



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/06162

Date and time of decision: 6 March 2019 16:18:00
M Simmons, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil, a Hindu and a Sri Lankan national. On 16 December 2016 he lodged an application for a safe haven enterprise visa. A delegate of the Minister for Immigration refused that application on 13 December 2018.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). The applicant's lawyer provided written submissions to the IAA on 9 January 2019. To the extent these provide elaboration, respond to the findings of the delegate and convey legal argument they do not contain new information and I have had regard to them.
3. The applicant's lawyer submits that the applicant's father, as a person with knowledge of whereabouts of Liberation Tigers of Tamil Eelam (LTTE) assets and equipment, is considered to be a person of post-conflict Tamil separatism and that is the reason the CID is actively searching for him. Therefore, the applicant is perceived to be an active person of post-conflict Tamil separatism because of the applicant's father's high level involvement with LTTE for many years. It has not previously been suggested that the applicant's father has certain knowledge of LTTE assets which has caused him to be of ongoing interest, or that he or the applicant are considered 'persons of post-conflict Tamil separatism'. This is new information, although the submission does not identify it as such contrary to the requirements of the IAA Practice Direction for Applicants, Representatives and Authorised Recipients. A copy of this Direction was emailed to the applicant on 19 December 2018 and to the lawyer directly on 2 January 2018. It stipulates that any new information must be clearly identified, including any new information referred to in submissions. Also no written explanation addressing the requirements of s.473DD(b) was provided, which is also a requirement by the Practice Direction in relation to any new information submitted by an applicant. The submission states that breaches of s.54 and s.57 "has denied procedural fairness in considering the Applicant's claims and this gives rise to the exceptional circumstances to the Applicant". This terminology appears to allude to s.473DD(a), however otherwise no submissions have been presented in relation to any aspect of s.473DD. Given these various instances of noncompliance with the Practice Direction I have decided not to accept this new information per s.473DB(5). The applicant's lawyer was clearly aware of the requirements of this Direction but has disregarded them. Moreover, there has been no effort to explain how this information might meet s.473DD, noting it is for the applicant to satisfy the IAA that s.473DD(b) is met.
4. The lawyer's submission also alleges that the delegate made numerous errors. Many purported errors, and their relevance to the IAA review, are not clearly articulated. For instance it is asserted that the delegate failed to have regard to all information as required by s.54 of the Migration Act without indicating what information was not considered. Similarly the submission states that s.57 of the Migration Act was not complied with as information that would be part of the reason for refusing grant of a visa was not put to the applicant; however the lawyer as not identified any such information that the applicant was not alerted to.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:

- He is a Tamil Hindu and a Sri Lankan national, born in Killinochchi District.
- His father worked as [Occupation 1] for the LTTE. He [performed certain duties] until the end of war. He never took part in hostilities. The applicant was not an LTTE member and never had any LTTE involvement. However, due to his father's work they were regarded as a family that supported the LTTE.
- In 2010 his father was identified as having LTTE links and was detained by the Criminal Investigation Department (CID) for [number] months. Following his release was asked to sign a register every week at [Location 1] in [City 1].
- In [month] 2012 his father went to sign the register and was detained for a week, tortured, and interrogated about his LTTE activities. He was released on the condition he would sign in again [next month]. He failed to report to the [location] as required because he was scared of further mistreatment. When he did not report CID officers came to the family home in search of him. As his father was not at home they took the applicant to [Location 1], and told him they would not release him until his father reports to the [location]. His father came to the [location] the next day and he was released. His father told the applicant to leave the country as soon as possible. With his [Relative A's] help the applicant left the country and came to Australia.
- The applicant's father was detained again in [Location 1] when he left the country. He later escaped and his whereabouts is currently unknown.
- His mother and siblings still live in [City 1] and they are being watched by the CID, who frequently inquire about him and his father.
- During approximately 2016 the CID detained and questioned his brother in relation to their father. When they released his brother he fled Sri Lanka for [Country 1], disobeying the CID's request to report to them at a later date.
- The CID contacted his family and asked about his father around one month before his interview with the delegate, at some time during September 2018.
- He fears harm from the CID because of his Tamil ethnicity and his father's links to the LTTE. He fears for his life and claims the authorities will shoot him because he was detained by the CID, they have his details and he is on their watch list.

Factual findings

Identity and background

6. The applicant has provided evidence in support of his claimed identity and nationality including a copy of his Sri Lankan birth certificate and documentation relating to his relatives. The details of these documents generally align with his evidence in his visa application and at interview that he is ethnically Tamil, Hindu by religion, and was born in Killinochchi District in Sri Lanka's Northern Province. I accept that the applicant is a Sri Lankan national from the Northern Province and find that Sri Lanka is the receiving country for the purpose of this assessment.

Events in Sri Lanka

7. The applicant claimed that his father [performed certain duties] for the LTTE and that this caused him to come to the adverse interest of the CID on various occasions. The applicant's evidence on these matters has been generally consistent, though somewhat vague. However I

am mindful that many of these claimed events occurred during the applicant's childhood, now some time ago. I am willing to accept that his father provided some low level support to the LTTE during the war as a [Occupation 1].

8. The applicant consistently asserted on numerous occasions in his application and at interview that his father was an LTTE [Occupation 1] and that he [performed certain duties]. When asked by the delegate if his father has a high profile with the Sri Lankan authorities the applicant responded he was responsible for [specified items] and he would know about other people. He has not provided any further details suggesting his father ever undertook any activities for the LTTE beyond [the duties specified]. Without more I am not satisfied he had any managerial or supervisory role, or that he had any other involvement with the LTTE other than as [Occupation 1]. The applicant's statement indicates his father was detained in 2010 for [number] months and in [month] 2012 for [specific time], and that he was subject to reporting obligations after being released on both occasions. It is claimed that after the [month] 2012 detention he failed to report as required for fear of further mistreatment, which led to the CID taking the applicant and detaining him until his father reported, upon which his father was again detained.
9. The applicant's lawyer has submitted that [Occupation 1] working for LTTE who [performed certain duties], even though they were not fighting in the battles, were considered as important high positioned persons in LTTE because they were responsible for [certain duties]. She has not referred to any corroborative material in support of this assertion. Country information before me does not support a conclusion that being an LTTE [Occupation 1] of itself means a person was considered important or high level within the LTTE. There is no evidence that the applicant's father [performed certain duties] for the LTTE. There is also no suggestion that the applicant's father was sent for rehabilitation after the war. This is notwithstanding this was a widespread practice by the Sri Lankan authorities for any actual or suspected LTTE members or supporters including those who made a significant contribution to the war effort,¹ and that he purportedly had numerous dealings with the authorities during the post war period. I do not accept the submission that the applicant's father's LTTE involvement can be regarded as serious or that the applicant's father would be regarded in any way as an important or high profile LTTE member or supporter. I am satisfied that his LTTE involvement was of a low level.
10. As I have accepted that applicant's father was an LTTE [Occupation 1], I am prepared to accept that he on occasion came to the adverse attention of the CID in the post war period for this association. I am prepared to accept that he was detained in 2010 and that he was subject to reporting obligations on release. However, on the profile I have accepted the applicant's father held, I have doubts whether he would continue to be of such interest in 2012 that he would be re-detained, still subject to ongoing reporting obligations, or that one of his sons would be held to secure his attendance after failing to report. As a low level LTTE member who was never referred to rehabilitation despite having various interactions with the authorities after the war, I consider this narrative unlikely. I am not satisfied that the applicant's father continued to be of such interest in 2012 that the authorities would exert such effort in pursuing him. I do not accept that the applicant's father was detained in 2012 then failed to report, and I do not accept that the applicant was abducted and used to secure his father's attendance.
11. The applicant arrived in Australia in September 2012 and undertook an entry interview in January 2013. I have listened to the recording of that interview. During this interview he was asked how long ago it was that he was detained by the CID. He responded that it occurred before

¹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

coming to Australia, around six months back. When asked how long he was held on that occasion he responded about one hour. I note the evidence in the statement accompanying his visa application was that he was detained in August 2012 for one day and left the country soon after. I have had regard to the Court's observations in *MZZJO v MIBP* concerning the circumstances in which entry interviews are conducted, and that caution required by decision makers in relation to omissions by applicants of matters at entry interview.² However I do not consider that the context in which the arrival interview evidence was provided accounts for the variation between it and the information set out in the applicant's visa application statement. It was undertaken around 3 months after the applicant's journey to Australia. The applicant has variously described his purported detention as lasting for one hour or one day, and occurring about six months prior to shortly before departure. Moreover, I have not accepted that his father was detained and breached reporting obligations in 2012, as such I do not accept that the applicant was abducted and used to secure his father's attendance after failing to report. I am not satisfied these claims events are a proportionate response to the applicant's father's low level, historical LTTE involvement particularly as by 2012 he had had many dealings with the authorities after the war. I am not satisfied that the applicant was ever detained by the CID while in Sri Lanka, I consider this claim have been fabricated.

12. The applicant states in his visa application that he is on a Sri Lankan government watch list because of his father's LTTE involvement. He did not mention this at the interview with the delegate, or subsequently. He has provided no further information in support of this claim, such as how it is that he has come to know he is on this list. DFAT reports that 'Watch' lists include names of those individuals whom the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities. The UK Home Office reported that the 'watch list' comprised minor offenders and former LTTE cadres.³ The applicant has clearly indicated he never had any LTTE involvement himself. I am not satisfied that the applicant is on any watch list.

Incidents while in Australia

13. The applicant claims his brother was detained by the CID in 2016 and then fled Sri Lanka. The applicant's visa application dated 16 December 2016 makes no reference to his brother experiencing any difficulties in Sri Lanka. Whereas his evidence at interview was that his brother was detained for half a day and questioned about the applicant and their father, and because of this he has since fled Sri Lanka for [Country 1]. He stated he is not sure when this incident occurred but he believes it was in 2016. The visa application form indicates that as at [date] December 2016 his brother continued to reside in [Country 1]. While it is possible this event may have occurred in the last [number] weeks of 2016, if it did, I would expect the applicant to have been more specific in indicating when this event occurred rather than only stating the year. Furthermore, he indicated he continues to be in regular contact with his family and as such it is not apparent why he could not have obtained further particulars about this incident involving his brother. More generally, I do not consider it plausible that the applicant's brother would continue to be of interest to the Sri Lankan authorities in 2016 because of his father's historical low level LTTE activities, given the nature of his LTTE involvement and that he had purportedly been missing for a number of years by that stage. Similarly the applicant had also been absent from Sri Lanka for a number of years by that time. I consider the claim regarding the brother's detention has been fabricated, I do not accept that he was ever detained by the CID.

² *MZZJO v MIBP* [2014] FCAFC 80

³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

14. The applicant claims his mother and siblings who are still resident in Sri Lanka are being watched by the CID and subject to frequent inquiries. The CID officers warned his mother that she is to inform them when she knows where the applicant and his father are. At the September 2018 interview the applicant said that the last time the authorities visited his family was about a month previously. There is no indication that they have moved since his departure or otherwise sought to avoid the authorities. In his visa application and at interview he also indicated that he regularly phones his mother in Sri Lanka. The country information before me does not support a conclusion that the applicant's mother and siblings, relatives of someone who provided historical low level support to the LTTE, would continue to be of interest to the Sri Lankan authorities. The UK Home Office concluded in 2017 that generally past LTTE connection would not warrant protection.⁴ DFAT reports that close relatives of high profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring. High profile members as including the LTTE leadership, and former members suspected of terrorist or serious criminal offences during the conflict, or of providing weapons or explosives to the LTTE.⁵ I have already found that the applicant's father would not be regarded as high profile. I do not accept that the applicant's mother and siblings have been subject to monitoring or visits since his departure or that they are of any ongoing interest to the Sri Lankan authorities.

Returning asylum seeker

15. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including the Immigrants and Emigrants Act 1949 (I&E Act). I am satisfied that the Sri Lankan government may assume that, due to his mode of departure, the applicant sought asylum from Sri Lanka in Australia. I find that if he were to return to Sri Lanka he may be identified as a returning asylum seeker.

Refugee assessment

16. 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

17. 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

⁴ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

- 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.

18. Information before me indicates that the situation in Sri Lanka has shifted considerably since the end of the civil war. While reports suggest that the government remains sensitive to the potential re-emergence of the LTTE or other Tamil separatist groups, its present focus is on identifying persons who pose a current threat to the country's unity rather than necessarily identifying a person's past LTTE links. Although reports persist of some ongoing monitoring and surveillance of the Tamil community, security measures such as military checkpoints and restrictions on travel to the north and east have been lifted and monitoring in day to day life has decreased.⁶ Different sources provide varied commentaries on the treatment of suspected LTTE sympathisers. The United States Department of State reported in 2016 that a major human rights problem was the ongoing harassment of persons viewed as sympathisers of the LTTE.⁷ More recently, the UK Home Office concluded in 2017 that the current focus of the Sri Lankan authorities was on identifying Tamil separatist activists in the diaspora and that returnees who had a previous connection with the LTTE were generally able to return to their communities without suffering ill-treatment. Generally past LTTE connection would not warrant protection and persons most at risk are those perceived to have a significant role in relation to post conflict separatism.⁸ DFAT similarly reports that close relatives of high profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring, but does not suggest such treatment amounts to, or attracts a risk of, serious harm. DFAT describes high profile members as including the LTTE leadership, and former members suspected of terrorist or serious criminal offences during the conflict, or of providing weapons or explosives to the LTTE.⁹

19. The applicant's father previously provided some low level support to the LTTE and he has been missing for a number of years. The LTTE is a spent force in Sri Lanka. I am satisfied in light of the country information before me that the applicant does not face a real chance of any harm for any reason related to his father's low level historical LTTE involvement. There is no indication that the applicant has ever been politically active or that he has ever taken part in any Tamil separatist activities. Reports before me do not support a conclusion that originating from, or residing in, areas previously under LTTE control would cause a person to be of adverse interest in Sri Lanka. Nor does the country information I have considered indicate that Tamils are currently at risk of harm in Sri Lanka on account of their race, religion or language.¹⁰ It does not support a finding that Tamil ethnicity or identity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age, or place of origin.¹¹ The applicant does not face a real chance of any harm for any reason related to his father's historic low level LTTE involvement or his Tamil ethnicity and his origins.

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826. ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251.

⁷ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁰ ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

20. The material before me also does not support a conclusion that a person, including Tamil males with the applicant's background, has a real chance of harm on return to Sri Lanka because they requested asylum in another country. DFAT reports that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka, including nationals returned from the Australian community and those removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries, and most returnees are Tamil.¹² A UNHCR survey in 2015 reported that 49 per cent of refugee returnees surveyed in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. However, only 0.3 per cent of refugee returnees interviewed by UNHCR (including UNHCR-facilitated and voluntary returns) in 2016 indicated that they had security concerns following their return.¹³ Given less than one percent of refugee returnees who were interviewed indicated they had security concerns following their return, I am not satisfied any post return visits by the authorities, were they to occur, may expose the applicant to a real chance of suffering serious harm. The applicant does not have a real chance of any harm for because he has requested asylum.
21. Given his illegal departure, I can accept the applicant may be arrested and charged, have his photograph and fingerprints taken and enquiries may be made about his departure and his activities while abroad. DFAT assesses that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during this processing. Notably, the most recent information from DFAT does not indicate the applicant would be detained in a prison while awaiting any court appearance. According to DFAT, applicant returnee will be brought before the Magistrate's Court at the earliest opportunity but subject to magistrate availability, he or she may be detained for up to two days in an airport holding cell.¹⁴ I have found the applicant would not be returning with an adverse profile that would be of interest to the authorities, including because of any historical familial LTTE ties. There is nothing to suggest there would be extant criminal charges or proceedings against him. Having regard to all the circumstances I am not satisfied that the applicant would for any reason face a real chance of suffering harm amounting to serious harm during returnee processing or if he is detained in a holding cell awaiting court transfer.
22. Should the applicant plead guilty to departing illegally, he may be fined a penalty of up to LKR 200 000 and may then be free to go. The I&E Act does allow for imprisonment but there is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger and according to the Sri Lankan Attorney-General's Department no custodial sentences have ever been issued to such persons.¹⁵ If a not-guilty plea is entered, usually in these circumstances the magistrate would grant bail either on the basis of personal surety or guarantee by a family member. I am not satisfied there is any reason the applicant would not be granted bail if required. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances over protracted lengths of time can be high. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment and manage arrangements for his court appearances (if further ones are required) and I do not consider that any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with the applicant's court appearances would constitute serious harm in the present case.
23. Additionally, I am satisfied the arrest and judicial processes the applicant may face result from a lawful prosecution and there is no evidence before me that laws or processes relating to

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

illegal departure are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. It does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act. There is no real chance of persecution related to his unlawful departure from Sri Lanka.

24. The applicant does not face a real chance of serious harm for any reason were he to return to Sri Lanka. His fear of persecution is not well founded.

Refugee: conclusion

25. 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

26. 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

27. 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.

28. I have accepted that because of his illegal departure from Sri Lanka, the applicant may be subject to treatment including questioning, possibly detention of up to two days in an airport holding cell and maybe be subject to a monetary fine. However reports do not suggest,¹⁶ and I am not satisfied, such treatment amounts to or may expose the applicant to a real risk of significant harm in the relevant sense. Country information also does not suggest that any post return visit by the Sri Lankan authorities would attract a real chance of significant harm as defined, and I am satisfied that is the case. Reports do not indicate a real risk of returnees having their life or liberty threatened, experiencing significant physical harassment or ill-treatment, or having their capacity to subsist threatened for any reason related to their illegal departure. As such I do not accept the applicant faces a real risk of experiencing significant harm on return to Sri Lanka for this reason.

29. I am also not satisfied that the applicant faces a real risk of any harm, including significant harm, for any of the other reasons claimed. The requirement for there to be a "real risk" of

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

significant harm applies the same standard as the “real chance” test.¹⁷ I have concluded for the reasons set out that the applicant does not face a real chance of any harm because of any actual or imputed LTTE affiliation including for any reason related to his father, his Tamil ethnicity, identity and residence in an LTTE controlled area or for having requested asylum in Australia. As I have found there is not a real chance of any harm to the applicant for these reasons were he to return to Sri Lanka, I am also satisfied that he does not face a real risk of any harm amounting to significant harm for these reasons.

Complementary protection: conclusion

30. 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.

¹⁷ *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.