



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/00244

Date and time of decision: 01 July 2016 12:34:08  
Jessica McLeod, 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 473ED(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. [In] August 2013 he lodged an invalid application for a protection visa (the 2013 application). [In] October 2015 he lodged a valid application for a Safe Haven Enterprise visa (the SHEV application). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] May 2016.
2. The delegate found the applicant was a Tamil Hindu male from the Eastern Province who lived and worked in [country] from 2007 to 2012. The delegate accepted the applicant faced harassment and general insecurity as a young Tamil male, that he feared being forcibly recruited by paramilitary groups and that his family had been burgled by armed men. However he found the applicant had was not previously harmed or sought after by any group. He found the applicant, as a young Tamil male from the Eastern Province who had lived and worked overseas and would be returning to Sri Lanka as a failed asylum seeker who departed illegally, would not face a real chance of persecution or real risk of significant harm in the reasonably foreseeable future.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

### Applicant's claims for protection

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4. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
  - He is a Hindu Tamil born in [town], [district], Eastern Province, Sri Lanka.
  - His mother and [sibling] died at birth. His father married his mother's [family member] – they have a grown-up child together (the applicant's [relative]). He was raised by his [Relatives A]. He has [siblings] who were raised by [Relative B]. All family lived close to each other. He attended school to year [grade]. After school he worked on the family's [farm].
  - Towards the end of 2006 National Identity (ID) Cards were issued. The Karuna group learned his address from his ID card and visited [Relative As'] house looking for him because he was young and they wanted to recruit him.
  - He moved to his [sibling]'s house because it was in a less isolated area and he could hide from militia more easily there.
  - [In] January 2007, he was home with his [siblings] and [Relative B] when they were robbed by [number] armed Karuna group members. They broke down the front door, smashed a window and pushed the applicant down. They stole money and jewellery and demanded more, threatening to kill them. They took his [siblings]' [jewellery] from their persons.

- Over the next few months the situation worsened. The Karuna and Piliyan groups were both forcibly recruiting. Sometimes they would demand money from people, or their motorbike or pushbike.
- The applicant was approached twice more by Karuna group members wanting him to go with them to their office. He refused both times and because there was many people around he was left unharmed and was not abducted.
- Around October 2007, he went to [country] on a work visa. His family warned him not to come back as the situation had not improved so he stayed until 2012. The Karuna group were still trying to extort his family and other Tamils.
- In May 2012, he returned to Sri Lanka as his [sibling] told him the situation had improved. He moved back in with [Relatives A].
- When the applicant returned to Sri Lanka he was using his [Relative C]'s phone as he did not have one. Someone threatened his [Relative C] to get his phone number.
- 15 days after he returned to Sri Lanka he was called by an unidentified Tamil speaker who said he was a Karuna member. The man threatened to kill him unless he delivered [amount] rupees to the local temple. He told the man he did not have the money and the man threatened to abduct and shoot him.
- Another five days later the applicant was out with friends and some Tamil men went to his [Relative B]'s house looking for him. They were armed and wanted to know where he was. He was advised not to come home.
- He went to his [sibling]'s house and stayed there until he departed Sri Lanka in August 2012.
- It took about three months for [another relative] to organise a smuggler and he was extremely worried. He would sleep in the paddy fields in case they came to his [sibling]'s house looking for him.
- Not long after he arrived in Australia some men went to his [sibling]'s house looking for him.
- He fears being harmed and killed by paramilitary group members (including Karuna and Piliyan groups) because they are still extorting, abducting and killing Tamils they perceive to be wealthy.
- He also fears being detained and tortured by the authorities because he is Tamil and from the Eastern Province, and he left illegally and sought asylum in Australia, a western country and will therefore be perceived to be an LTTE supporter. Some asylum seekers that have returned to Sri Lanka from Australia have been detained, beaten and tortured by the authorities in Colombo and [town].
- He cannot seek state protection from the Karuna group. The Karuna group was in the parliament until 2014. They stand against the LTTE and are supported by the government. The government does not protect the people they target.

## Findings of Fact

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### Identity and migration history

5. On the documentary evidence and his consistent accounts, I accept the applicant is a Tamil Hindu citizen of Sri Lanka and this is his receiving country for the purpose of this assessment.

6. I accept the applicant went lawfully to [country] in 2007 to work and because his family feared that as a young Tamil male he may be forcibly taken or recruited by a paramilitary group in the area at that time. While he spent [number] years in [country], on the evidence before me I am not satisfied that he has a right to re-enter or reside there.
7. I accept the applicant departed Sri Lanka illegally on his journey to Australia and if returned, he would be identifiable as a failed asylum seeker.

### **Incidents with Paramilitary groups**

#### *Prior to leaving for [country] in 2007*

8. On the consistency of the applicant's accounts I accept in early 2007 he was at his [sibling]'s house with his [siblings] and [Relative B] when it was robbed by [number] armed men they believed to be Karuna group members. The delegate put to the applicant that this appeared to be a robbery and it did not seem as though he had been individually targeted. The applicant responded that it was a problem in the area he was living and that the Karuna and Piliyan groups were kidnapping and killing young boys at the time. On the evidence, the house intruders did not identify themselves, however country information does indicate that during this time the Karuna group was active committing crimes including robberies, against the local Tamil population in [town].<sup>1</sup> It is not implausible that the men were members of the Karuna or other paramilitary group. While I accept the applicant was pushed over during the incident, he had not claimed that they attempted to recruit, kidnap or otherwise harm him during this incident. I am not satisfied the applicant was a personal target of this attack.
9. At the SHEV interview the applicant stated he was approached by armed Karuna group members at least three times – twice at the temple and once when they stopped him near the river and took his ID card. However at various points in the SHEV interview he mixed up the sequencing of these events and provided differing responses as to where he was residing at the times those incidents occurred. At several points in the interview the delegate put to the applicant that he had concerns about the sequencing and his claimed residences at those times and the applicant responded with more inconsistent responses. In his SHEV application the applicant also stated that the Karuna group had gone to [Relatives A] house looking for him because they had his address from his ID card. However this was omitted from his 2013 application and not mentioned at the SHEV interview until the delegate raised it as an inconsistency. The applicant responded that it did happen after he returned from [country], however this was contradictory to the 2006/2007 timeline provided in the SHEV application.
10. While the applicant's responses have been inconsistent in parts, I do not consider he has been deliberately misleading. I am willing to accept that the applicant was approached three times and that he moved from [Relatives A] house to his [sibling]'s house out of fear of being taken by a paramilitary group. Country information indicates that forced recruitment of young Tamil males by paramilitary groups was occurring in the Eastern Province during this period.<sup>2</sup> I accept that in 2006/2007, the applicant, fitting this recruitment profile, feared being forcibly recruited by an armed paramilitary group. I accept he moved from his [Relatives A] to his [sibling]'s house because [name] house was located in a less isolated area and the family felt he would be safer with more people around. The applicant has been broadly consistent about this and it is not implausible when considered against country information.

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<sup>1</sup> International Crisis Group, "Sri Lanka's Return To War: Limiting The Damage", 1 February 2008, CIS18918; UK Home Office, "Sri Lanka November 2007", 15 November 2007, 431

<sup>2</sup> UK Home Office, "Sri Lanka November 2007", 15 November 2007, 431

11. However, on each occasion the applicant was approached by people be believed to be paramilitary members, he was left unharmed, even when he refused the demands to go with them to their office. Although this happened on repeated occasions, on the evidence before me I find these were opportunistic attempts by paramilitary groups interested in recruiting young Tamils at that time.
12. The applicant confirmed at the SHEV interview that he continued working the family farm right up until he went to [country] in late 2007. I am satisfied that while he may have been taking precautions, he was able to conduct his daily work activities and was not actually in hiding. There is nothing before me to suggest the applicant had any other interactions with paramilitary group members apart from those discussed above. I found above that although they were repeated interactions, paramilitaries' attempts to recruit the applicant were opportunistic. I am satisfied that at the time he left Sri Lanka in 2007 he was not personally of personal interest to the Karuna group, or any other paramilitary group.
13. Country information indicates forced recruitment of young Tamil males was still occurring at the time the applicant left for [country]<sup>3</sup> and I accept the applicant was genuinely fearful about this. I am satisfied that while the applicant went to [country] to work, he was also motivated by the prospect of avoiding paramilitary groups.

*After returning from [country] in May 2012*

14. The applicant claims about 20 days after returning from [country], he was at a restaurant with friends when some men went to one of his relative's homes looking for him. In his 2013 and SHEV applications he stated they went to his [Relatives A] house and described them as 'Tamil speaking men' and 'Tamil men' respectively. At the SHEV interview he stated they were Karuna group members and they had gone to his [Relative C]'s house. It was later clarified that this [Relative C] was residing with his [Relatives A] at that time. However, the applicant was not specific about the identity or affiliation of the armed men until the SHEV interview. I am willing to accept some men asked after him, however, on the evidence I am not satisfied that these Tamil men were Karuna group members.
15. The delegate asked the applicant if anything else happened to him – if there were any incidents or interactions with anyone that was trying to harm him and he stated *"not much problem, what I said it was true."* The delegate put to him that in his 2013 and SHEV applications he had stated that he received phone calls. The applicant agreed that he had received phone calls and apologised for not previously mentioning it at the interview. He stated he has been in Australia a long time, was confused, was having trouble recalling incidents and was affected by family problems because [another relative] was sick. He stated he had a lot going on in his head.
16. The delegate offered the applicant another opportunity to tell him everything that happened from when he returned from [country] until he departed for Australia. The applicant responded by reiterating the incident about the Karuna group visiting his [Relative C]'s house while he was at the restaurant. He then said they took his phone number from his [Relative C] and called him. The delegate asked when they had called him. He responded *"my [Relative C] called me, they didn't call me."* The delegate put to the applicant that he had given him multiple opportunities to freely provide information about what happened after he returned from [country]. He put to the applicant that in his written statement he had outlined a detailed sequence of events about people calling him and demanding money but during the interview

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<sup>3</sup> UK Home Office, "Sri Lanka November 2007", 15 November 2007, 431

he had not mentioned this. The applicant responded that he was confused, that he has been in Australia a long time and had some big problems when he left Sri Lanka.

17. After speaking privately with his representative, the applicant stated that 'they' had demanded money ([amount] rupees) from him and after that he slept in the paddy fields out of fear. His representative acknowledged there were inconsistencies in the applicant's responses. However she submitted the applicant had not been deliberately misleading. She stated he was confused and that he appeared to be operating on a level of assumption that the delegate knew what he was talking about, that he did not appear to have understood the necessity for detail in certain areas and that his understanding was affected by his education level. The applicant again added that [another relative] was sick and he was having family problems.
18. I hold some concerns about the veracity of the applicant's statements. At his Entry interview [in] Jan 2013, the applicant was asked to explain "*in one to two sentences*" why he decided to leave Sri Lanka. The applicant responded that the Karuna group beat him and threatened to kill him if they did not give him money. He has been consistent in stating that he fears the Karuna group and that paramilitary members harassed people for money. However, apart from being pushed over during the robbery in 2007, the Entry interview contains the only mention that the applicant had been previously physically harmed. As this detail was omitted from his 2013 application, SHEV application and SHEV interview, I am not satisfied the applicant was beaten up by the Karuna group.
19. Having considered the totality of the applicant's evidence and the explanations put forward for the various discrepancies, as well as country information, I accept the applicant has not been deliberately misleading. I am willing to accept that after he returned from [country], the applicant was called and threatened by someone demanding money and that some men visited his [Relative C's/Relative B's] house five days later. However, the applicant does not claim that he was ever called again and the evidence before me about the armed men does not satisfy me that it was Karuna group members, nor that there was any link between them and the phone threat. The applicant then moved to his [sibling]'s house and while he said he could not go out freely and would cautiously ask if anyone on the street had seen Karuna group members before going out and sometimes slept in the paddy field, I am not satisfied that he was of continued interest to anyone. I consider that if the applicant was being sought by anyone during the three or more months that he resided at his [sibling]'s house, they would have come looking for him there during that time. There is also no evidence before me that anyone looked for him again at his previous residence, his [Relative C's/Relative B's] house or that any members of his family were subsequently questioned about his whereabouts while he was in Sri Lanka. On the evidence I consider the threat was empty. I find it implausible that anyone looked for the applicant after he arrived in Australia. I am not satisfied that the Karuna group, or any other paramilitary group had any interest in the applicant.

#### *Problems with Sri Lankan authorities*

20. At the SHEV interview, the delegate asked the applicant why he left Sri Lanka and came to Australia. He responded that he had problems with the CID, Special Task Force (STF), army and Karuna group and that everyone was working together. He claimed he could not complain to the police because they are linked. As for his problems with the CID, STF and army, while the applicant has consistently stated that the Karuna group is linked to the government this was the only stage in the process where he mentioned he had had problems specifically with those branches of the authorities. I consider this extends only from his fear that Karuna and other anti-LTTE paramilitary groups are linked to the government and because he has previously been required to show his ID to army when moving about the Province. I do not accept he has

personally had any problems with the Sri Lankan authorities. I am satisfied that the applicant has never been of adverse interest to the CID, the STF or the army, nor any other branch of the authorities.

## **Refugee assessment**

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21. 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**

22. 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.

### *Risk of harm resulting from extortion and perceived wealth*

23. The applicant believes the reason he was previously targeted and threatened for money after returning from [country] was because he was a young Tamil they thought who would have earned a lot of money overseas. He fears being extorted by branches of the authorities (Special Task Force, CID, Army) or paramilitary groups (Karuna, Piliyan) because as a returnee from Australia, he will be perceived as wealthy.

24. However, while I accept there was an extortion attempt, I did not accept the applicant was pursued when he failed to pay or that he was sought by anyone during the three or more months that he resided at his [sibling]’s house. On the facts I am satisfied that the threat was empty.

25. Country information indicates that more than 250,000 Sri Lankans leave every year to seek employment abroad. As of 2013, more than two million Sri Lankans were working abroad, mostly as unskilled and semi-skilled labour in the Middle East, to seek higher wages and more reliable work.<sup>4</sup> DFAT assesses that since the war’s end, incidences of extra-judicial killing, disappearances and kidnapping for ransom has fallen considerably. DFAT reports that no

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<sup>4</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143

particular group has recently been the target of kidnappings or extortion.<sup>5</sup> UNHCR also does not advise that wealthy persons or businessmen of any ethnic group or returnees who have worked overseas are at risk of persecution on account of their wealth. Country information does not support persons who have worked overseas are targeted for extortion (or otherwise harmed) by any group in Sri Lanka with such frequency that the applicant would be at risk. I do not accept that the applicant faces a real chance of harm on account of any perceived wealth.

#### *Risk of forced recruitment and other harm from paramilitary groups*

26. While I accepted the applicant's family were victim to an armed robbery in their home in 2007, the applicant has not claimed that the armed men attempted to recruit, kidnap or otherwise harm him during this incident. I am not satisfied the applicant was a personal target of this attack. Additionally, while I accepted the applicant was approached on repeated occasions, I found above that these were opportunistic attempts by paramilitary groups interested in recruiting young Tamils at that time. I am satisfied that at the time he left Sri Lanka in 2007 he was not of personal interest to the Karuna group, or any other paramilitary group. As noted above, I am not satisfied that the applicant was subsequently extorted by Karuna or paramilitary members or that he was ever beaten up by them. I am not satisfied that the Karuna group, or any other paramilitary group had any interest in the applicant when he left Sri Lanka in 2012 and I found it implausible that he was sought by anyone after he arrived in Australia. Country information does not report that forced recruitment by paramilitary groups is still occurring. I am satisfied the applicant does not face a real chance of forced recruitment or other harm from the Karuna group or other paramilitary groups in Sri Lanka.

#### *Tamil race and imputed LTTE links*

27. The applicant belongs to the ethnic Tamil minority.<sup>6</sup> The situation has markedly improved for Tamils since the end of the war. The Sri Lankan constitution provides for race equality<sup>7</sup> and DFAT assesses there are currently no official laws or policies that discriminate on the basis of ethnicity or language.<sup>8</sup> Recent developments in Sri Lanka's political landscape are significant and indicative of a more positive future for Tamils. DFAT considers the Sirisena government has a more proactive approach to human rights and reconciliation than the previous government.<sup>9</sup> This view is shared by the United States.<sup>10</sup> Since taking power in 2015, the Sirisena government has, inter alia, established a new reconciliation taskforce mandated with 'healing the wounds of mistrust and social and cultural stress generated from extended conflicts between different communities in Sri Lanka', replaced military governors with civilians governors in the Northern and Eastern Provinces, reduced high security zones, released land formerly held by the military, released some individuals held under the Prevention of Terrorism Act 1979 (PTA) and engaged constructively with the Tamil national Alliance (TNA) and the international community.<sup>11</sup> The August 2015 parliamentary election was deemed credible by international and domestic observers.<sup>12</sup> While the Tamil National Alliance (TNA), contesting

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<sup>5</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 4.10.

<sup>6</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.4, 2.5

<sup>7</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.1.

<sup>8</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.3.

<sup>9</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 2.31.

<sup>10</sup> Thomson Reuters Foundation, "U.S. lauds Sri Lanka government on post-war Tamil reconciliation", 24 November 2015, CXBD6A0DE16447

<sup>11</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 2.29 and 2.31; South Asia Terrorism Portal, "Sri Lanka Timeline - Year 2015", 19 October 2015, CISEC96CF13618

<sup>12</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 2.26

under the Ilankai Arsu Kachchi (ITAK) won just 16 seats, Tamil representation increased in profile with the TNA leader, Rajavaothian Sampanthan formally appointed opposition leader.<sup>13</sup>

28. I accept that Tamils in the Eastern Province were harmed during the war and subsequently. In considering the risk of such harm in the reasonably foreseeable future, I have considered the UNHCR's most recent 2012 advice which is its most current risk assessment and continues to be relied upon in and reinforced by, more recent and current reports from a variety of other credible sources, including DFAT and the United Kingdom Home Office.<sup>14</sup> Country information indicates that the security situation in Sri Lanka, including in the North and the East has greatly improved since the war ended in May 2009<sup>15</sup> and DFAT, the UNHCR and other authoritative sources do not indicate in their recent and current reporting that Tamils are at risk of persecution in Sri Lanka purely on account of their race.<sup>16</sup> I am therefore satisfied that the applicant will not be targeted upon return for reasons of his Tamil race.
29. There has been some suggestion of recent official discrimination. The United States State Department has noted evidence of state sponsored Sinhalese settlements being established in the North in 2014.<sup>17</sup> However, there is ambiguity over the legitimacy of the settlements and I place weight on the fact that DFAT's assessment is more current and that there have been significant positive developments since Sirisena came to power in early 2015. On the evidence, I am not satisfied that country information supports the assertion that Tamils are currently subject to official discrimination, nor does it support that they will be in the reasonably foreseeable future.
30. DFAT acknowledges that there is a moderate level of societal discrimination resulting largely from the conflict.<sup>18</sup> However, the report does not identify the relevant ethnic groups or the nature and level of this discrimination. There is nothing before me to suggest the applicant will not be able to attain employment or access to basic services in Sri Lanka on account of his race, gender or origin. Given the country information below indicates monitoring in the North and East has significantly decreased, that there have been significant positive developments for Tamils in the country's politics and that the situation has generally improved, I find that there is not a real chance the applicant would face harm through official or societal discrimination for reasons of his race upon return to Sri Lanka.
31. The applicant has stated that abductions and kidnappings of Tamils are still occurring. However, as noted above, DFAT's assesses that since the war's end, incidences of extra-judicial killing, disappearances and kidnappings for ransom has fallen considerably. DFAT reports that no particular group has been the target of kidnapping attacks and they do not appear to be ethnically-based.<sup>19</sup> Country information also does not support that forced recruitment is

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<sup>13</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 2.2, 2.26; The New York Times, "Tamil Lawmaker to Lead Opposition in Sri Lanka", 3 September 2015, CXBD6A0DE13145

<sup>14</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28

<sup>15</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 2.33, 2.37; UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28

<sup>16</sup> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; UK Home Office, 7 March 2012, 3523; Landinfo, "Sri Lanka: Menneskerettigheter og sikkerhetsrelaterte forhold for tamilbefolkningen i Colombo og Nordprovinsen [extract]", 1 December 2012, CIS24850; "DFAT Country Information Report - Sri Lanka", Department of Foreign Affairs and Trade (DFAT), 18 December 2015, CISEC96CF14143

<sup>17</sup> US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8

<sup>18</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.3.

<sup>19</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 4.10.

occurring by either the authorities or any paramilitaries. I do not accept that the applicant faces a real chance of being kidnapped or abducted by paramilitaries, authorities or others.

32. The applicant originates from the Eastern Province of Sri Lanka, a Tamil majority and formerly LTTE controlled area and the site of intense wartime fighting. During the war, more Tamils (mostly in the North and East) were detained under emergency regulations and the PTA than any other ethnic group. DFAT assesses this was primarily due to LTTE members and supporters being almost entirely Tamil and that there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity.<sup>20</sup> I accept this imputation was made in the past and that elements of the Emergency Regulations remain in force under the PTA including the ability to detain individuals without charge.<sup>21</sup> However, DFAT and others assess that there is currently fewer individuals detained under the PTA<sup>22</sup> and country information no longer supports a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with place of origin. UNHCR advised in 2012 that *“originating from an area that was previously controlled by the LTTE does not in itself result in the need for international protection”*.<sup>23</sup> This advice remains current in line with the fact the security situation has improved with a decrease in militarisation and monitoring trends in the East.<sup>24</sup>
33. I found above that the applicant has never been of adverse interest to any authorities, on account of any imputed links to the LTTE or for any other reason. I accept that the government has kept a close watch on the situation in former LTTE controlled areas including in the applicant’s Eastern Province.<sup>25</sup> However the situation in Sri Lanka has changed in the three and a half years that the applicant has been in Australia. The noticeable demilitarisation of the North and East has been a focus of the Sirisena government and forced registration of Tamils has now also ceased, indicating the trend of monitoring and harassment of Tamils in daily life has generally eased.<sup>26</sup> DFAT reports that with the decrease of monitoring and harassment under the Sirisena government, the Tamil community feels more confident to refuse or question the motives of any monitoring activities that still occur.<sup>27</sup>
34. I am not satisfied that the applicant faces a real chance of harm now or in the reasonably foreseeable future on the basis of his Tamil race, or his Tamil race and origins from the East. Further, the country information before me also does not indicate that the applicant would face persecution in the reasonably foreseeable future on account of his being a Tamil of male gender or young age or an overseas worker profile, or that this would elevate his profile to be of adverse interest to any authorities. I am not satisfied that his profile is such that the applicant has a well-founded fear of persecution on the basis of any imputed LTTE support or links.
35. I accept that should the applicant be returned to Sri Lanka, he would be returning as a failed asylum seeker who departed illegally. I accept that Sri Lankan authorities at the airport would

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<sup>20</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 18 December 2015, CISEC96CF14143 at 3.7

<sup>21</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 18 December 2015, CISEC96CF14143 at 2.34

<sup>22</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 18 December 2015, CISEC96CF14143 at 2.39; Landinfo, “Sri Lanka: Menneskerettigheter og sikkerhetsrelaterede forhold for tamilbefolkningen i Colombo og Nordprovinsen [extract]”, 1 December 2012, CIS24850

<sup>23</sup> UNHCR, “Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 21 December 2012 UNB0183EA8.

<sup>24</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 18 December 2015, CISEC96CF14143 at 2.37 – 2.39

<sup>25</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 18 December 2015, CISEC96CF14143 at 2.33, 3.7, 3.36, 3.9

<sup>26</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 18 December 2015, CISEC96CF14143 at 2.29, 2.31, 3.8

<sup>27</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 18 December 2015, CISEC96CF14143 at 3.9

be aware of this due to the nature of his return (without evidence in his passport of having departed through an approved port).

36. Entry procedures upon arrival back in Sri Lanka may take several hours as involuntary returnees are processed by: the Department of Immigration and Emigration who check travel documents and identity information against their immigration database; the State Intelligence Service who check the returnee against intelligence databases; and the Criminal Investigations Department who check to see if the returnee has any outstanding criminal matters.<sup>28</sup> Checks may involve interviewing the returnee, contacting their home area's police, neighbours and family and checking criminal and court records.<sup>29</sup> DFAT assesses that returnees are treated in accordance with these standard procedures, regardless of their ethnicity and religion, and that they are not subject to mistreatment while undergoing these checks.<sup>30</sup>
37. Of the thousands of Tamil asylum seekers who have returned to Sri Lanka since 2009 from western countries including Australia and others with significant Tamil diaspora,<sup>31</sup> there have been reports of mistreatment.<sup>32</sup> However, I am satisfied the authorities have never perceived the applicant to be an LTTE member, have family links to the LTTE or to have an LTTE supporter profile. DFAT advises that re-entry procedures are applied without discrimination on the basis of ethnicity and I find this indicative that the authorities do not impute failed Tamil asylum seekers as being LTTE members or supporters.
38. There is no indication before me that the applicant has engaged in any activities with the Tamil diaspora in Australia (or previously when he was in [country]) that would elevate his profile or bring him to the adverse attention of authorities. There is also no indication that he has openly criticised the Sri Lankan government, or openly shared information which would embarrass authorities. The authorities have never showed previous interest in the applicant. Nevertheless, I accept he may be subject to a brief period of detention while he undergoes more questioning upon return before being released.
39. Current case law provides that the determination of whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.<sup>33</sup> I am not satisfied that undergoing a brief period of detention and questioning as part of these re-entry procedures would amount to a threat to his life or liberty, or to significant physical harassment or ill treatment or any other manifestation of serious harm for the applicant.
40. I accept that the applicant will be identified as having departing illegally (once in departing for Australia) and may be charged under the Immigration and Emigration Act 1988 (I&E Act).<sup>34</sup> From DFAT's reporting on previous cases, I accept that following the normal entry procedures described above, the applicant may: be arrested by police at the airport; have his fingerprints and photograph taken; and be transported to the closest Magistrates Court at the first opportunity following investigation. The applicant may be held in police custody at the airport, or, if the Magistrate is not available within 24 hours (eg. due to a weekend or public holiday),

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<sup>28</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 5.29 – 5.31

<sup>29</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 5.29 – 5.31

<sup>30</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 5.29 – 5.31

<sup>31</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 4.23, 5.37

<sup>32</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 4.22

<sup>33</sup> *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22; *SZTEQ v MIBP* [2015] FCAFC 39

<sup>34</sup> It is an offence for a Sri Lankan to depart the country without proper authorisation and they are subject charge under s.45(1)(b) of the Immigration and Emigration Act 1988 (I&E Act) for contravening s.34 (departing Sri Lanka from a place other than an approved port) and s.35(a) (departing the country without a valid passport): DFAT, "DFAT Country Information Report Sri Lanka", 16 February 2015, CISE96CF1164 at 5.22, 5.23, 5.27-5.29

may be held at a nearby prison while waiting to face the Magistrate, after which time, he may be transferred to the custody of the courts or prison services.<sup>35</sup> Information from DFAT does not indicate that detention is selectively applied or that returnees are processed in any discriminatory manner.<sup>36</sup> In terms of the conditions he may face while being detained, DFAT advises that detainees are not subject to mistreatment during processing at the airport and that the risk of torture or mistreatment among those suspected of committing an offence under the I&E Act is low.<sup>37</sup> I find that even if held over the weekend, he will face a brief period of detention but that the conditions will not be such as to rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment or otherwise amount to serious harm.

41. Penalties for departing illegally can include up to five years in prison and a maximum fine of 200 000 rupees. DFAT advises that penalties are applied on a discretionary basis and are almost always a fine. The amount of fine varies on a case-by-case basis and is payable by instalment. Sri Lanka's Attorney General's department (the prosecuting agency) advised that as at July 2015, no custodial sentences had been imposed on returnees who were found to be merely a passenger on a people smuggling vessel but that fines have been used for deterrent purposes. The applicant does not claim to have had any involvement in organising or driving the boat. There is also nothing before me to indicate that he would be otherwise perceived of, or accused of facilitating the people smuggling venture such that he would be treated as anything other than a mere passenger, who DFAT assesses, the Sri Lankan authorities tend to view as victims.<sup>38</sup>
42. DFAT advises that if an individual pleads guilty, they will be fined and are then free to go. In most cases if they plead not guilty, they will be granted bail on their own personal surety<sup>39</sup> immediately by the magistrate, or may be required to have a family member act as guarantor. If bailed, there are rarely any conditions, and if there are, they are imposed on a discretionary basis. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to police or police stations between hearings.<sup>40</sup>
43. On the evidence before me, I find that the applicant will be issued a fine and released, or if he pleads not guilty, he will be released on his own personal surety. Case law confirms that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.<sup>41</sup> In this case, the information from DFAT does not support that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the process leading to charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to illegal departures and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
44. DFAT reports that the Sri Lankan constitution allows for freedom of movement and choosing of residence and there are no official restrictions to internal relocation within Sri Lanka and the government has stopped compulsory registration of Tamil's residences.<sup>42</sup> However, DFAT

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<sup>35</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 5.32

<sup>36</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

<sup>37</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 4.23, 5.31

<sup>38</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 5.33

<sup>39</sup> DFAT, "Country Information Request No LKA15326 Personal surety", 18 December 2013, CX316873; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 5.33

<sup>40</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 4.23, 5.33

<sup>41</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293, at 20; *Applicant A v MIEA* (1997) 190 CLR 225, at 233

<sup>42</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 5.23

assesses that Sri Lankan authorities may monitor any member of the Tamil diaspora returning to Sri Lanka, depending on their risk profile.<sup>43</sup> While the applicant is unlikely to be bestowed with such a profile, in the event that he is monitored, country information indicates that monitoring and fears about mistreatment have reduced under the current Sirisena government.<sup>44</sup> As noted above, there is also no indication before me that the applicant has engaged in any activities individually or with the Tamil diaspora in Australia that would elevate his profile or bring him to the adverse attention of authorities. I am not satisfied that any monitoring the applicant may experience on return would amount to serious harm.

45. I have considered the applicant's circumstances in their totality. I am not satisfied that the applicant, as a relatively young Tamil male originating from the Eastern Province who was of no previous interest to authorities, and who would be returning to his home region having been charged under the I&E Act and as a failed asylum seeker who has spent considerable time in [country] and Australia gives rise to a well-founded fear of persecution.

#### **Refugee: conclusion**

46. 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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47. A criterion for a protection visa is that the applicant is a non citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

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

48. 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.

49. I have found that the extortion attempt against the applicant was empty as I did not accept the applicant was pursued when he failed to pay or that he was sought by anyone during the three or more months that he resided at his [sibling]'s house. I am therefore not satisfied that the applicant faces a real risk of suffering significant harm from the Karuna group, or other people who previously tried to extort him.

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<sup>43</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.47

<sup>44</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 4.23

50. I found above that the applicant was not of interest to the Karuna or other paramilitary groups when he left Sri Lanka in 2007, or 2012, and has not become of interest to them since arriving in Australia. Country information does not report that forced recruitment by paramilitary groups is still occurring. I am satisfied the applicant does not face a real risk of forced recruitment or other harm from the Karuna group or other paramilitary groups in Sri Lanka.
51. As noted above, country information does not indicate that persons who have worked overseas are targeted for extortion (or otherwise harmed) by any group in Sri Lanka with such frequency that the applicant would face a real risk of this occurring to him. I am not satisfied that the applicant would face a real risk of significant harm on account of his profile as an overseas worker or any perceived wealth.
52. Having regard to country information cited above which indicates that Tamils including young Tamil males are no longer at risk of harm on account of race, even when originating from the East, I am not satisfied the applicant faces a real risk of significant harm in the reasonably foreseeable future on this basis.
53. I found above that the applicant has never been suspected of being an LTTE member, nor was he perceived to have any other family links to the LTTE. I found that he would not face a real chance of harm in relation to these matters upon return, and for the same reason I also find there is not a real risk he will suffer significant harm.
54. I note the applicant would be returning to Sri Lanka as someone who has previously lived and worked in [country] that he would now be returning as a failed asylum seeker from a Western country. I accept he may be questioned upon return.
55. However, the country information cited above indicates that under the Sirisena government which came to power while the applicant has been in Australia, harassment and monitoring of Tamils (including in the East) has generally eased. As noted above, there is also no evidence before me that the applicant has been openly critical of the Sri Lankan authorities, nor has he engaged in any activities individually with the Tamil diaspora in Australia that would elevate his profile or bring him to the adverse attention of authorities. There is no indication that the applicant will be subject to the death penalty or otherwise arbitrarily deprived of his life because of his overseas residence or his return from Australia. I am not satisfied there are any indicators the applicant will be tortured, or that the authorities would, through any act or omission intentionally inflict pain or suffering such as to meet the definition of cruel or inhuman treatment or punishment, nor that they would intentionally cause extreme humiliation. I am not satisfied that the applicant would be subject to acts or omissions which would constitute significant harm, as defined under s. 36(2A) and s.5 of the Act during any post-return monitoring or any brief period of detention or questioning. I am not satisfied that the applicant faces a real risk of questioning or monitoring activities which would amount to significant harm on the basis of any imputed LTTE support or links.
56. I have accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally once (his departure to Australia only) and will likely be subject to prosecution on account of breaching the I&E Act. In relation to detention at the airport, the applicant may be questioned and detained there for up to 24 hours depending on the length of individual investigation and the availability of a Magistrate. DFAT advises that the risk of harm for the majority of returnees, including those suspected of offences under the I&E Act is low. As noted above, I am not satisfied that the applicant would be subject to acts or omissions which would constitute significant harm, as defined under s. 36(2A) and s.5 of the Act during any post-return monitoring or any brief period of detention or questioning. I am not satisfied

that the applicant faces a real risk of significant harm during the investigation, questioning or while held in airport detention.

57. I am not satisfied there is any reason the applicant will not receive bail. While I have found above that the applicant will not receive a custodial sentence, I have considered the conditions the applicant may face if he is held in a nearby prison while waiting to come before the magistrate. DFAT notes that in general, prison conditions in Sri Lanka do not meet international standards due to a lack of resources, over-crowding and poor sanitation. There is no evidence that prisoners subject to short periods of detention awaiting prosecution under the I&E Act are currently or will be subject to the death penalty or otherwise arbitrarily deprived of their life nor tortured. There is also no indication that authorities or others would, through any act or omission intentionally inflict pain or suffering such as to meet the definition of cruel or inhuman treatment or punishment, nor that they would intentionally cause extreme humiliation. In light of this, I am not satisfied that the applicant would be subject to acts or omissions which would constitute significant harm, as defined under s.36(2A) and s.5 of the Act during his time in detention or prison while awaiting his Magistrates Court hearing.
58. In terms of punishment, I have found above that rather than receiving a custodial sentence, the applicant will likely receive a maximum fine of up to 200 000 rupees. I note that the government allows payments to be made in instalments. I am not satisfied that the imposition of such fine would amount to pain and suffering, physical or mental, inflicted on the applicant or that it is intended to cause extreme humiliation such that it would amount to cruel or inhuman treatment or punishment, degrading treatment or punishment, or any other significant harm under the definition in s.36(2A).
59. In summary, having regard to the cumulative circumstances and profile of the applicant, I do not accept his profile is such that he would face a real risk of significant harm. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm because of his Tamil race, because of a perception that he is wealthy from being an overseas worker, because he would be perceived to hold a pro-LTTE opinion or have LTTE links, because he has lived and worked in [country], because he is young, male and from the East or because he left illegally and sought asylum in Australia.

#### **Complementary protection: conclusion**

60. 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**

...

***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.

#### **91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

**91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  - (b) either:
    - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.