



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00724

Date and time of decision: 10 November 2016 10:06:00
Don Lucas, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an ethnic Tamil Christian from [town 1], Northern Province, Sri Lanka. The applicant arrived in Australia [in]November 2012 as an unauthorised maritime arrival. [In]May 2016 the applicant lodged a valid application for a [visa subclass] Safe Haven Enterprise visa ("SHEV").
2. The applicant relied on claims for protection which related to his Tamil race/ethnicity; his imputed political opinion as a supporter of the Tamil National Alliance (TNA) and as a supporter of the Liberation Tigers of Tamil Eelam (LTTE). Submissions made to the Department, not reflected in the applicant's actual evidence, also requested consideration of the applicant's fear of harm as a member of the particular social group of failed asylum seekers who have departed Sri Lanka illegally.
3. The delegate found that the applicant did not face real chance of serious harm or a real risk of significant harm upon return Sri Lanka.

Information before the IAA

4. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information was obtained or received.

Applicant's claims for protection

5. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - The applicant claims to be a Tamil of the Christian (Catholic) faith from [town 1], Northern Sri Lanka; the rest of his family are all Christian. He stated that he was studying in Sri Lanka to become a [occupation] and that his [sibling] was a [profession].
 - Between the early 1990s until around 1995 the applicant lived in a [refugee camp], on release he was told to not participate in political activities.
 - He volunteered in the TNA, which is an evolution of the Tamil United Liberation Front. His involvement with the TNA included, but was not limited to, meeting people at their property, undertake campaign activities including doorknocking and accompanying MPs to events. He undertook these volunteer activities during the elections in 2005, 2007 and 2009.
 - Between the end of 2009 until the middle of 2010 the applicant claims to have been approached between 10 and 15 times either by persons in vans (usually between seven and eight men wearing plainclothes) or by such persons on motorbikes. Sometimes his house would also be approached.
 - From the middle of 2011, the applicant again experienced regular harassment. On one occasion, 7-8 men were in a white van approached the applicant and threatened him at his house - informing the applicant that he would be killed for his volunteer work with the TNA.

- Also during 2011, while approaching a shop, 7- 8 people threatened him while they were on motorbikes – again in relation to his volunteer work for the TNA. Some people also approached his [sibling's] house and his own home during that time asking as to his whereabouts.
- Separately in 2011, 2-4 plain clothes men cautioned him about his volunteer work for the TNA.
- He was approached on numerous occasions by unknown men, at times at his house, questioning him, threatening him and cautioning him about his volunteer work for the TNA. He claims that some men spoke Tamil and Sinhala.
- In his arrival interview conducted [in] February 2013, the applicant stated that [in]September 2012 he flew to [country 1] and then later departed [country 1] by boat with the assistance of a people smuggler from [town 2]. The applicant stated that his passport remained in [country 1]; it had been issued in Colombo lawfully. In his Protection Visa application made [in] March 2016, the applicant reiterated that he departed from Sri Lanka via Colombo by air in approximately October 2012, using his passport. He made no claims whatsoever in the application that he had departed Sri Lanka unlawfully.
- Written submissions provided by the applicant's former representative at the primary stage made generalised submissions without specific reference to the applicant's own claims, concerning the treatment of persons who had unlawfully departed from Sri Lanka.
- The applicant lived in [country 1] for two-three weeks in October 2012 with members of his family, before travelling by boat to Australia using a people smuggler, arriving in early November 2012.
- Whilst in Australia, in November 2015 the applicant attended a Tamil Martyrs' Day commemoration in Springvale, Melbourne. His picture was taken at the event by an unknown person. He fears that as a result of his picture being taken, the Sri Lankan government may use his attendance against him should he return to Sri Lanka.
- If returned, he will be arrested, detained and possibly killed because the Sri Lankan authorities suspect him to be a TNA supporter.
- He is unable to return to Sri Lanka as the Criminal Investigations Department (CID) will consider him to be a LTTE member due to his race as a Tamil and as a result, would be a risk to the Sri Lankan government.
- He is unable to live elsewhere in Sri Lanka as local authorities or paramilitary groups will come looking for him, take him away, detain and torture him.

Refugee assessment

6. 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

7. 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.

Tamil race/ethnicity/internment in the [Refugee] Camp in the early 1990s/imputation of pro-LTTE political opinion on this account

8. I accept that the applicant is of Tamil ethnicity and of Catholic religion. The applicant has made no claims to have been harmed on account of his religion. I accept that the applicant was born in the Northern Province of Sri Lanka and resided there prior to his departure from Sri Lanka in 2012. I am also prepared to accept that the applicant was interned in a refugee camp between the early 1990s until his release in around 1995. However, none of the evidence advanced by the applicant as discussed herein draws any causal link between this earlier period of internment in a refugee camp, ending more than 20 years ago, and the applicant's more recent claims that he requires protection.
9. For the following reasons, I find there is no real chance of him being harmed on the basis of his Tamil ethnicity and place of origin, either now or in the foreseeable future.
10. The applicant has claimed, and I accept that neither he nor any members of his family have had any direct involvement with the LTTE in Sri Lanka. I have considered below the applicant's claims in relation to his assistance over time to the TNA.
11. Country information in the referred materials documents harassment and mistreatment of ordinary Tamils during the civil war.¹ DFAT advice indicates that while reports of monitoring, harassment, arrests and detention of Tamils in the North and East by police and security forces continued to occur after the war under the previous Rajapaska government, the security situation in the country has since changed considerably. Country information indicates that on 8 January 2015, Maithripala Sirisena defeated President Mahinda Rajapaksa in the presidential election winning 51.3 per cent of the vote, with a historically high 81.5 per cent voter turnout. The Tamil vote was significant in Sirisena achieving victory. Sirisena's campaign was run on a platform of democratic reform, good governance and anti-corruption. The parliamentary election of 17 August 2015 reinforced the outcomes of the presidential election and ushered in a 'national unity government' of major parties and the Tamil National Alliance (TNA) now

¹ UNHCR, "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.

formally leads the opposition. The TNA currently has 16 members of parliament and holds the majority of seats in the Northern Provincial Council.²

12. DFAT considers the Sirisena government is more proactive in its approach to human rights and reconciliation than the previous government. Since January 2015, the new Government has replaced military governors in the Northern and Eastern Provinces with civilians, reduced High Security Zones and released land held by the military, released some individuals held under the *Prevention of Terrorism Act 1979 (Sri Lanka) (PTA)*, engaged constructively with the TNA, the UN and other international partners and established the Office of National Unity and Reconciliation.³
13. DFAT's current assessment is that while Tamil civilians who live in former LTTE areas in the North may be monitored by the Sri Lankan authorities, incidents of harassment and detention have notably decreased and the Tamil community feels more confident to refuse or question the motives of monitoring activities undertaken by authorities, if and when they occur.⁴ Restrictions on movement within these areas have also eased, and many checkpoints in the country have now been removed.⁵
14. More generally, DFAT advises that there are currently no official laws or policies that discriminate on the basis of ethnicity or language in Sri Lanka, which includes education, employment or access to housing and the report also suggests that implementation of laws and policies by the current Sirisena government is generally without discrimination.⁶ I accept there is some indication by DFAT of societal discrimination against certain ethnic groups in Sri Lanka, but the information is silent as to how this specifically manifests and the impact it has on Tamils specifically.⁷ Significantly, though, the country information overall indicates there have been significant positive developments for Tamils in the country politically and socially, and that the improvements are evidenced by the decreases in monitoring and harassment. I accept the applicant may still encounter a degree of societal discrimination and monitoring, but I am not satisfied that this would, separately or cumulatively, constitute serious harm. Ultimately, even accepting there is a level of societal discrimination still present in Sri Lanka, the information before me does not indicate that ordinary Tamils, including Tamil males from the North, are at risk or face a real chance of suffering a level of discrimination or any other mistreatment that would amount to serious harm.⁸
15. In considering the applicant's claim on the basis of current circumstances as reflected in the country information forming part of the referred materials, the United Nations High Commissioner for Refugees' (UNHCR) current Eligibility Guidelines for Sri Lanka⁹ note that a person's real or perceived links with the LTTE may give rise to a need for international refugee protection. However, originating from an area that was previously controlled by the LTTE does not in itself do so. Although the nature of these links can vary, this may include:

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 2.2, 2.26 and 2.27.

³ Ibid 2.31.

⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, at p.8-9.

⁵ Ibid.

⁶ Ibid, at p.9

⁷ Ibid, at p.9

⁸ UNHCR, "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; UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines Sri Lanka July 2010", 6 July 2010, 1698; UK Home Office, "Operational Guidance Note: Sri Lanka (July 2013)", UK Home Office, 1 July 2013, CIS29708.

⁹ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp26 and 27.

- Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
 - Former LTTE combatants or “cadres”;
 - Former LTTE combatants or “cadres” who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, “computer branch” or media (newspaper and radio);
 - Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
 - LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; or
 - Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
16. DFAT refers to the UNHCR’s guidelines and notes¹⁰ that accurately identifying people according to those categories can be difficult and the UNHCR recognises that each case will depend on its individual circumstances.¹¹ DFAT also confirms¹² that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and monitor former members and supporters of the LTTE.
17. The UNHCR Guidelines¹³ state that there is no longer a presumption of a requirement for protection simply for reason of being of Tamil ethnicity and a prior resident of areas of the country previously under the control of the LTTE, namely the Northern and Eastern Provinces. While the Guidelines state that persons suspected of certain links with the LTTE may be in need of international refugee protection, depending on the individual circumstances of their case, I do not accept that the applicant has now been imputed with LTTE links, nor do I consider there to be anything in the applicant’s profile which brings him within the current UNHCR guidelines.
18. On his own evidence, he has no actual LTTE connection or criminal record, and as discussed further below nor do I consider he has any other profile that would cause him to face a real chance of harm on the basis of his ethnicity or the area he originates from and would return to. I am satisfied, based on the evidence and information before me, that the applicant does not face a real chance of serious harm on the basis of his ethnicity as a Tamil, or as a Tamil male from the North of Sri Lanka, or for any other reason related to these characteristics.
19. I accept that the applicant and his family were displaced during the civil conflict, and the applicant spent several years in turned in the [Refugee] Camp for displaced persons. I accept that the applicant may have faced mistreatment during this period, but give weight to the fact that on the applicant’s evidence he was ultimately released from the camp and, aside from a generalised warning not to become involved in politics, he was not otherwise harassed or monitored following his release. Neither on the applicant’s evidence was he at any time placed

¹⁰ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143, 3.35.

¹¹ UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8, p25.

¹² DFAT, “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143, 3.36.

¹³ UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8

in any rehabilitation camps for persons considered to have actively been involved with the LTTE.

20. Together, these lead me to a conclusion that there is no real chance of the applicant being targeted by the authorities or be imputed with any pro LTTE political opinion either now or in the foreseeable future were he to return to Sri Lanka, for reasons to do with his Tamil ethnicity or his origins.

Imputed political opinion as a supporter of the TNA and as a supporter of the LTTE

21. The applicant has claimed to be a supporter of the TNA who volunteered his assistance to the TNA during election campaigns in 2005, 2007 and 2009. The level and nature of the assistance the applicant provided according to his claims was had been to campaign on behalf of the TNA by to door-docking in his local area, putting up posters and banners and handing out flyers and helping to organise public meetings during the 2007 and 2009 election campaigns. He also describes having accompanied TNA MPs to certain events.
22. On the basis of the applicant's consistent evidence in relation to his TNA involvement I am prepared to accept that he had the involvement as claimed. In light of the country information concerning instances of violence and intimidation occurring in the contexts of Sri Lankan elections¹⁴, I am prepared to accept that the applicant experienced some measure of targeting on account of his TNA involvement at various times.
23. However, the applicant's involvement with the TNA on his own evidence is indicative of that of a low level volunteer campaign worker rather than that of any senior figure within the TNA. The applicant has described such instances of intimidation as having occurred between 10 and 15 times between the end of 2009 until the middle of 2010, and another approximately 10 such instances during 2011. By reference to the applicant's own profile within the TNA, I consider that the applicant has exaggerated the frequency of instances where he or family members were intimidated by unknown persons or by the CID during each electoral campaign when he was providing low-level assistance to the TNA on a voluntary basis.
24. Furthermore, I am required to assess whether now or in the foreseeable future the applicant faces a real chance of harm either from the Sri Lankan authorities or from non-state agents on account of his involvement as a TNA volunteer. In this regard, country information in the referred materials indicates that historically, anti-TNA paramilitary groups such as the Karuna Group engaged in paramilitary activity and criminality with a high degree of impunity during the Civil War and in the years immediately following the war ending in 2009, during the Presidency of Mahinda Rajapaksa.¹⁵
25. More recently however, country information indicates that on 8 January 2015, Maithripala Sirisena defeated President Mahinda Rajapaksa in the presidential election winning 51.3 per cent of the vote, with a historically high 81.5 per cent voter turnout. The Tamil vote was significant in Sirisena achieving victory. Sirisena's campaign was run on a platform of democratic reform, good governance and anti-corruption. The parliamentary election of 17 August 2015 reinforced the outcomes of the presidential election and ushered in a 'national unity government' of major parties and the TNA now formally leads the opposition. The TNA currently has 16 members of parliament and holds the majority of seats in the Northern

¹⁴ Amnesty International, "SRI LANKA: Sri Lanka must halt pre-election attacks on political activists", , 22 January 2010m CX292773

¹⁵ DFAT, "DFAT Country Information Report - Sri Lanka", , 18 December 2015, CISEC96CF14143

Provincial Council.¹⁶ Country information also indicates that since the August 2015 election various members of the Karuna Group have been questioned and arrested¹⁷. There is no information in the material before me indicating that the Karuna Group or any of its anti-TNA affiliates or anti-TNA political groupings operate as organised paramilitary groups or act with impunity.

26. In view of my findings of the applicant's low level connection with the TNA, and in the absence of any country information indicating instances of recent politically motivated violence against persons with such low level TNA connections, I consider the prospect of any future such adverse attention from any non-state agents to be remote. In this regard I further take into account the applicant's own evidence to the delegate that in view of his age now, he would no longer volunteer his support for any political party including the TNA if he returned to Sri Lanka.
27. The applicant has described the threats and intimidation as having been received from men (usually seven-eight) usually wearing plain clothes. The applicant has claimed that from time to time the CID of the Sri Lankan police were also involved with approaching and intimidating him in the context of his voluntary assistance as a TNA campaign worker.
28. On the basis of the contemporary political and security circumstances set out in the available country information, there is no evidence of the Sri Lankan security apparatus being directly involved in instances of electoral related violence and intimidation. Furthermore, the current country information before me does not indicate any real chance of serious harm facing the applicant from non-state agents either now or in the foreseeable future.
29. I further do not accept that the applicant will be imputed with a pro LTTE political opinion on the basis of his low-level support for the TNA, the latter of which as noted above is currently the major opposition grouping in Sri Lankan mainstream politics.
30. I accordingly find that the applicant does not face a real chance of serious harm from the Sri Lankan on this account either now or in the foreseeable future if he returns to Sri Lanka on account of his particular level of involvement with the TNA. I further find that the applicant will not be attributed with a pro LTTE political profile for any of the reasons he has advanced in this regard.

Returning failed Tamil asylum seeker and attendance at a Tamil martyrs Day celebration in Australia in 2015

31. The applicant claims to fear harm if he returns to Sri Lanka because he would do so as a Tamil failed asylum seeker, which I accept to be the case.
32. Having regard to the country information in the referred material and in particular in the DFAT reports¹⁸, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities by virtue of his return as a failed asylum seeker. In particular, I note the information in the DFAT reports that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, although there have been reported

¹⁶ Ibid, 2.2, 2.26 and 2.27.

¹⁷ Ramakrishnan, T 2015, 'Ex-Eastern Province CM Pillayan, who rebelled against LTTE, arrested in murder case', The Hindu, 13 October <CXBD6A0DE14564>, 'Body of Ekneligoda dumped at Trincomalee sea' 2015, Lankasri News, 20 October <CXBD6A0DE14915>, Jeyaraj, DBS 2015, TMVP Leader 'Pillaiyaan' Implicated in Assassinations of TNA Parliamentarians Pararajasingham and Raviraj, dbsjeyaraj.com, 23 October <CXBD6A0DE17510>, 'TMVP's criminal complicity' 2015, Sunday Observer, 1 November <CXBD6A0DE18024>

¹⁸ Ibid.

instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants. The information before me does not suggest the applicant is a person with that kind of profile.

33. For these reasons I am not satisfied the applicant faces a real chance of serious harm due to being a failed Tamil asylum seeker, now or in the reasonably foreseeable future, if he returns to Sri Lanka.
34. The applicant claims to have travelled by boat from [country 1] to Australia with the assistance of a people smuggler. As the applicant's own evidence has consistently been that he departed Sri Lanka by air to [country 1] lawfully on a valid passport in either September or October 2012, I find that there is no prospect of the applicant facing adverse attention from the Sri Lankan authorities on the basis of having unlawfully departed Sri Lanka.
35. The applicant claims, and I accept that on one occasion he attended a Martyr's Day ceremony in Melbourne Australia in 2015, an event which according to country information is held in all cities in Australia and around the world by members of the Sri Lankan Tamil diaspora.¹⁹ The applicant has speculated that certain unidentified photographers may have passed photographs of him at this event to the Sri Lankan authorities.
36. I accept that although unlikely, it may become known to the Sri Lankan authorities that the applicant attended an event of this nature whilst in Australia. However, taken together with my assessment of the applicant's profile more generally which I have outlined above, I do not accept that mere attendance at such an event alone would place the applicant within the risk profile identified by the UNHCR of LTTE fundraisers and propaganda activists or persons perceived to have links to the Sri Lankan diaspora that provided funding and other support to the LTTE.

Refugee: conclusion

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

Complementary protection assessment

38. 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

39. 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

¹⁹Maya Ranganathan, "'Chapter Four - Diaspora Dynamics Online', in Eelam Online: The Tamil Diaspora and War in Sri Lanka ", Cambridge Scholars Publishing, 18 January 2011, CISD9559B12239

- 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.

40. I accept that the applicant may face some level of societal discrimination and monitoring as a Tamil male from the north. Having considered the evidence discussed above however, I am not satisfied that the treatment the applicant may face amounts to significant harm as defined in ss.36(2A) and 5 of the Act.

41. I have found that there is not a real chance of harm of any nature to the applicant, from any non-state agents or from the Sri Lankan authorities, either now or in the reasonably foreseeable future, for any perceived links to the LTTE for reason of his ethnicity, origins, internment in a refugee camp or attendance at a Martyr's Day ceremony in Australia. I have further found there is no real chance of serious harm facing the applicant from any parties on account of his involvement as a low-level TNA supporter. In addition, I have found there is no real chance of serious harm facing the applicant as a returned Tamil failed asylum seeker from Australia. As 'real chance' and 'real risk' involve the same standard,²⁰ it follows that I am also satisfied that there is no real risk of significant harm on these bases if returned to Sri Lanka.

42. 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

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

Decision

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

²⁰ *MIAC v SZQRB* (2013) 210 FCR 505.

Applicable law

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.