, the general situation and country conditions for Tamils in Sri Lanka have substantially improved since the applicant was there in May 2012. Given those improvements, and despite the current political uncertainty, and even if there was a further deterioration in the Government's treatment of persons who are considered to be of adverse interest to the Government, I am not satisfied that the applicant's profile is such that there is any real chance he would attract adverse attention from the Sri Lankan authorities, or anyone else, if returned to Sri Lanka.
39. I accept that the applicant may be identified by the authorities as returned asylum seeker who departed Sri Lanka illegally, if returned to Sri Lanka.
40. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). People who have departed irregularly by boat are considered to have committed an offence under the IE Act. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine. DFAT is not aware of a prison sentence being given for an illegal departure by itself, and sources suggest a fine of LKR 50,000-200,000 is typically imposed. Those charged are required to appear in court where the matter was first heard and DFAT understand, regardless of plea, individuals so charged appear every 3-6 months for bail hearings. The cases may take years to resolve, requiring ongoing court appearances. DFAT is not aware of returnees from Australia being charged under the under the PTA.<sup>19</sup>

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<sup>16</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>17</sup> USDOS, "Country Reports on Human Rights Practices 2022 - Sri Lanka", 20 March 2023, 20230321155722.

<sup>18</sup> *WAKZ v MIMIA* [2005] FCA 1065 at [45]-[49].

<sup>19</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

41. Advice from DFAT is that upon arrival in Sri Lanka, returnees are interviewed by the Chief Immigration Officer. They may also be interviewed by other agencies, including the CID, the State Intelligence Service, and Sri Lankan Navy Intelligence, depending on the circumstances of their departure and personal histories. These agencies check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Those who departed illegally will be referred to the CID and taken to court in Negombo where they are bailed and released. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town. DFAT is not aware of mistreatment of returnees during processing at the airport.<sup>20</sup>
42. Taking into account my findings about his profile, and the country information, I am not satisfied that, other than the potential monitoring, the applicant will be at a real risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether when processed at the airport or on his return home.
43. The applicant is likely to be identified as having departed illegally and therefore be charged under the IE Act. I am not satisfied that there is a real chance that he would face persecution in these circumstances. I accept that he may be processed under the IE Act at the airport and may face court action and a fine under the IE Act as well. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. In this case, the evidence also does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that any processing, investigation, prosecution and punishment the applicant may face under the IE Act is not discriminatory and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
44. As discussed above the USDOS refers to long standing complaints from Tamils in relation to various forms of discriminatory conduct and the UKHO states that many Tamils may face official discrimination and harassment.<sup>21</sup> DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access employment or housing, and also notes that Hindus are able to practice their religion freely throughout Sri Lanka.<sup>22</sup>
45. DFAT indicates that bureaucratic inefficiencies present a significant challenge to reintegration for returnees. Limited job opportunities in the north and the east further contribute to difficulties in securing jobs and housing. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. Some Tamils who had failed to secure asylum in Australia and returned to the Northern Province told DFAT they were able to reintegrate into their communities and find employment. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to sale of their belongings to fund irregular ventures overseas, but do not experience societal discrimination for seeking asylum elsewhere. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Some Tamils who had failed to secure

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<sup>20</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>21</sup> USDOS, "Country Reports on Human Rights Practices 2022 - Sri Lanka", 20 March 2023, 20230321155722; and UKHO, "Country Policy and Information Note - Sri Lanka: Tamil Separatism", 25 August 2022, 20220930153437.

<sup>22</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

asylum in Australia and since returned to the Northern Province told DFAT they had not experienced significant societal discrimination following their return. DFAT assesses returnees face a low risk of societal discrimination upon return to their communities.<sup>23</sup> I accept that the current economic crisis in Sri Lanka may make it more difficult for the applicant, in common with anyone else looking for work in Sri Lanka, to obtain employment.

46. Country information confirms that Sri Lanka is experiencing an unprecedented economic crisis. Sri Lankans face severe shortages of fuel, electricity, food, medicines, and other essential items.<sup>24</sup> I accept that, if returned to Sri Lanka, the applicant will very likely be impacted by these difficult economic conditions. As discussed above, if returned to Sri Lanka, the applicant will very likely be returning to Colombo. His wife and daughter live in Colombo, and his father and brothers also live in Sri Lanka. He has remained in regular contact with his family. The applicant has a range of work experience, including in retail, in construction and as a factory worker. While I accept that he may face hardship and that obtaining employment may be very difficult, I am not satisfied on the evidence that the situation is such or that the applicant's prospects are so limited that there is a real chance that he would be denied the capacity to earn a livelihood of any kind or experience hardship to an extent that would threaten his capacity to subsist or otherwise lead to serious harm. Further, the country information indicates that the economic conditions in Sri Lanka impact the population and country generally. I am not satisfied that the difficulties or hardship the applicant may face because of the economic situation in Sri Lanka would amount to persecution for any s.5J reason under the Act.
47. DFAT assesses that a returnee faces a low risk of societal discrimination upon return to their communities and that there is a low risk of official and societal discrimination as a Tamil in Sri Lanka. I appreciate that low risk is not the same as no risk, however, considering all the applicant's circumstances, including that he returns as a failed Tamil asylum seeker, that he is very likely returning to Colombo, where some of his family reside, I am not satisfied he faces a real chance of serious harm as a failed Tamil asylum seeker, if returned to Sri Lanka.
48. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

49. 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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50. 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.

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

<sup>24</sup> UNHRC, "Situation of human rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5 - Advance Edited Version", 4 October 2022, 20221007144505.

## Real risk of significant harm

51. 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.
52. 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.
53. I accept that the applicant may be subject to investigation and processing under the IE Act at the airport and may also face action under the IE Act for his illegal departure. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture in consequence of his illegal departure. The evidence does not suggest that the treatment and penalties the applicant may be subject to because of his illegal departure is intended to inflict pain or suffering that can reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or that it is intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason. I am not satisfied there is a real risk of significant harm on this basis, or when considered in combination with any issues he may experience as a failed Tamil asylum seeker.
54. If he returns to Sri Lanka, it is possible that the applicant may be subject to a short period of monitoring by the Sri Lankan authorities. Although such monitoring may be harassing in a general sense, I am not satisfied on the evidence, including any psychological condition he may be suffering from, that it will amount to severe pain or suffering, pain and suffering that could reasonably be considered as cruel or inhuman in nature, or that it amounts to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any short period of monitoring and surveillance that the applicant may be subject to on his return to Sri Lanka amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
55. The country information indicates that the conditions and hardship currently being felt across Sri Lanka arise from the economic crisis impacting the country, rather than an act or omission intended to cause pain or suffering that could reasonably be regarded as cruel or inhuman, severe pain or suffering or extreme humiliation as required by the relevant definitions of significant harm. I am not satisfied on the evidence that any difficulties or hardship the applicant may experience due to these conditions amounts to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment within the meaning of the Act. I am not satisfied that there is a real risk of the applicant being arbitrarily deprived of his life or the death penalty being carried out.
56. Otherwise, I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, based on his profile and history, if he is returned to Sri

Lanka. As 'real chance' and 'real risk' involve the same standard,<sup>25</sup> it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.

57. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

**Complementary protection: conclusion**

58. 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.

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<sup>25</sup> *MIAC v SZQRB* (2013) 210 FCR 505.



## 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.