



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA22/10334

SRI LANKA  
IAA reference: IAA22/10336

SRI LANKA  
IAA reference: IAA22/10335

SRI LANKA  
IAA reference: IAA22/10333

Date and time of decision: 15 August 2022 15:45:00  
S Kamandi, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

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

**Background to the review**

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**Visa application**

1. The referred applicants (the applicants) include a mother (the applicant), her adult son (applicant's son) and her two minor children born in Australia. The applicant, her husband

and their son arrived in Australia in September 2012. The applicant's minor children were born in 2013 and 2016. On 28 September 2017, the applicants (including the applicant's husband) lodged a combined application for Safe Haven Enterprise Visas (SHEV).

2. On 10 June 2022, a delegate of the Minister for Immigration (the delegate) refused to grant the applicants visas on the basis that they were not persons in respect of whom Australia owes protection obligations. The delegate was not satisfied that the applicants faced a real chance of harm or were at a real risk of significant harm for any of the claimed reasons.
3. The applicant's husband was found to be an excluded fast track visa applicant under s.5(1) of the *Migration Act 1958* (the Act) and was not referred for review by the Immigration Assessment Authority (IAA).

#### **Information before the IAA**

4. I have had regard to the material given by the Secretary under s.473CB of the Act.
5. On 13 July 2022, the IAA received an email from the applicants' representative attaching several documents, including a submission and various news reports. The submission indicates that the applicants rely on previous statements and submissions and argues that the delegate did not consider their claims in conjunction with country information. The submission also restates the applicant's claims made before the delegate and refer to new country information provided to the IAA with arguments that they are to be considered under s.473DD of the Act. I have considered the submission in undertaking this review and assessment of the new information under s. 473DD of the Act.
6. The IAA has been provided with news reports published in the BBC and Aljazeera and information on the UK Home Office and DFAT Smart Traveller websites advising against non-essential travel to Sri Lanka. The news reports were published after the delegate's decision and it is submitted that they could not have been provided to the delegate. It is submitted that there have been dramatic changes in Sri Lanka, with violent protests continuing amid the country's worst economic crisis since independence in 1948 and that this information is critical in assessment of the applicants' claims and their risk of facing significant harm due to the economic situation in Sri Lanka. With reference to the information published on the UK Home Office and DFAT Smart Traveller websites, it is submitted that due to the advice against all but essential travel to Sri Lanka and reconsidering the need to travel to the country by these organisations, the current situation in Sri Lanka is such that the applicants will face significant harm due to the violence in the country.
7. The news reports and travel advise published on the UK Home Office and DFAT Smart Traveller websites were published/updated after the delegate's decision and I am satisfied that they could not have been provided to the delegate and meet the requirement under s.473DD(b)(i) of the Act. The news reports published in the BBC and Aljazeera report on the skyrocketing inflation and lack of food, petrol, and medicines due to the ongoing economic crises which is blamed on the government's economic mismanagement. The news reports indicate that the economic crises and lack of food and other essential has sparked protests, including protesters storming President Rajapaksa's official residence, and setting the Prime Minister's house on fire. These protests and violence triggered the President and the Prime Minister's agreement to step down, with President Rajapaksa agreeing to step down on 13 July 2022. Most of the news reports refer to identifiable individuals which is personal information in the relevant sense. The travel advises also refer to the impact of the current economic and political crises in Sri Lanka and advises against non-essential travel to the

country. As the information relates to very recent events in Sri Lanka and not reported in country information before the delegate, I am satisfied that this information may have affected the consideration of the applicants' claims and that there are exceptional circumstances to justify considering them. I am satisfied that the requirements under s.473DD(b) and (a) are met.

8. I have also obtained media reports published by the International Crisis Group<sup>1</sup> on 17 July 2022 and the Economist<sup>2</sup> published on 20 July 2022. These media reports provide more recent updates on the economic and political situation in Sri Lanka. I am satisfied that there are exceptional circumstances to justify considering these reports.

### **Applicants' claims for protection**

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9. In her SHEV statement, the applicant confirms that she relies on the content of her husband's SHEV statement in support of her protection claims. The applicant's son also relies on her parent's statements in so far as the information applies to him. The applicant and her son have also made claims and the applicant has raised claims on behalf of her two minor children.
10. The applicants' claims can be summarised as follows:
  - The applicants are Tamils of Hindu faith. The applicant was born in [year] in [Town 1], Sri Lanka. She married her husband in 1998 and they lived together in [Town 2], an Liberation Tigers of Tamil Eelam (LTTE) controlled area. The applicant's son was born in [year] and in 2001, the applicant's husband left Sri Lanka for [Country 1].
  - In September 2009, the applicant was arrested by the army while visiting a relative in Colombo. She was detained for seven days and asked about her and her husband's involvement with the LTTE.
  - The applicant's husband's protection visa application in [Country 1] was refused, and he was forced to return to Sri Lanka in 2011. At the airport in Colombo, the applicant's husband was detained by the Criminal Investigation Department (CID) for one night. Due to his extended stay in [Country 1], the CID suspected that he had a lot of money and asked for money. The applicant's husband refused to give them money but had to provide them with his phone number and address in order to leave the airport.
  - In less than four months the CID located the applicant and her husband in Vavuniya. They informed the applicant's husband that they were aware of his nine-year residence in [Country 1] and accused him of financially supporting the LTTE. The applicant's husband told them that he did not have permit to work in [Country 1] and convinced them to leave. The applicant and her husband left Vavuniya shortly after and moved to [Town 1] where they remained for five months and then moved to [Town 2].
  - On return to [Town 2], they realised that half of their land was occupied by the army. After about 23 days, the CID found them, told the applicant's husband that they were aware of his residence in [Country 1] and believed that he was financing the LTTE. They also told him that they were aware of the applicant's arrest in 2009 and that they could link his family with the LTTE. The applicant's husband was threatened with death if he

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<sup>1</sup> International Crisis Group (ICG), "Sri Lanka's Uprising Forces Out a President but Leaves System in Crisis", 18 July 2022, 20220719124014.

<sup>2</sup> The Economist, "In with the old - Sri Lanka picks a new president to replace the one that fled", 21 July 2022, 20220722101909.

did not give them money and was asked him to report to the CID camp in five days. The CID also referred to their son which caused the applicant and her husband to fear that their son may be kidnapped for ransom. The applicant, her husband and their son departed Sri Lanka three days later. They departed the country illegally.

- The applicant fears harm at the hands of the CID for reasons of her arrest in 2009, her residence in an LTTE controlled area and her husband's profile with the CID. She also fears that her two children born in Australia may be kidnapped by the CID due to the ongoing persecution of Tamils in Sri Lanka.
- The applicant's son was affected by the fighting during the civil war. Two of his mother's brothers died during the war. He fears being targeted by the CID for reasons of his association with his father and having grown up in an LTTE controlled area. He will be identified and targeted as a person who has lived in a western country and questioned about why he left and what he was doing in Australia.
- The applicant and her son have attended anti-Sri Lankan government protests in Australia and fear that they will be targeted for this reason. If returned to Sri Lanka, the applicant will not be able to exercise her right to protest and speak out against the government.

## **Refugee assessment**

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11. 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**

12. 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.
13. The applicant and her son have consistently claimed to have been born in Sri Lanka and are citizens of Sri Lanka. They provided the delegate with their Sri Lankan birth certificates and the applicant's national identity card and marriage certificate. I accept that Sri Lanka is their receiving country for the purposes of this review.

14. The applicant's minor children were born in Australia in 2013 and 2016. The family's combined SHEV application does not specify the minor children's citizenship but indicates that their parents are Sri Lankan citizens. DFAT<sup>3</sup> reports that children born overseas to a Sri Lankan citizen can have their birth registered at a Sri Lankan diplomatic mission in the country of their birth or at the office of the responsible government minister in Sri Lanka in order to receive Sri Lankan citizenship. As indicated by the delegate, there is no information to indicate that the minor children's birth in Australia has been registered with the Sri Lankan authorities and they may be considered stateless. However, as the applicant and her husband are Sri Lankan citizens and have evidence of their Sri Lankan marriage certificate and their children's Australian birth certificates, the applicant may apply to obtain her children's Sri Lankan citizenship in Australia or if returned to Sri Lanka. The Refugee Law Guidelines indicate that a child who does not have a nationality but whose parents have either a country of nationality or country of former habitual residence should have their claims assessed against that country. As the applicant and her husband are both nationals of Sri Lanka, Sri Lanka is also the minor children's receiving country for the purposes of this review.
15. The applicants have consistently claimed, and I accept, that they are of Tamil ethnicity. I also accept that they are of Hindu religion but have not made any claims based on their religion.
16. I accept that the applicant was born in [Town 1] and married her husband in 1998. I accept that they resided in [Town 2] an area controlled by the LTTE during the war, and that their son was also born and grew up in the area until their departure in 2012. It is claimed, and I accept, that in 2001 the applicant's husband left Sri Lanka with the assistance of an agent and made the journey to [Country 1]. I accept that the applicant and her son were to join her husband in [Country 1] after he obtained a visa, which did not occur. It has consistently been claimed, and I accept, that the applicant's husband remained in [Country 1] until 2011 when he exhausted all avenues of obtaining a protection visa and was forced to return to Sri Lanka.
17. Apart from having lived in an LTTE controlled area, the applicant nor her husband have claimed that they were supporters of or were involved with the LTTE prior to the applicant's husband's departure from the country in 2001. The evidence before me also indicates that while residing in [Country 1], the applicant's husband did not provide any financial support to the LTTE nor was involved in any activities with the LTTE or other pro-Tamil organisations. While it is claimed that two of the applicant's brothers were killed during the war, which I accept, there is no suggestion that they were associated with or were members of the LTTE or that they were killed for these reasons. It appears that they were victims of the longstanding civil war which claimed the lives of many Tamils.
18. It is claimed that on return to Sri Lanka in October 2011, the applicant's husband was approached and interviewed by the CID. He was detained overnight, was told that given his extensive stay in [Country 1] he had money and was asked for money, which he refused to provide. He was required to provide his phone number and address in order to leave the airport.
19. The applicant her husband and son were interviewed by the delegate on 29 April 2021. During the SHEV interview, the applicant's husband was questioned about his interactions with the CID following his return from [Country 1]. He confirmed that he refused to give money to the CID officers at the airport but had to give his details in order to leave the airport. He stated that while living in Vavuniya the CID found him, asked him for money and

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<sup>3</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

threatened to shoot him if he did not give them money. He claimed that they fled to [Town 1] out of fear and that the CID and the police found him again. They came in a white van and told him that he had lived in [Country 1] for a long time and assisted the LTTE financially. When asked about what happened next, the applicant's husband stated that they said that and left. When asked given that they suspected him of helping the LTTE and wanted money why did they just leave without taking any further action, the applicant's husband stated that they told him if he was not going to give them money today, they would come back on another occasion and that he should have the money ready or he would be shot. He stated he had not seen these people on any prior occasion and that they did not inform him when they were coming back. The applicant's husband stated that they decided to leave the area and went to [Town 2]. The applicant's husband could not recall when the CID visited him in [Town 1] and referred to having been found in [Town 2] after 20 days when he was told that he had to report to the CID in five days' time and that they fled the country within three days. When asked if the CID actually thought that he financed the LTTE or were they just using that to extort money from him, the applicant's husband stated that they knew that many people from [Country 1] assisted the LTTE and that the CID were using that thinking that he would give them money. He confirmed that he was not arrested and that some unknown CID officers just wanted to extort money from him.

20. The applicant's husband was referred to evidence he provided during his arrival interview held on 15 September 2012 and transferee interview held on 1 February 2013. It was put to him that during his arrival interview he indicated that the reason he left Sri Lanka was because the government did not let him live on his land where he used to live and that he did not mention threats or harassment by the CID. The applicant's husband confirmed that the army took over half of their land but stated that it was problems with the CID that caused them to depart the country. When asked why he didn't mention this at his first interview, the applicant's husband stated at that time he did not have the knowledge of what to say, they were broken, worried, anxious and forgot to say certain things. The delegate also referred him to his evidence during his transferee interview held on 1 February 2013 and observed that at that time he indicated that he was threatened by the CID once in November 2011 by phone and that after he changed his SIM card, he didn't hear from them again. In response the applicant's husband stated that he did change his SIM card, but the CID got his details and continued to pursue him.
21. During the SHEV interview, the applicant was also referred to her transferee interview, during which she stated that they departed Sri Lanka because the army occupied their land and were harassing her and that it was impossible for them to live there. The delegate observed that she did not mention the CID or that they were after her husband. The applicant stated that at the time of the interview "we were unwell" and full of fear of whether we would be deported and that they didn't know how to answer the questions.
22. In her SHEV statement, the applicant claims that during the civil war she was arrested in Colombo while on a trip to visit relatives. She claims that she was staying in a hotel with a friend when she was arrested by the army and placed in jail for under a month. The applicant states that because she lived in an LTTE controlled area she was suspected of having been involved with the LTTE. The applicant enclosed a copy of a document, "receipt of arrest" dated [in] September 2009 which indicates that was arrested on that date for "17 hrs.45mts" at "[a named accommodation place]" with the reason for the arrest noted as "in connection with terrorist activities". At the SHEV interview, the applicant stated that she was arrested after the army took control of all areas and was accused of having helped the LTTE because she lived in an LTTE controlled area and her husband went overseas which caused them to believe that he was assisting the LTTE from overseas. She stated that she was questioned for

five to six hours and then jailed for about a month. The delegate referred to the applicant's evidence about her arrest during her transferee interview held on 1 February 2013. The delegate observed that during that interview the applicant stated that in 2009 when residing at an IDP camp her son got sick and she was given permission to leave the camp to get medical assistance after which she did not return to the camp as required and went to stay with a relative causing her arrest. She also stated that she was detained for seven days and released without charge with the assistance of a lawyer. The applicant stated that she was just relaying what was on the document relating to her arrest and that she may have been detained for only seven days.

23. During his SHEV interview, the applicant's husband also stated that while he was overseas, the applicant assisted the LTTE with providing them with food and assistance with wounded LTTE officers. This is a claim that was not raised prior to the SHEV interview or by the applicant in her SHEV application or interview.
24. On 19 April 2022, the applicant's husband was sent an invitation under s.57 of the Act requesting his comments regarding the discrepancies in his and the applicant's evidence about the applicant's arrest in 2009. The invitation referred to the applicant's husband's evidence at the SHEV interview that his wife was arrested by the CID because they believed she had information about his support of the LTTE. The invitation pointed out that this was inconsistent with the applicant's evidence at her transferee interview and that this may lead the delegate to find that the applicant was not arrested for reasons of her husband's profile but for not returning to the IDP camp after obtaining medical assistance for her son. The invitation letter also pointed to the applicant's husband's evidence that the applicant assisted the LTTE by providing them food and medical assistance and that this claim was not raised by the applicant at any time.
25. The applicant responded to the s.57 invitation directed to her husband. In her response she indicated that she was detained for seven days not a month as previously claimed and that she was asked about her and her husband's involvement with the LTTE, which was nothing unusual for the CID to ask about.
26. At the Conclusion of the interview the differences in the applicant's husband's evidence regarding his interactions with the CID was put to the applicant, applicant's son and husband with the delegate expressing that these inconsistencies, together with the problems regarding the applicant's evidence about her arrest in 2009, made it difficult for him to accept that the family departed Sri Lanka for reasons claimed or that the CID problems was the motivation for their departure from Sri Lanka. No further comments or explanations were provided by the applicant or her husband in this regard.
27. In light of the above, I accept that the applicant was arrested and detained for seven days in September 2009. I accept that this occurred in Colombo and that she was released after seven days without being charged and allowed to return to her place of residence. While I do not accept that the applicant was suspected of having LTTE links due to her husband who had been away from the country for over eight years, I consider it plausible that during her detention she was questioned about her involvement with the LTTE, as she had resided in an LTTE controlled area during the civil war, and possibly about her husband and whether he was assisting the LTTE from overseas. Country information<sup>4</sup> indicates that during and in the years after the end of the civil war, many Tamils, particularly in the north and east, reported

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<sup>4</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

being harassed, threatened, and arrested by security forces which suspected them of links with the LTTE, based largely on their ethnicity and place of residence. Given the country information and as submitted by the applicant, it was not unusual for the Sri Lankan authorities to question Tamils, particularly those who resided in LTTE controlled areas, about their involvement with the LTTE during the war. Like the delegate, I am also of the view that the applicant was arrested due to her failure to return to the IDP camp after seeking medical assistance for her son, rather than due to the CID or the army having information about her husband or suspicion that they were assisting the LTTE. The applicant was released without charge and there is no credible evidence to indicate that she was approached by the CID or the army or security forces after this incident prior to her husband's return to Sri Lanka in 2011 or that she was the subject of further questioning or harassment in this regard.

28. I consider it plausible that on return to Colombo in 2011, the applicant's husband was interviewed at the airport and because of his extended period of stay in [Country 1], the officers at the airport believed that he was wealthy and asked him for money. The applicant's husband's evidence, which I accept, is that he refused to give them money and was released from the airport after providing his contact details. As outlined above, there were a number of discrepancies in the applicant's husband's evidence regarding his subsequent claimed interactions with the CID. There are significant differences about the threats he claims to have received, while he initially claimed that he received a call a few weeks after his arrival requesting money he did not hear from the people after he changed his SIM card, his evidence during his SHEV application has been that he was pursued until his departure in 2012, including having been visited by CID officers who arrived in a white van at his place in [Town 1 variant] but left without harming or arresting him and that he was also visited at his place at [Town 2], days prior to his departure and asked to visit the CID camp in five days' time. Like the delegate, I have difficulty accepting that if the CID suspected him of assisting the LTTE while overseas or that they had information about this, that they would not have arrested, interrogated or taken further action in this regard. The applicant's husband's evidence at the SHEV interview was also that the CID officers he claims to have visited him were unknown to him and that they may have told him that they can link his family with the LTTE in order to extort money from him, suggesting that he also believed that the unknown people seeking money from him did not have any information about him assisting the LTTE. Overall, on the evidence before me, while I accept that the applicant's husband was asked for money at the airport which he refused to provide, he was allowed to return to his family after providing his contact details and that he may have been called a few weeks later by some officers asking him for money, I place more weight on his evidence during his earlier interviews that after he changed his SIM card he did not hear from these officers. I also consider that if the applicant was pursued by the CID as claimed, that he or the applicant would have mentioned this as part of their reasons for departing Sri Lanka when interviewed shortly after their arrival. I am not persuaded by the applicant and her husband's explanations about why they did not refer to these issues. While I accept that they may have been worried about being deported and were anxious, I am not satisfied that if the applicant's husband was threatened with death by the CID days prior to their departure and this prompted their immediate escape from the country, that they would not have mentioned this during their transferee interviews. On the evidence before me I am not satisfied that the CID pursued the applicant's husband for months after his return to Sri Lanka or that he was suspected of having any links to the LTTE or that he supported the LTTE while overseas. I am not satisfied that he was told that his wife's arrest in 2009 and his extended stay in [Country 1] caused the CID to suspect him of assisting the LTTE or that he was threatened with death or abduction of his son if he did not provide them with money. The applicant, her husband and son resided in a number of places after the husband's return from [Country 1] and I am not satisfied that they had any adverse profile of interest with the CID or



Sri Lankan authorities at the time of their departure in 2012. The applicant's evidence at the SHEV interview that the applicant assisted the LTTE during the war was not raised by the applicant at any time nor did she respond to this issue in her response to the s.57 invitation addressed to her husband. I do not accept this claim raised only by the applicant's husband at the SHEV interview to be credible.

29. It is claimed that when the applicant and her family went to [Town 2], half of their land was occupied by the army where they set up camp. The applicant's husband's SHEV statement indicates that the army seized their land during the civil war but was starting to give it back to the Tamils. At the conclusion of the SHEV interview the applicant stated that their land was still occupied by the army. In his statement dated 27 April 2021, the applicant's husband states that he had been told by neighbours and relatives that the army still occupying their land and if forced to return to Sri Lanka they would have to live next to army and would be in constant danger. The 2019 DFAT report<sup>5</sup> indicates that the military appropriated substantial amounts of private and state-held land in the northern and eastern provinces during and after the civil war in order to establish bases and associated buffer zones. As part of its transitional justice efforts, in 2015 the former Sirisena government pledged to return all land appropriated by the military. DFAT reports that according to the Sri Lankan government, as of 2 April 2019, more than 75 per cent of land held by the military had been released. Delays in releasing remaining land has been attributed to complexity and financial cost associated with closing bases and relocating military personnel elsewhere. Incremental land return had continued and in cases where land is not returned due to national security reasons, the government committed to paying compensation to those affected. More recent reports<sup>6</sup> indicate that the return of military occupied land in the northern and eastern provinces has progressed with 92.22 percent of private land held in 2009 returned by 31 December 2019.
30. I accept that when the applicant and her husband returned to [Town 2] in 2012, half of their land was occupied by the army base. Country information indicates that majority of military occupied land has been returned in the northern and eastern provinces and that in cases where the land hasn't been returned due to security reasons, the government committed to pay compensation. While the applicant and her husband claim that their land is still occupied by the army, no recent credible evidence has been provided to support their assertions. There is no indication that their land would still be occupied for national security reasons and given the that the army only occupied half of the land and the country information indicating that over 90 per cent of the occupied land has been returned, I am not satisfied that the applicant's land remains under the control of the army as claimed. Even if I were to accept that half of the applicant's husband's land remain in control of the army, I am not satisfied that they will not be able to utilise the unoccupied part of their land or that they have a profile such that they would be in danger if returned to their land. I am not that this amounts to serious harm as defined in the Act.
31. In statements provided to the delegate two days prior to their SHEV interviews, the applicant, and her son, claim that they had been attending protests in Australia and fear harm on that basis. In her statement the applicant states that during her time in Australia, she had been politically active and attended protests against the Sri Lankan government, with the most recent protest taking place last month (March 2021) and that she attended with her husband and son. She also claims that if returned to Sri Lanka she would not be able to exercise her right to protest and speak against the government. The applicant's son's statement also

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<sup>5</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

<sup>6</sup> Report of the Office of the High Commissioner for Human Rights (OHCHR), 'Promotion reconciliation, accountability and human rights in Sri Lanka, 27 January 2021, 20210203162131; US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

indicates that he had attended protests with his parents, most recently last month (March 2021) and that he would be targeted for his involvement in anti-government rallies.

32. At the SHEV interview, the applicant, her son, and husband were asked about their political involvement and activities in Australia. The applicant stated that may have attended four or five protests and that when they are contacted, they go and that her husband also attends. When asked how many protests she attended with her husband, the applicant stated maybe two or three and that she could not recall which protests they were. When asked when the first protest she attended was, she said that she could not recall but maybe it was last year. When asked about the last protest she attended, she stated it was recent, she believed it was in February of 2020 and that she attended with her husband and two young children. When asked where it was held, she could not recall any details such as the building Infront of which the protest may have occurred or who she met there. The applicant's son stated that they attended protests to stay in Australia and regarding issues that were happening in Sri Lanka. When asked how many protests he attended, he said that he could not recall, maybe two or three times, and that he attended with his parents on one occasion. When asked about when he attended protests alone, he stated that he could not recall, maybe around 2019, and that he did not know who organised it but heard about it from the Tamil Refugee Council. The applicant's son stated that the "main person" whose name he did not know came to his house and asked him to join the Tamil Refugee Council and that he at times assisted with delivering food to Tamil refugees during COVID. When asked about the protest he attended with his parents, the applicant's son stated that the last protest he attended was in 2019. He confirmed that he had no evidence of his attendance at these protests and did not know if the Sri Lankan authorities would know of his attendance. The applicant's husband stated that he had attended processions and participated in Martyrs Day and Independence Day celebrations. He stated that he participated in a protest about one and a half month ago, and that they all went including small children and that he had no evidence of his attendance as they were not allowed to take photos.
33. At the conclusion of the interview, the delegate put to the applicant, her son, and her husband that he had difficulty accepted that they had attended any protests in Australia or that they had any political profile. The delegate outlines that the applicant's son stated that he attended a protest with his parents in 2019, which is inconsistent with the applicant's husband's evidence that they all attended a protest about a month ago and again inconsistent with the applicant's evidence that they attended a protest in February 2020. The delegate also stated that the details they provided were vague, lacked detail and unconvincing and that any limited participation they may have had do not appear to be significant to place them at a risk of harm if returned to Sri Lanka. The applicant's husband and son's response were that people involved in protests in Australia do have a profile with the Sri Lankan government and that the government do not disclose this to others.
34. Like the delegate, I found the applicant, her son's, and her husband's evidence about their claimed participation in protests/rallies against the Sri Lankan government extremely problematic and unconvincing. While it may be the case that the applicant, her son, or her husband may have attended some rallies in Australia relating to Tamil refugees, I am not at all satisfied that they have been politically active, involved in any such activities that would be of any concern to the Sri Lankan authorities, or that the Sri Lankan authorities have become aware of their activities in Australia. Given their evidence and very limited participation at rallies, or other Tamil/refugee related events, I am also not satisfied that the applicant or her son have any desire or commitment to express their political opinion in Australia or if returned to Sri Lanka, or that they would refrain from doing so for fear of persecution.

35. Country information<sup>7</sup> before me indicates that the security and situation for Tamils in Sri Lanka has improved significantly since the end of civil war in May 2009 and the applicant's family's departure from Sri Lanka in 2012. After the 2015 election, President Sirisena promised a new era of "clean" government and embarked upon a path of reconciliation with the Tamil minority. The government committed to implementing a range of truth, justice and reconciliation measures under the UN Human Rights Council resolution. Many initiatives markedly improved the lives of Tamils in Sri Lanka, which included the recognition of both Sinhala and Tamil as the official languages of the country; the lifting of restrictions on travel to the north and east of the country; the freeing of civilian land from military control; the release of some individuals detained under the PTA and the government's public commitment to reducing military involvement in civilian activities. Such measures resulted in a decrease in the number of Tamils held in detention, reduced incidents of extrajudicial killing, disappearances, abductions, extortion and kidnapping for ransom.
36. DFAT<sup>8</sup> reports that the Sirisena government faced a constitutional crisis when the President briefly appointed Mahinda Rajapaksa as his Prime Minister in a move that was not approved by the parliament. As Mahinda Rajapaksa's 10-year presidency, between 2005 and 2015, was marked by accusations of corruption and human rights violations including war crimes against Tamils, both Tamils and non-Tamils expressed concerns that human rights improvements achieved since 2015 would be reversed if the Rajapaksa came into power. The election held in November 2019, saw Gotabaya Rajapaksa become the new President. The 2020 parliamentary election, reported to be mostly credible, resulted in a two-third majority in the Sri Lankan parliament led by Prime Minister Mahinda Rajapaksa. It is reported that following the election of Rajapaksa, the progress made under the Sirisena government was seen to have reversed in direction with threats of return to the patterns of discrimination and widespread violation of human rights experienced in the past decade. Local sources expressed concern about the militarisation of the civilian government under the Rajapaksa government and increasing use of the PTA to silence critics of the government. International organisations have expressed concerns about the Sri Lankan government seeking to stifle and suppress critics with knowledge of historical abuses during the war. The 2021 DFAT report<sup>9</sup> indicates that the government no longer restricts travel to these areas. It removed security checkpoints on major roads in 2015. Security checkpoints established in response to Easter 2019 bombings have also been removed with roadblocks re-established in 2020-21 in response to COVID-19 and drug trafficking. It is reported that military involvement in civilian life has decreased overall since the end of the war, although some military involvement in some civilian activities, particularly the economy, continues in the north. The 2021 DFAT report also indicates that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the war and that Sri Lankans face a low risk of torture overall, with those detained facing a moderate risk of torture. While the information indicates that those detained face a moderate risk of torture, given my findings, I am not satisfied that the applicant or her children are at a real risk of detention or torture.
37. DFAT<sup>10</sup> reported that in 2020, the World Bank classified Sri Lanka as a lower middle-income country, downgrading it from upper middle-income status. Amid the COVID-19 pandemic,

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<sup>7</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; OHCHR, 'Promotion reconciliation, accountability and human rights in Sri Lanka, 27 January 2021, 20210203162131; US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

<sup>8</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>9</sup>DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>10</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

government measures negatively impacted sectors such as tourism, construction, and transport. In 2021, Sri Lanka's economy was further troubled by the country's low foreign-exchange reserves and high and rising government debts. The government's severe restrictions in imports to reduce use of foreign reserves resulted in soaring prices for food stuff. The news articles supplied by the applicant report on the skyrocketing inflation and lack of food, petrol, and medicines due to the ongoing economic crises which is blamed on the government's economic mismanagement. The news reports indicate that the economic crises and lack of food and other essential has sparked protests, including protesters storming President Rajapaksa's official residence, and setting the Prime Minister's house on fire. These protests and violence triggered the President and the Prime Minister's (Ranil Wickremesinghe who replaced Mahinda Rajapaksa on 11 May 2020) agreement to step down, with President Rajapaksa agreeing to step down on 13 July 2022. The travel advises also refer to the impact of the current economic and political crises in Sri Lanka and advises against non-essential travel to the country. More recent reports<sup>11</sup> indicate that demonstrators had directed anger at the newly appointed Prime Minister's failure to deliver on his promise of political stability and efficient economic management and that on 13 July 2022, President Rajapaksa and his wife fled Sri Lanka for Singapore from where he resigned. On 15 July 2022, Ranil Wickremesinghe was sworn in as acting President and was officially elected by a clear majority on 20 July 2022. He is expected to serve out the remainder of Mr Rajapaksa's term, which ends in 2024. It is reported that the new President has tried to sound conciliatory and has acknowledged that the country is in deep trouble and that the young people were demanding "systemic change". Before his election, the President had begun to curtail some of the powers of the Sri Lanka's mighty executive presidency and that he is likely to stick to a programme of economic reform which he had begun to implement as the Prime Minister.

38. I accept that the return of the Rajapaksa government resulted in many Tamils feeling anxious about the possible reversion of policies around human rights and reconciliation and media has reported that certain groups such as journalists, political activist and those considered to be involved in regrouping of the LTTE have encountered harassment, arrest and detention, information regarding the situation for Tamils post 2019 election does not indicate that the result of the elections marked the return of an anti-Tamil agenda or that the government has an intention to re-introduce restrictions on Tamils' daily lives. The applicant nor any members of her family fit the profile of persons, such as activists or journalists that the country information reports indicate are at a greater risk of harassment and monitoring. While the applicant claims that her family have reported that the situation has become worse since the 2019 election, she has not provided any details of her family having faced any harassment, discrimination or harm under the Rajapaksa government. I also accept that Sri Lanka is facing a challenging economic and political situation which is still unfolding. The reports before me indicate that the recent protests in response to the current economic situation in Sri Lanka and resentment towards the government's management of the situation is projected by all Sri Lankans uniting the whole of the population and there is no indication that the government response to widespread protests, aimed at the government, have targeted Tamils, or that allocation of resources are applied in a disproportionate or discriminatory manner towards any ethnicity or religious group, or that people of the applicant and her family members profile have been targeted. The information indicates that despite the change of Presidency, the government is planning to continue to work towards resolution and addressing the current very difficult economic and political situation and acknowledges the people's demand for systematic change. While the UK Home Office and DFAT Smart

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<sup>11</sup> International Crisis Group (ICG), "Sri Lanka's Uprising Forces Out a President but Leaves System in Crisis", 18 July 2022, 20220719124014; The Economist, "In with the old - Sri Lanka picks a new president to replace the one that fled", 21 July 2022, 20220722101909.

Traveller reflect the situation in Sri Lanka and advise against non-essential travel to Sri Lanka, the information is not supportive of any conclusions that Tamils or people of the applicant and her family's profile would be at a real risk of harm for any convention reasons.

39. Country information indicates that Tamils are the second largest ethnic group in Sri Lanka.<sup>12</sup> The 2021 DFAT report indicates that Tamil political parties are active, with the largest coalition of parties operating under the umbrella of the TNA. In the 2020 parliamentary election the TNA won 10 seats and that there are two Tamil parties in the government. While some members of the Tamil community report discrimination in employment, particularly in government jobs, other sources suggest that this is because Tamils speak neither Sinhala or English and DFAT assesses that there is no official discrimination on the basis of ethnicity in public sector employment. It is reported that members of the Tamil community and NGOs report that the authorities monitor public gatherings and protests in the north and east, security forces are more likely to monitor people associated with politically sensitive issues, including relating to the war or missing persons. While DFAT assesses that surveillance of Tamils in the north and east continues, with particular surveillance of those associated with politically sensitive issues, it concludes that physical violence against those being monitored is not common, and that ordinary Tamils living in the north and east of the country are a low risk of official harassment. DFAT also reports that while the LTTE was comprehensively defeated in May 2009, Sri Lankan authorities remain concerned over its potential re-emergence, and to separatist tendencies in general. DFAT assesses that while they may be monitored, Tamils with former links with the LTTE, and those who are not politically active, are generally able to lead their lives without concern for the security as a result of their past association with the LTTE, with the government focusing on Tamil activities in the diaspora who are working for Tamil separatism to destabilise the government and that monitoring of Tamil diaspora returning to Sri Lanka depends on their security risk profile.
40. In her statement to the delegate dated 27 April 2021, the applicant refers to recent abduction of two Tamil children by the CID after being accused of supporting the LTTE and claims that she fears her two children born in Australia would be kidnapped. The applicant has not provided any news reports of the claimed recent incident or any further details or evidence in support that her two young children would be kidnapped by the CID. In light of my findings about the applicant and her husband's profile with the CID and considering the country information cited above, I am not satisfied that the applicant's minor children face a real chance of kidnaping by the CID or will be harmed for the reasons claimed.
41. The applicant and her family were not of any adverse interest to the Sri Lankan authorities at the time of their departure in 2012 and I am not satisfied that they have been involved in any politically sensitive activities that would be of concern or considered as security risk to the Sri Lankan authorities or that would result in their ongoing harassment or monitoring if returned to Sri Lanka.
42. Overall, I am not satisfied that the applicants would face a real chance harm for reasons of their Tamil ethnicity, have resided in a former LTTE controlled area during the civil war or that they have any adverse actual or imputed political profile that would result in them facing any harm or ongoing harassment or monitoring. On the information before me, I am also not satisfied that Tamils, or persons of the applicants' profile, are facing any systematic or discriminatory treatment or conduct due to Sri Lanka's current financial or political crises that amounts to persecution for the purposes of s.5J of the Act.

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<sup>12</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

43. The applicant and her son claims, and I accept, that they departed Sri Lanka in 2012 illegally and that they do not have a valid Sri Lankan passport. The applicant's minor children were born in Australia and do not have Sri Lankan passports. The applicant and her son claim to fear harm on the basis of their illegal departure and the applicant's son claims that if returned to Sri Lanka, he would be identified and targeted as a person who lived outside of Sri Lanka in a western country and would be asked why he left and what he has been doing in Australia.
44. DFAT<sup>13</sup> indicates that Sri Lankans without passports can re-enter the country on temporary travel documents, also known as an Emergency Passport or a Non-Machine-Readable Passport, issued by diplomatic and consular missions and valid for re-entry to Sri Lanka. Given that the applicant is no longer in possession of his passport he may well be returning to Sri Lanka on temporary travel documents. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. DFAT is not aware of detainees being subjected to mistreatment during processing at the airport.
45. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). According to DFAT<sup>14</sup> persons who departed Sri Lanka illegally, are very likely to be questioned at the airport, have their criminal history checked and be charged under the I&E Act. DFAT reports that minimum age for criminal responsibility is 12, and that no charges are imposed on children who are younger than 12 at the time of the alleged offence. At the time of their departure in 2012, the applicant was an adult, and her son was 12 years old, and therefore they are likely to be charged under the I&E Act. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine, though DFAT indicates that it is unaware of a prison sentence being given for illegal departure by itself. Those charged are required to appear in court in the location where the matter was first heard, reportedly Negombo Courts, near the airport, which involves legal and transport costs. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the I&E Act appear in court every 3-6 months, regardless of their plea and that cases of those charged with illegal departure may take years to resolve, requiring on-going court appearances.
46. The 2020 UK Home Office report<sup>15</sup> indicates that claiming asylum abroad is not an offence and as such when someone returns to Sri Lanka who has been absent for a number of years, they would not be questioned on this and that there are no media reports on returnees interrogated on this ground. The report also indicates that there is no distinction in treatment of returnees based on ethnicity and only those with outstanding criminal offences are of interest to the authorities. The information before does not support the applicant's son's assertion that he would be targeted having lived in a western country. While he may be questioned to establish his identity or criminal background, he left Sri Lanka when he was a child and, on the information provided I am not satisfied that he has engaged in any activities that is known to or would be of concern to the Sri Lankan authorities placing him at a real risk of being targeted or facing continued harassment or monitoring. The information before me also does not support that the applicants, having spent an extended period in Australia, would be at a real risk of being perceived as wealthy or harassed for this reason if returned to Sri Lanka.

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<sup>13</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>14</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

<sup>15</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

47. In relation to the applicants facing any harm for reasons of having sought asylum in Australia, DFAT<sup>16</sup> notes that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from Australian community. It is reported that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis or are treated in such a way that endangers their safety or security. DFAT<sup>17</sup> reported that returnees faced financial difficulties reintegrating into their communities' potential challenges in securing employment or reliable housing on return. Those with skills in high demand in the labour market were best placed to find well-paid employment and eligible returnees have been provided with livelihood assistance and regular welfare checks. The information before me do not indicate that there has been a shift in the treatment of returnees due to the current political and economic situation or that persons of the applicants' profile would be at a greater risk of mistreatment or harassment for having sought asylum or due to their extended absence from the country.
48. Societal discrimination is not considered a major concern and DFAT assesses that returnees face a low risk of societal discrimination on return to their communities. It is reported that some Tamils who have failed to secure asylum in Australia and since returned to the northern province told DFAT that they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits, but DFAT could not determine if this was the case for all returnees. Given the applicants profile, I consider the chance of him being of any ongoing interest to the authorities to be no more than remote. The applicant has family and relatives residing in Sri Lanka. She will be returning with her children, including her adult son educated in Australia. She has not claimed that she will be returning to Sri Lanka without her husband, and I note that they have property in Sri Lanka. Considering the applicants' background and circumstances, I am not satisfied that there is a real chance the applicant or her son's s capacity to subsist would be threatened and consider any societal discrimination that the applicants may face does not to amount to serious harm.
49. Having regard to all the evidence before me and considering the applicants' overall profile and the totality of their circumstances in the context of the country information, I am not satisfied that the applicants face a real chance of persecution in the foreseeable future if returned to Sri Lanka. I am not satisfied that the applicants have a well-founded fear of persecution within the meaning of s.5(J) of the Act.

#### **Refugee: conclusion**

50. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

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51. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

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

<sup>17</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

## Real risk of significant harm

52. 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.
53. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
54. I accept that on return to Sri Lanka the applicant and her son will very likely be subjected to an investigation process on arrival and charged under the E&I Act. I am not satisfied that there is a real risk they would be identified as persons of interest or otherwise be harmed during this process. Considering the country information cited above, I am not satisfied that the arrival process or the applicant and her son being charged for reasons of their illegal departure would involve the level of pain, suffering or humiliation or degrading treatment or punishment. I also find that the treatment they likely face due to their illegal departure does not involve the requisite intention to inflict pain or suffering or to cause humiliation, arbitrary deprivation of their life, or death penalty to amount to significant harm as defined.
55. Considering the country information about difficulties that a person returning to Sri Lanka may face on return, I also accept that the applicants may face some low-level societal discrimination as a returning asylum seeker and may face some challenges to re-establish themselves particularly if half of their land has remained occupied by the army as claimed. However, I do not consider that the difficulties that the applicants may encounter as returned asylum seekers or due to the occupation of half of their land amounts to a level of pain, suffering or humiliation required by the definition of torture in s.5(1) of the Act, nor cruel or inhuman or degrading treatment or punishment, or arbitrarily deprivation of their lives or be subject to the death penalty or tortured such as to amount to significant harm as defined in s.36(2A) of the Act.
56. I accept that the current economic situation in Sri Lanka may also have some adverse impact on the applicants' ability to re-establish themselves. As noted above, the current economic and political situation in Sri Lanka has caused difficulties and shortages of essentials that impact the population as a whole and is not a matter faced by the applicants personally. On the evidence before me, I am not satisfied that any difficulties that the applicants may experience due to these conditions would amount to significant harm as defined. I am not satisfied that, there is an intention to inflict pain or suffering that can reasonably be regarded as cruel and inhuman in nature, severe pain or suffering or an intention to cause extreme humiliation such as to meet the definitions of torture or cruel or inhumane treatment or punishment or degrading treatment or punishment. I am also not satisfied that the applicants will face a real risk of being arbitrarily deprived of their lives or be subject to the death penalty or tortured.



57. I have found above that there is otherwise no real chance of the applicants facing any harm. The Federal Court<sup>18</sup> has held that ‘real risk’ imposes the same standards as the ‘real chance’ test. Having regard to my findings and reasoning above I am also satisfied that the applicants do not face a real risk of significant harm.
58. I am not satisfied that there is a real risk that the applicants will suffer significant harm in Sri Lanka.

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

59. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

#### **Member of same family unit**

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60. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression ‘member of the family unit’ is defined in r.1.12 of the Migration Regulations 1994 to include dependent children.
61. However, as none of applicants meet the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

#### **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

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<sup>18</sup> MIAC v SZQRB (2013) 210 FCR 505.

## Applicable law

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### **Migration Act 1958**

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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

...

### 5J Meaning of well-founded fear of persecution

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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