



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03358

Date and time of decision: 8 March 2018 10:45:00
Jane Bishop, 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) is a [man] that claims to be a national of Sri Lanka and identifies himself as a Hindu Tamil. He arrived in Australia by boat [in] October 2012. [In] October 2016 the applicant applied for a Safe Haven Enterprise Visa (SHEV).
2. [In] August 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the applicant's visa. The delegate accepted that the applicant is a Hindu Tamil and a national of Sri Lanka. Likewise, the delegate accepted that the applicant was a young Tamil male from an area formerly controlled by the Liberation Tigers of Tamil Eelam (LTTE), that a member of his family was a senior member of the LTTE and that he departed Sri Lanka illegally and would be returning as a failed asylum seeker. The delegate was not satisfied that the applicant was a member of the LTTE, that the applicant fled the LTTE leading to adverse attention from them or that the Sri Lankan army (SLA) targeted the applicant and accused him of transporting weapons for the LTTE.
3. The delegate determined that the applicant does not have a profile of interest with the Sri Lankan authorities and that he does not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Sri Lanka. Likewise, the delegate determined that the applicant does not have a criminal background and was not of interest to the authorities when he left Sri Lanka. The delegate was satisfied that the applicant does not hold a well-founded fear of persecution on account of being a failed Tamil asylum seeker from an area once controlled LTTE who departed Sri Lanka without the knowledge of the Sri Lankan authorities.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 18 September 2017 the applicant's representative provided submissions and the "Committee against torture fifth periodic report" dated November 2016, the UK Home Office, "Sri Lanka: Tamil separatism. Version 5" dated June 2017, the "Sri Lanka: COI Compilation" (ACCORD) dated 31 December 2016 and the "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka" dated 22 December 2016.
6. Under s.473DC of the Act I am not required to accept new information. New information is information that was not before the delegate and I consider may be relevant. However even if I accept new information provided by the applicant, I must not, pursuant to s.473DD of the Act, consider that new information unless I am satisfied there are:
 - exceptional circumstances to justify its consideration; and
 - the new information was not, and could not have been provided before the delegate's decision was made; or
 - the new information is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.

7. To the extent that the submissions provided on 18 September 2017 argue errors and/or omissions in the delegate's decision based on the information that was before the delegate, I have had regard to it. Likewise, the articles "Sri Lanka COI Compilation" (ACCORD) dated 31 December 2016 and the "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka" dated 22 December 2016 were before the delegate and I have had regard to them.
8. The articles "Committee against torture fifth periodic report" dated November 2016 and the UK Home Office, "Sri Lanka: Tamil separatism. Version 5" dated June 2017 both predate the delegate's decision and could have been provided before the decision was made. The articles are of a general nature and do not contain credible personal information. I find that the new country information does not meet the requirements of s.473DD(b)(i) or (ii). I am also not satisfied that there are exceptional circumstances to justify considering the information. I am therefore not able to consider the new information.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - He is a national of Sri Lanka and a Hindu Tamil from a Northern Province of Sri Lanka.
 - He lived in an LTTE controlled area that was attacked by the SLA.
 - [Relative 1] was [an officer] in the LTTE and killed in combat with the SLA in 2000.
 - He left school and joined the LTTE. He was tasked with gathering information about where the SLA camps were located and the SLA's movements.
 - In 1988 he was monitoring a SLA camp in Kilinochchi and was detected and shot in the leg. He spent one month in hospital.
 - In 1991 he was homesick and fled the LTTE camp to return home. The area was under the control of the SLA and he was suspected of links to the LTTE because he was a young able bodied Tamil. The LTTE were looking for him and visited his family home.
 - The SLA harassed, intimidated and abused the applicant. He would be stopped on the street and questioned. In 2003 he was sleeping with his family and the SLA came and arrested him. He was taken to a SLA camp in [a town]. He was tortured and interrogated. He was beaten with a baton and hung upside down with wires. He was told that the SLA had received information that the applicant was transporting arms and equipment for the LTTE.
 - He was kept in detention for two weeks until his wife visited the camp and pleaded for the applicant to be released. He was released and told to report regularly to the SLA camp. During his detention the Eelam People's Democratic Party (EPDP) and Eelam People's Revolutionary Liberation Front (EPRLF) were present and participated in the applicant's interrogation.
 - Once the applicant was released the SLA harassed the applicant, asked him to attend the SLA camp on a regular basis and would question him for hours about his movements and what he knew about the LTTE.
 - In 2012 the SLA wanted to wipe out any opposition to their rule and many of the applicant's former LTTE comrades were arrested and disappeared. The applicant was concerned the SLA would obtain information about his past involvement with the LTTE.

He decided to leave Sri Lanka before being arrested and killed by the SLA and intelligence services.

Factual findings

10. In the applicant's arrival interview he stated that he joined the LTTE in 1989 while he was a student. He gathered intelligence and information. He would tell the LTTE the location of the SLA camps and the SLA's movements. He did this surveillance for one and a half years when the Indian Peace Keeping Forces were present in Sri Lanka. He was not part of the LTTE army but was a member of the LTTE. He did not undergo training, he had no rank and he did not carry a weapon. He was not in the LTTE army just a member. He had no rank or training. He did not carry a weapon. He stopped being involved with the LTTE in 1991 after he got married. The applicant stated that in 2003 he was taken by the SLA and detained for 15 days. He was suspected of smuggling weapons for the LTTE. He was beaten with batons and hung upside down with wires. He said the EPDP and the EPRLF groups were in the area and would harass him. This information is consistent with the information contained in the applicant's statement of claims.
11. In the applicant's arrival interview he stated that the EPDP and EPRLF were in his area and would harass him. In his statement of claims he stated that the EPDP and EPRLF participated in his interrogation in 2003. In his SHEV interview the applicant first stated that no one other than the SLA detained and questioned him in 2003. When the delegate put to the applicant that he had stated the EPDP and EPRLF were involved in his interrogation, he responded that the delegate was correct. He could not remember what was asked and said that the Criminal Investigation Department (CID) were also present.
12. In the applicant's SHEV interview the applicant was provided limited specific information and most of his answers were vague and general. He stated multiple times that 'he could not remember' or that he 'had mixed up the dates'. He said he has had memory problems over the last three months and that something was happening to his head. However, the applicant did state that he undertook surveillance for the LTTE for six months when he was married and had two children [and] that he was detained for three days in 2003 on suspicion of smuggling weapons for the LTTE. In post SHEV interview submissions, the applicant's representative submitted that the applicant's inconsistent evidence provided during the SHEV interview was due to the applicant's health issues and obvious difficulties with concentration. In a medical certificate dated [March] 2017 [his doctor] states that the applicant presented with episodes of collapsing on and off for the last two to three months and queried fits. [His doctor] stated that the applicant said his episodes of collapsing were worse when he thought about his problems and queried whether the applicant had depression and anxiety. The medical certificate stated that the applicant had a very abnormal liver function test, high ferritin and high creatine phosphokinase levels. [His doctor] stated that safe levels of alcohol consumption were discussed and the applicant was to be referred to a neurologist, liver clinic and psychologist. During the SHEV interview the applicant stated that he had not started taking his prescribed medication. The applicant's representative submitted that she was – [in] March 2017 – “currently liaising with the applicant's doctor to receive a report commenting on the connections between the applicant's health issues already noted in his medical certificate and problems with memory and concentration.” It was submitted that the report would be sent as soon as it was received. No report was sent to the delegate. The applicant's representative's submitted to the IAA that it was irrelevant if the applicant provided further medical evidence to the delegate and there was no obligation on the applicant to do so. I accept that the applicant is under no obligation to provide further medical evidence.

13. The medical evidence before me is scant. It indicates that the applicant has reported a history of collapsing, has abnormal blood results and was educated about safe levels of drinking alcohol. It indicates that the applicant needs further investigation from a neurologist, liver clinic and psychologist. Based on the medical evidence before me, I am not satisfied that the applicant had, or has, a medical condition that affected his memory or concentration during the SHEV interview. However, I am prepared to accept that the applicant worked for the LTTE undertaking surveillance/information gathering for [several] months during the period 1988 to 1991. I accept that the applicant was arrested and detained for a period of three to 15 days by the SLA in 2003 on suspicion of smuggling weapons for the LTTE. I accept that the applicant was beaten with batons and hung up with wires while he was detained. However, I am not satisfied that the EPDP, EPRLF and CID were involved during the applicant's detention.
14. I accept that the applicant was detained on suspicious of smuggling weapons for the LTTE. However, I do not accept that, if the SLA believed - or continued to suspect that - the applicant was smuggling weapons for the LTTE, he would have been released because his wife and people from his home went to the SLA camp and pleaded/cried for the applicant's release. Sri Lankan law prohibits arbitrary arrest and detention. However, I note that the Prevention of Terrorism Act 1979 (Sri Lanka) (PTA) allows authorities to detain suspects without charge for up to 72 hours. Following this, a suspect must either be produced before a Magistrate or can be held without charge under detention orders for three-month periods not exceeding 18 months. Suspects can be held in irregular places of detention, as well as at police stations, detention centres or prisons. DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring¹. I am prepared to accept that the applicant had to report to a SLA/CID camp after he was released. In the SHEV interview the applicant stated he was required to report for three months. He described his reporting requirements as going to the CID camp every morning and signing in before going to work. I accept that the applicant was required to attend a particular place for a number of months to sign in each morning before going to work. DFAT reports that military and security forces maintain a significant presence in the Northern Province and, in September 2016, a low-level of visible military presence was observed. However the checkpoints on the major roads travelling into and out of the Northern Province were removed in 2015². I accept that after the applicant was released in 2003 the SLA continued to harass him. Likewise, I accept that in 2012 the SLA continued to harass, arrest and/or detain people connected to, or suspected of being connected to, the LTTE. I accept that some of the applicant's former LTTE comrades could have been arrested and disappeared.
15. In the applicant's statement of claims he stated that he fled the LTTE because he was homesick and the LTTE were looking for him. However, during the SHEV interview the applicant stated that there were no problems with the LTTE when he stopped working for them. He said that the LTTE were not looking for him and he was not scared of them. He was scared of the SLA. The applicant stated during his arrival interview that the LTTE asked him if he would help gather information and he chose to help. He stated that it was not compulsory. Based on all the evidence before me, I am not satisfied that the applicant fled the LTTE. I accept the applicant's evidence at his arrival interview that he was not forced to work for the LTTE and did so of his free will. I find that the applicant voluntarily left the LTTE after he got married, that the LTTE were not looking for him after he left and that the applicant was never scared of the LTTE.

¹ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105., 3.47 – 3.48.

² Ibid. at 2.39.

16. During the SHEV interview the applicant said he and his family were given rations of rice, flour, sugar and oil from 2010 to 2012. In support of this claim he provided an untranslated copy of his family's 2012 ration card. He said that he left Sri Lanka because the SLA started digging up old problems. The delegate put to the applicant that he was detained on suspicion of smuggling weapons in 2003, that he had remained in the area and he has received rations from the Sri Lankan authorities in 2010, 2011 and 2012 without incident. The applicant responded that he fears informants will tell the SLA about his past association with the LTTE. The applicant's representative submitted at the SHEV interview that the applicant has never disclosed to the SLA and CID that he was a member of the LTTE and fears that informants will provide this information to the Sri Lankan authorities. The applicant undertook the role of information gathering for the LTTE more than 25 years ago. He has remained in the area and received rations of food from the Sri Lankan authorities. Given the length of time that has elapsed and the applicant's continued presence in the area I am not satisfied that the SLA or CID are, or will become aware of, the applicant's past involvement with the LTTE.
17. During the SHEV interview the applicant stated that no one in his family served in the LTTE and I accept that evidence. Based on the evidence before me, I am not satisfied that [Relative 1] was [an officer] in the LTTE and killed in combat with the SLA in 2000.
18. The applicant stated during the SHEV interview that if he is returned to Sri Lanka he will be questioned about how he left Sri Lanka and taken to the fourth floor of the Central Intelligence Department (CID). I accept that the applicant left Sri Lanka illegally.

Refugee assessment

19. 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

20. 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 and/or real or perceived links to the LTTE

21. I accept that the applicant is a Hindu Tamil from the Northern Province of Sri Lanka and that the area had been under the control of the LTTE during the civil war. The most recent DFAT report³ states at paragraph 3.8 that:

...During the civil conflict more Tamils were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the conflict and the Rajapaksa Government. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity (see 'Political Opinion' below). Since 2015 the Sirisena Government has reviewed and released some PTA detainees, including Tamils. DFAT assesses that there are currently fewer individuals detained under the PTA than there were during the conflict.

DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. The Sri Lankan police are now responsible for civil affairs across Sri Lanka. While a sizeable (and largely idle) military presence remains in the north and east, armed forces personnel are generally restricted to their barracks. While some cases of monitoring continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities...

22. The UK Home Office Report⁴ on Tamil separatism states at paragraphs 3.1.2 and 3.1.3 that:

- A person being of Tamil ethnicity would not in itself warrant international protection.
- Neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.

23. I have accepted that the applicant undertook information gathering/surveillance for the LTTE for a period of [several] months from 1988 to 1991. I have accepted that the applicant was detained, questioned and beaten in 2003 on suspicion of smuggling weapons for the LTTE and was required to report daily after his release for a period of three months. I accept that the SLA continued to harass the applicant after he was released in 2003. Likewise, I accepted that in 2012 the SLA continued to harass, arrest and/or detain people connected to, or suspected of being connected to, the LTTE. I accept that some of the applicant's former LTTE comrades could have been arrested and disappeared. However, I did not accept that, if the SLA believed - or continued to suspect that - the applicant was smuggling weapons for the LTTE, he would have been released because his wife and people from his home went to the SLA camp and pleaded/cried for the applicant's release. I was not satisfied that [Relative 1] was [an officer] in the LTTE and killed in combat with the SLA in 2000 or that the EPDP, EPRLF and CID were involved during the applicant's detention.

24. The applicant's involvement with the LTTE was for a short period of time and not a significant role. I consider the chance of an informant telling the SLA about the applicant's involvement in the LTTE is remote. There is no credible evidence before me to indicate that the applicant

³ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

⁴ UK Home Office, "Sri Lanka: Tamil separatism v 4", 31 March 2017, CISED50AD3779

would be perceived to have had a significant role in the LTTE or perceived to be active in post-conflict Tamil separation.

25. I am satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm by any of the Sri Lankan authorities. Likewise, there is no credible information to indicate that the applicant would be detained for any other reason. I am therefore satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm by the Sri Lankan authorities for this reason.

Returning as a failed asylum seeker and/or a person who departed illegally

26. I accept that the applicant left Sri Lanka illegally in September 2012. I also accept that by the manner of his return, the Sri Lankan authorities may know or infer that he made a claim for protection in Australia, and that he will be subject to background checks on arrival. DFAT advises that a returnee like the applicant will be processed at the airport by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the Sri Lankan CID who check for identity and any outstanding criminal matters. DFAT is aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka but cannot verify these reports given that many allegations are made anonymously, often to third parties and sometimes long after the torture is alleged to have occurred. DFAT also reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, with relatively few allegations of torture or mistreatment. Although it does not routinely monitor the situation of returnees, DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce. In his SHEV application the applicant stated that he had never been charged, convicted or wanted for an offence in Sri Lanka. I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the concern of the authorities. I am satisfied that the applicant would not be at risk of serious harm during, or as a consequence of this routine investigation. The evidence before me does not suggest that asylum seekers, including Tamil asylum seekers face a real chance of harm for that reason. I am not satisfied, having regard to the applicant's profile, that he faces a real chance of any harm as a returning asylum seeker.

27. Information in the DFAT report states that after processing at the airport, persons who departed illegally are charged under the Sri Lanka's Immigrants and Emigrants Act (I&E Act), fingerprinted and photographed, and then transported to the closest Magistrate's Court at the first available opportunity once investigations are completed, at which point responsibility shifts to court or prison services.⁵ Because the applicant departed illegally he may be arrested and charged under the I&E Act. When brought before a court, a person who pleads guilty will most likely be fined and discharged. While penalties can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees (SLR), DFAT advises that no returnee who was merely a passenger on a people smuggling venture has ever been given a custodial sentence for departing Sri Lanka illegally. Fines are imposed on a discretionary basis, are generally between 5 and 50 thousand SLR, and may be paid by instalment. As the applicant was not involved in organising or facilitating people smuggling, I find that there is no real chance that the applicant will be given a custodial sentence.

28. Based on DFAT's advice I find that if the applicant were to plead not guilty, he would either be immediately granted bail on personal surety, or wait to be collected by a family member if required to have a family member act as guarantor. DFAT advises that if bail is granted there are rarely any conditions. An accused will only need to return to court when the case against

⁵ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105., 5.21

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. I am not satisfied that the imposition of any fine, surety or guarantee would of itself constitute serious harm in this case. As DFAT advises that there are usually no reporting requirements attached to the grant of bail, I do not consider that there is a real chance the applicant would be required to report regularly to local police. There is no information before me to indicate that the applicant would be unable to post bail.

29. On the basis of DFAT's advice, I accept that on return the applicant may be detained for a short period during investigation and while waiting to be taken before a court. I find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution. In this case, the evidence does not suggest that the I&E Act is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be pursuant to a non-discriminatory law of general application and does not amount to persecution within the meaning of s.5J(4). I am not satisfied that it involves systematic and discriminatory conduct.

Refugee: conclusion

30. 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

31. 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

32. 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.

33. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm

- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

Is there a real risk that the applicant will suffer significant harm?

34. I have considered the applicant's claims individually and cumulatively and found that the applicant does not face a real chance of serious harm if he returned to Sri Lanka for reason of his ethnicity, past involvement with the LTTE or having sought asylum in Australia. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear".⁶
35. I accept that, on return to Sri Lanka, the applicant will be subject to a series of administrative processes (as outlined above) and identified as a person that departed Sri Lanka illegally and is a returning asylum seeker. I have found that the applicant is not a person of interest to the Sri Lankan authorities and, upon his return, I am not satisfied that the applicant faces a real risk of being arbitrarily deprived of his life; of facing the death penalty or of being subjected to torture. I am not satisfied that the acts or omissions of the Sri Lankan authorities during this administrative process are intended to cause pain or suffering, severe pain or suffering or to cause extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment. I am therefore not satisfied that there is a real risk that the applicant will suffer significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Sri Lanka. Likewise I do not accept that having a fine imposed upon the applicant under the I&E Act for his illegal departure amounts to suffering significant harm within the meaning of s.5(1) and s.36(2A).
36. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka (the receiving country), there is not a real risk that he will suffer significant harm now or in the foreseeable future.

Complementary protection: conclusion

37. 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.

⁶ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

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.