



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10351

Date and time of decision: 27 September 2022 09:15:00
M Oakman, 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 a stateless Tamil Hindu of Sri Lankan descent from India. He arrived in Australia on [date] April 2013 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 3 May 2017. On 11 January 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa.
2. In the event, the decision made by the delegate on 11 January 2021 to refuse to grant the applicant a visa was only referred to the IAA for review on 25 July 2022.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 8 August 2022 the IAA received an email from the applicant with submissions and further information attached.
5. In the submissions the applicant criticises aspects of the delegate's decision, including the findings that he left Sri Lanka illegally, that he was not stateless, and refers to recent political upheaval in Sri Lanka. To the extent the submissions discuss material that was before the delegate, and contain argument, I consider this does not constitute new information.
6. The applicant also refers to a media article dated 1 August 2022 in relation to the recent upheaval in Sri Lanka. The media article post-dates the delegate's decision. It is not personal information in the s.473DD sense. However, the article provides some commentary on political developments that have only arisen since the date of the delegate's decision. I am satisfied that s.473DD(b)(i) is met and that there are exceptional circumstances to justify considering the media article.
7. I have obtained eight country information reports which were not in the review material and are new information. These are a reports of the Department of Foreign Affairs and Trade (DFAT) from December 2021 about country conditions in Sri Lanka, and from December 2020 about country conditions in India; a report of the UK Home Office (UKHO) from June 2021 about Sri Lanka and Tamil separatism; a report of the US Department of State (USDOS) from April 2022 about human rights practices in Sri Lanka; a report of the United Nations Human Rights Council (UNHRC) from September 2022 in relation to human rights and the current situation in Sri Lanka; a report of the World Food Programme (WFP) from July 2022 concerning Sri Lanka; and reports of the United Nations Office for the Co-ordination for Humanitarian Affairs (OCHA) from August and September 2022 on the situation in Sri Lanka. Given the time that elapsed between the delegate's decision and the referral of the matter to the IAA for review, together with the delegate not considering the applicant's protection claims in relation to India, I am satisfied there are exceptional circumstances to justify considering this new country information.
8. On 8 September 2022 the IAA wrote to the applicant and invited him to provide new information in relation to the DFAT, USDOS, UKHO, UNHRC, OCHA and WFP reports. A full copy of each report was provided to the applicant. The invitation specified that he should respond by 22 September 2022. On 22 September 2022 the IAA received an email from the applicant with a response to the IAA's invitation attached. To the extent that the applicant's response

contains new information, I am satisfied it could not have been provided prior to the IAA's invitation which post-dates the delegate's decision, and where it contains new information that is personal information, it is credible personal information that may have affected the consideration of the applicant's claims. I am also satisfied there are exceptional circumstances to justify considering the new information provided by the applicant in response to the IAA's invitation.

Applicant's claims for protection

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

- He has never been to Sri Lanka and has no familial support there, especially as he has lived outside of Sri Lanka all of his life and his parents are now both deceased.
- His parents lived in areas formerly controlled by the Liberation Tigers of Tamil Eelam (LTTE).
- He is Tamil by extraction although he was born in Tamil Nadu in a refugee camp.
- His father was involved in the LTTE causing the applicant's father and mother to leave Sri Lanka in 1990.
- He will be seriously harmed if he is returned to Sri Lanka and will be perceived to be a member of the LTTE.
- He was affected by the data breach in 2014.
- He participated in a protest against the civil war.
- He has no entitlement to live in India where he lived the majority of his life. He will not be able to obtain Indian citizenship.

Factual findings

Background

10. The applicant was born in Tamil Nadu, India, in [year]. He grew up and lived in Sri Lankan Tamil refugee camps in Tamil Nadu until he left India in 2013. He is single and has no children. His father and mother are deceased. He has [siblings] in India, living with his uncle's (mother's brother) family. The applicant attended school in India up to Year 12 [and] then completed a [degree]. He worked in India as a casual labourer after completing his studies and until he left India (2011-2013). He has worked in Australia as a casual [worker] since about 2018. The applicant is Tamil and Hindu. He reads, write, and speaks Tamil and English (limited).

Problems in Sri Lanka and life in India

11. In summary, the applicant claims that in the riots which took place in 1990 in Sri Lanka his father and mother lost their families. His parents travelled to India in 1990 with his brother's family. The applicant was born in [year]. He lived in India as a refugee for [number] years. His whole life he has been a refugee. He does not have a country and considers himself to be stateless.

12. The applicant said his father had also been forcibly recruited into the LTTE to fight in the war, but his father escaped from the LTTE after about two months in 1990. His parents, who had

also lost most of their family members by that time, decided to flee to India after his father escaped from the LTTE. His parents were living in [City 1] in Sri Lanka before they fled for India. He heard this from his mother and doesn't know any other details of what his father did in the LTTE. The applicant doesn't know if any of his family were supporters of the LTTE and he is not a supporter of any organisation.

13. The applicant claims that it is better to say that he was a slave in India for [number] years rather than a refugee. He had to obey whatever they said. He could not go out of the house. If he went out, he would have to return before 6 o'clock. While he was studying at a residential college, he was in another district about 100kms from where the camp was, and he had to return every 10-15 days to sign in, make an entry, with Q Branch. If politicians from the north of India came to visit the area, he and the other refugees were restricted to their camp for that visit. Q Branch were always asking questions. Since the killing of Rajiv Gandhi, Sri Lankan refugees are looked at with suspicion. The fact that he has now come to Australia will cause suspicion among them. Time and again he will have to sign with the Q Branch. They treat him like a suspect, if he goes to study, they will ask him to be in contact with them. In India they discriminated against refugees, they didn't see them as human beings but always saw them as refugees. Even after living there for [a long time] he could not get citizenship and he was not eligible for a driver's licence. His parents decided to send him to Australia because the Q Branch police mistreated him and discriminated against him. Many people attempted to come to Australia from India as refugees and were arrested by Q Branch and detained. They are in prison for many years.
14. The applicant said that in India he participated in a protest about atrocities committed against Tamils in Sri Lanka. It was in about 2010, while he was still at college, although it took place at his home camp. At the protest he participated in a hunger strike from the morning until 3pm. About 200 people were involved. He helped to make a banner with others, but he was not an organiser, and had no other role. Q Branch police came and dispersed the crowd. He provided with his SHEV application two photos from a media article about the protest; he is not shown in the photos, but he was at the protest. If he goes to India, he will be in gaol for many years.
15. The applicant claims he does not have any relatives in Sri Lanka. If he is returned to Sri Lanka he will be arrested at the airport. There is no one to get him out on bail. They will also question him about his father, mother, and siblings. His father's old LTTE contacts will come to light. Although his father is dead, they will suspect the applicant now. They will suspect whether he had or has any LTTE contacts. As there is no one who will be able to get him out of gaol he will have to spend his whole life in prison. His mother had told him that she faced problems because of his dad. His family will never come to Sri Lanka to get him out on bail. His brother and sister are still in India, living with his uncle's family. He speaks to his brother every day, just to check on them. His siblings in India don't have the same support from family now as they did when his parents were alive.
16. The applicant provided supporting documents including ID documents, educational certificates, a Sri Lankan birth certificate (stamped by the Sri Lankan High Commission in Chennai) showing he was born in Tamil Nadu, and a Tamil Nadu Sri Lankan refugee ID card.
17. In assessing the applicant's evidence, I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin, including factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, a lack of cohesive narration due to the passage of time, and that some events occurred before the applicant was born and he is relying on what his mother told him.

18. The applicant provided generally consistent address, education, employment, and family details throughout the visa application process, and I accept those details, including that he is Tamil and Hindu, as summarised in the 'background' above. The applicant also provided generally consistent details about why his family left Sri Lanka in 1990 in his entry interview with the Department, in his SHEV application statement and at the SHEV interview. I accept his claims about the problems experienced by his father and mother in Sri Lanka before they went to India in 1990, including that they lost most of their relatives and his father was forcibly recruited into the LTTE but escaped after two months or so.
19. The applicant has also provided a generally consistent history about his life in India as a Sri Lankan Tamil refugee. Country information indicates that Sri Lankan Tamils in refugee camps in Tamil Nadu faced movement restrictions, limited facilities, and are subject to surveillance including by Q Branch.¹ I accept that the applicant faced restrictions on his movements, was sometimes restricted to camp when politicians visited the area, was occasionally questioned by Q Branch, and was required to sign in with Q Branch every 10-15 days while he was undertaking his studies at college. However, he only referred to being mistreated by Q Branch at his SHEV interview when asked about why his parents sent him to Australia. I do not consider it credible that if the applicant had been subject to some specific physical or psychological harm by Q Branch, he would not have mentioned being so mistreated earlier in the visa application process. To the extent the applicant was suggesting at the SHEV interview that he was physically or psychologically mistreated by Q Branch, as opposed to the impact of the various restrictions and requirements he and other Sri Lankan Tamil refugees were routinely subject to in the camps, I am not satisfied any such mistreatment occurred.

Returned Asylum Seeker

20. The applicant claims he left India in 2013 to travel to Australia, in a boat organised by a smuggler. The applicant does not have a passport. I find that, if returned to his receiving country, he may be considered by the authorities to be a returned asylum seeker who left the country without permission.
21. The applicant was among the numerous asylum seekers whose personal information was published by the Department of Immigration in early 2014 due to a data breach on its website. The personal information of the applicant that was accessible due to the data breach was his name, date of birth, nationality, gender, details of when he was detained and if he had other family members in detention. The information did not include any details of the applicant's addresses, phone numbers, other contact information, health information or information about his protection claims.²

Receiving country

22. The applicant has consistently claimed that he was born in India to Sri Lankan citizen parents. He stated in his initial interviews with the Department, in his SHEV application statement, at the SHEV interview, and in his submissions to the IAA that he is stateless. He has never claimed to have, or to be entitled to, Indian citizenship. Country information indicates that Sri Lankan

¹ Canadian IRB: Immigration and Refugee Board of Canada, "Status of Sri Lankan Tamil refugees in India, including information on identity documents, citizenship, movement, employment, property, education, government aid, camp conditions and repatriation (2008 - January 2010)", 3 February 2010, OG1AC8B47181.

² Protection visa decision record, 11 January 2021, pages 5 and 6; and Department's letter concerning the data breach dated 14 March 2014.

Tamils refugees in India currently are not entitled to and have no pathway for obtaining Indian citizenship.³

23. Country information indicates⁴ that the applicant is entitled to Sri Lankan citizenship, because of the citizenship of his parents, and which can be claimed by following an administrative procedure with any Sri Lankan overseas mission. Registration for someone over 21 can only be made in Sri Lanka, and a small fine is imposed in that case. However, given that he is not currently registered, and the applicant in his submissions to the IAA flagged that he does not currently have all the required documentation to do so, I am satisfied that the applicant is not formally recognised as a Sri Lankan citizen. While it is apparent that he is entitled to such citizenship and it may be easy to obtain, I am nevertheless satisfied on the material before me that the applicant is currently stateless. As India is the only country he has resided in prior to his arrival in Australia, I am also satisfied it is the only country of habitual residence for the purposes of the definition of receiving country in s.5 of the Act. As such I am satisfied the receiving country for the applicant is India.

Refugee assessment

24. 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

25. 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.

26. The applicant says he does not have a right of return to India. That may be the case but under the s.5 definition, a country of former habitual residence is still a ‘receiving country’, regardless

³ DFAT, “DFAT Country Information Report: Sri Lanka”, 4 November 2019, 20191104135244; and DFAT, “DFAT Country Information Report - Sri Lanka”, 23 December 2021, 20211223094818.

⁴ CLD2021/1167339 - NWK090 - Open Source - Citizenship Registration of Children born outside Sri Lanka; and DFAT, “DFAT Country Information Report: Sri Lanka”, 4 November 2019, 20191104135244; and DFAT, “DFAT Country Information Report - Sri Lanka”, 23 December 2021, 20211223094818.

of whether it would be possible to return to it. Regardless of whether he can return there, the legislation requires the IAA to assess the applicant against the relevant country or countries of former habitual residence, in this case India. Additionally, I note that the inability to re-enter a country where a person was habitually resident because that person has no right of entry does not, without more, constitute persecution.⁵

27. I am not satisfied that the applicant's fear of harm, if returned to India, whether on account of any real or perceived LTTE links, his involvement in the protest in India, because of the treatment of Sri Lankan Tamil refugees in India, his leaving India without the permission of the Indian authorities, the data breach, or for any other reasons, is well-founded.
28. The applicant referred generally in his claims to Sri Lankan Tamil refugees, including himself, being discriminated against, and being treated as refugees and not human beings. DFAT indicates⁶ that there are an approximately up to 100,000 or so Sri Lankan refugees, and their descendants, in Tamil Nadu in India, with some 62,000 registered and living in refugee camps and another 37,000 or so living outside the camps but required to register with the police. DFAT does not refer in its reports on Sri Lanka to Sri Lankan refugees in Tamil Nadu facing discrimination or other harm, other than commenting that unregistered refugees fear police harassment.⁷ Nor does DFAT's report on India refer to any discrimination or harm faced by Sri Lankan refugees in Tamil Nadu. That report does note, despite various legal protections against discrimination on the basis of religion, race, caste, sex or place of birth, local sources have told DFAT that refugees, among others, face discrimination in India. However, in that report DFAT does not make any assessment that refugees face a risk of official or societal discrimination, even a 'low risk'.⁸ The applicant's siblings continue to live in India, he is in regular contact with them, and he has not claimed any specific incidents of discrimination or other harm have occurred to them since he left India. Although I am prepared to accept that as a Sri Lankan Tamil refugee in India, the applicant has, and may in the future, face minor incidents or manifestations of discriminatory conduct, I am not satisfied that there is a real chance of him suffering harm from such conduct, if he returned to India.
29. The authorities in India, including Q Branch, appear to take an adverse interest in LTTE suspects, and there are special administrative camps for those suspected of LTTE involvement.⁹ However, the applicant was not involved with the LTTE, and although his father was a former (forced) recruit of the LTTE, the applicant has not claimed that Q Branch or other authorities in India ever questioned the applicant, his father, or other family members about his father's or any of the family's LTTE involvement or links. The applicant participated in a protest against atrocities in Sri Lanka, at his camp in about 2010. He said the Q Branch dispersed the crowd; but did not suggest he was arrested, questioned, detained, or otherwise suffered any adverse interest from the Indian authorities for his participation at the time or in the next few years he remained in India. Nor does he claim that Q Branch or other authorities in India ever questioned the applicant's family about his having left the camp / India in 2013. Other than as part of the general surveillance of Sri Lankan Tamil in the refugee camps, I am not satisfied the

⁵ *BZADW v MIAC* [2013] FCCA 1229; *BZADW v MIBP* [2014] FCA 541.

⁶ DFAT, "DFAT Country Information Report India", 10 December 2020, 20201210103716; DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; and DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

⁷ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; and DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

⁸ DFAT, "DFAT Country Information Report India", 10 December 2020, 20201210103716.

⁹ "More than one lakh Sri Lankan Tamil refugees live on low rations in dingy camps", *Hindustan Times*, 19 April 2014, CX324969; "Sri Lankan Tamil refugees treated worse than 'Beasts' in Tamil Nadu", *Asian Tribune*, 12 July 2012, CX290922; and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

Indian authorities displayed any adverse interest in the applicant before he left India, nor any adverse interest in him after he left the camp and India in 2013. I am not satisfied that the applicant would be questioned about, would be of adverse interest to, or that there is a real chance of him suffering harm from the Indian authorities, because of his father's LTTE involvement in about 1990, for any suspected LTTE links of his own or his family, and/or for the applicant's conduct in India, including his participation in the protest, if he returned to India.

30. The applicant lived in Tamil Nadu until his early 20's. His brother and sister continue to live in Tamil Nadu, with the applicant's uncle's family. He has remained in regular contact with his family in India, speaking daily to his brother. On that basis I am satisfied that, if he returns to India, Tamil Nadu is the area to which he will return. DFAT refers to Indian citizens requiring a permit to leave India but does not suggest it is a criminal offence to not do so.¹⁰ Similarly, DFAT refers to Sri Lankan Tamil refugees needing to obtain an Indian exit permit if considering relocating to Sri Lanka, together with its understanding that there are regular illegal boat movements between India and Sri Lanka in order to visit relatives, but does not suggest anyone has faced criminal prosecution in India as a result.¹¹ DFAT is not aware of any evidence of mistreatment of returnees, including failed asylum seekers, by the authorities in India.¹² The country information does not suggest that, if returned to India, he would face prosecution or other action as a returned asylum seeker who left India without the authorities' permission while residing there in a refugee camp. Nor do I consider it plausible that the Indian authorities would re-admit the applicant to India simply to gaol him for having left India in the first place. Additionally, although the applicant was affected by the 2014 data breach as discussed above, the information before me does not suggest the data breach, which released personal details that the authorities would in any event be aware of given the circumstances of the applicant's return to India from Australia, increases his risk profile in any way or otherwise increases his chances of suffering harm. I am not satisfied that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Indian authorities, as a returned Sri Lankan Tamil asylum seeker from Australia who departed without permission from the Indian authorities while residing in a refugee camp, and who was affected by the 2014 data breach, if returned to India, now or in the reasonably foreseeable future.

31. I accept that the applicant's life in India was subject to various restrictions while he was living in the refugee camp. I also accept that the applicant may take some time to re-establish himself in Tamil Nadu. Country information indicates that registrations for the Sri Lankan Tamil refugee camps operating in Tamil Nadu closed in 2011,¹³ and I am not satisfied that he would be confined to such a camp if returned to India. DFAT states Sri Lankan Tamils in India have limited work rights but indicates that refugees living outside the camps are generally better off and often run successful businesses, albeit the COVID pandemic has had an impact; those outside the camps are just required to register with the local police, and re-register if they move; and DFAT does not suggest those so registering are subject to mistreat or any other harm.¹⁴ The applicant is educated to the tertiary level and he has shown himself to be resourceful and resilient by adapting to life in Australia after growing up in India. He is a relatively young man in his early [age]s. He speaks, reads and writes Tamil as well as limited English. He is able bodied and has work experience, both in India as a labourer and in Australia as a [worker]. He can register as a refugee at a local police station as, on my findings, he would not be of any adverse interest to the Indian authorities, if he returned to India. He has siblings

¹⁰ DFAT, "DFAT Country Information Report India", 10 December 2020, 20201210103716.

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

¹² DFAT, "DFAT Country Information Report India", 10 December 2020, 20201210103716.

¹³ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; and DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

in India, who he is in regular contact with, and who receive support, albeit less than that given by his now deceased parents, from their uncle's family. Given those factors, I am not satisfied that any period of unemployment or other issues he may experience while he re-establishes himself in Tamil Nadu, would threaten his capacity to subsist or otherwise amounts to harm to the applicant, now or in the reasonably foreseeable future.

32. I am not satisfied that there is a real chance of harm to the applicant, if returned to India, whether on account of any real or perceived LTTE links, his involvement in the protest in India, because of the treatment of Sri Lankan Tamil refugees in India, his leaving India without the permission of the Indian authorities, the data breach, or for any other reasons, now or in the reasonably foreseeable future.
33. Having considered the applicant's circumstances, history, and profile as a whole, in the context of the country information, I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future, if returned to India. He does not have a well-founded fear of persecution, if returned to India, within the meaning of s.5J.

Refugee: conclusion

34. 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

35. 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

36. 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.
37. 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.
38. I accept that, if the applicant returns to India, as a Sri Lankan Tamil refugee he may face minor incidents or manifestations of discriminatory conduct. In considering the applicant's circumstances, I am not satisfied that any such discriminatory conduct 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, such as to amount to significant harm as defined in s.36(2A) of the Act.

39. Otherwise, I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, based on his profile and history, if he is returned to India. As 'real chance' and 'real risk' involve the same standard,¹⁵ it follows that I am also satisfied that there is no real risk of significant harm if they are returned to India.
40. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

Complementary protection: conclusion

41. 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.

¹⁵ *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.