



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01163

Date and time of decision: 25 May 2017 14:23:00
Mark 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil of the Hindu faith from [District 1], Northern Province, Sri Lanka. He arrived in Australia [in] September 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) [in] April 2016. [In] October 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 9 November 2016 the IAA received correspondence that was signed by the applicant but notes it was prepared with the pro bono assistance of [Organisation 1]. The correspondence explains the applicant's inability to provide a submission to the IAA and raises his concerns about the IAA process. It appears to be in the nature of a form letter prepared with the assistance of [Organisation 1]. I consider the letter to be argument rather than new information and I have had regard to it.
4. The applicant argues he is unable to make a submission to the IAA due to the short time frame for submissions which he regards as arbitrary and unreasonable, because of his inability to afford legal assistance or access free legal assistance in a short period of time, because the delegate's decision is lengthy and in English and has not been translated into the applicant's own language, and because it makes findings which he has only just heard for the first time. The applicant raised concerns about the IAA process. He said the IAA process is not fair and reasonable, the IAA's short time frame for submissions impacts on his ability to present his case, and as the IAA will only consider new information in exceptional circumstances it is potentially missing relevant country information. The applicant requested as a matter of procedural fairness that he be provided with copies of all the information before the IAA. The applicant also requested an oral hearing with the IAA and says the IAA will fall into error if it does not conduct a hearing, particularly if it makes adverse credibility findings.
5. IAA Practice Direction 1 provides that an applicant may give the IAA a submission on why they disagree with the primary decision or as to any matter that was presented but overlooked by the Department. That direction specifies that the submission should be given within 21 days. The applicant did not request further time to make and, other than his response to the IAA's invitation for comment on adverse information discussed below, no submission was received from the applicant after 9 November 2016. At 12 pages in length, excluding the attachments, I do not consider the delegate's decision to be particularly lengthy. Given the time that has now passed between the referral to the IAA and this decision I am satisfied the applicant has been provided with a reasonable period of time to seek assistance, including obtaining a translation of the delegate's decision, and to provide any submission.
6. I note the legislative framework governing the IAA provides for an exhaustive statement of the natural justice hearing rule. The IAA is not required to give a referred applicant any material that was before the Minister when the primary decision was made (s.473DA) and, subject to Part 7AA, is to review the matter without interviewing the referred applicant (s.473DB). The IAA can obtain new information from an applicant, including at an interview, but can only consider that information in exceptional circumstances. The applicant was represented by a

migration agent when lodging his written SHEV application and at the SHEV interview. At the SHEV interview he was asked about his claims and was given a number of opportunities by the delegate to expand or clarify his information, as well as the delegate putting the applicant on notice about a number of credibility concerns with his evidence. I am satisfied that the applicant has had an opportunity to fully present his case for protection. I consider that an interview is not necessary or required.

New county information considered by the IAA

7. In accordance with s.473DC(1) of the Act I obtained new information in the form of country information regarding conditions in Sri Lanka from the most recent Department of Foreign Affairs (DFAT) country report¹ for Sri Lanka. This report is dated 24 January 2017 (DFAT 2017 report) and was not available at the date of the delegate's decision. The delegate relied on information contained in DFAT reports for Sri Lanka dated up to 18 December 2015 which the latest report has updated. Given that I consider DFAT an authoritative source of country information, the DFAT information relied on by the delegate is now more than 18 months old and the DFAT 2017 report is DFAT's most recent assessment regarding the situation in Sri Lanka and was prepared for the specific purpose of protection status determination, I am satisfied that there are exceptional circumstances to justify considering this new information.
8. On 26 April 2017 the IAA invited the applicant to comment by 10 May 2017 on the new information contained in the DFAT 2017 report in relation to the political situation in Sri Lanka, the security situation in Sri Lanka, incidents of extra-judicial killing, disappearances and abduction for ransom, torture, prison conditions and the processing at the airport on return and shortly thereafter that are of general application to people in Sri Lanka. Extracts from the DFAT 2017 report of the relevant paragraphs were attached to the invitation. I have also considered other information in that report that is just about the classes of persons of Tamils and those with imputed links to the LTTE.
9. On 4 May 2017 the applicant provided a submission and further information in response to the IAA's invitation. The further information consists of three online news articles and a new claim in relation to continuing visits by the Sri Lanka authorities to his home in Sri Lanka. None of the further information was before the delegate and it is new information. Given that the submission and the new claim was provided in response to the IAA's request for comments, appears related to that request, and in relation to the new claim post-dates the delegate's decision, I am satisfied that the information could not have been provided to the delegate and there are exceptional circumstances to justify considering this new information. The news articles supplied by the applicant are in Tamil. No English translation was provided of the Tamil language news articles and I am unable to attach any weight to the contents of those news articles.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - He fears returning to Sri Lanka because he is Tamil and was previously suspected by the Criminal Investigation Department (CID) of being a supporter of the Liberation Tigers of Tamil Eelam (LTTE) and fears this will still be the case if he returns; and

¹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

- He fears the CID and the Sri Lankan Army (SLA) and he would be targeted anywhere in Sri Lanka as he is a Tamil from the north suspected of being connected to the LTTE.

Factual findings

Receiving country

11. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from [District 1], Northern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

Problems in Sri Lanka

12. The applicant states that he was born in [his hometown] in [year]. He moved to M in [District 1] in 1995 where he continued to reside except for a month [overseas] in 2004 and displacements from December 2008 to April 2010. He is married with [children] and his family live in M. His parents and siblings live in [their hometown] in Sri Lanka, except for a [sibling] who died in 2008. The applicant completed school in [year] and his work history includes [various occupations].
13. The applicant says that in during the war his area was under the control of the LTTE. Neither he nor members of his family were involved in political activities in Sri Lanka and were not members of the LTTE. However, in 2009 while displaced, the LTTE forced the applicant to undergo [training]. He ran away [before] he completed the training. In 2009 the SLA came into the area and told them that he and his family had to move to a refugee camp in [Town 1] that was under the SLA's control. He and his family lived in the camp under the SLA's orders for about a year. When he was taken to the camp he was questioned by the CID. There were three people in the room and he was questioned by one officer who asked him whether he had any LTTE connections. He said he didn't have any LTTE connections and that he didn't support the LTTE. The officer didn't believe him and said he was suspected of LTTE connections because he lived in a LTTE controlled area. He was questioned for about an hour and then photographed and allowed to return to the camp. He was questioned a number of times while he was in the camp including when he was released from the camp. When he and his family were released they were taken to a school where they filled out forms and photographs were taken of the applicant and his family before they were allowed to go to their home.
14. The applicant claims that from 2010 he was driving [a vehicle] which he purchased from his savings. He drove the [vehicle] as a taxi to take people to their destinations. Sometimes at night he would drive members of the SLA because he was afraid they would harm him if he refused. The SLA sometimes paid but when they didn't pay there was nothing he could do because he was afraid of the SLA. He used to leave the car park around 10:30pm and on the way home if he got a call from a customer he would drive them. If the SLA soldiers stopped him he had to take the soldiers rather than the customer. This made it difficult for him to work because he was scared of the SLA but the SLA never harmed him. When his [vehicle] was parked at the car park it was often searched by the CID who would ask him to leave his vehicle and then search it all over. The searches could occur at any time, were impossible to predict and happened about once a fortnight or once a month. He was worried the CID might plant a weapon and say it was his weapon. He was also worried that when driving the SLA around they might intentionally leave one of their weapons and the CID say it was his weapon. This happened to other Tamil drivers.

15. The applicant claims that while driving his [vehicle] in July 2012 he was stopped by members of the CID. The CID searched his vehicle thoroughly but found nothing. The CID made him leave his [vehicle] by the side of the road and took him in their car to the CID office which involved a drive along a road through the jungle. At the CID office he was threatened and accuse of being connected to the LTTE. He denied the accusation and the CID threatened to shoot and kill him, putting a gun in his mouth. They also tied his hands behind his back. He kept denying he was in the LTTE. The CID released him on condition that he came to their office any time they called him and said he was not to leave the area without their knowledge. The CID took his photo and took him back to his [vehicle].
16. The applicant states that it was after this incident that he decided to leave Sri Lanka. Around 20 days after the incident he was driving and on his way back to his home town when he stopped for tea and overheard people talking about making arrangements to leave Sri Lanka. Subsequently he made arrangements to pay them to leave Sri Lanka and travel to Australia.
17. The applicant claims that since arriving in Australia his wife told him that the CID visited his house on three occasions and asked about him and his whereabouts. She was scared to give more information over the phone and he knows nothing more. At the SHEV interview he said the most recent visit was in 2014. In his response to the IAA the applicant said that even nowadays the military intelligence unit comes to his house in Sri Lanka at least once or twice a month and asks for him.
18. The applicant provided a number of identity and related documents in support of his claims, including a temporary ID issued when he was in the IDP camp in 2009.
19. Country information confirms that in areas they controlled, including [District 1], the LTTE had an extensive administrative structure, people were required to interact with the LTTE's military and civil administration as a matter of course and people were required to do short periods of training, including physical and arms training, and the LTTE forcibly recruited people.² The UN High Commissioner for Refugees (UNHCR) confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.³ In the final stages of the war hundreds of thousands of people became displaced (IDPs) and were moved by the authorities into IDP camps where they were subject to initial screening by the SLA and the CID to identify and remove LTTE fighters and cadres; the screening continued at the camps and people were sometimes interrogated several times; their movements were restricted; and the large scale release of people from the camps only began in late 2009.⁴ Many thousands of suspected LTTE members and supporters were detained, following screening at IDP camps, in Rehabilitation Centres by the Sri Lankan authorities in the final stages and aftermath of the war.⁵
20. Country information indicates that under the former Rajapaksa government the security forces in the north were known to monitor any possible LTTE activity and other forms of civil

² DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 3.32; United Nations High Commissioner for Human Rights (OHCHR), "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358, paragraphs 169-170, 632-655 and 1136-1139; and "Tragic phenomenon of forcible recruitment of Tamil civilians by the LTTE", Daily Mirror (Sri Lanka), 3 October 2015, CXBD6A0DE16205.

³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp17 and 18.

⁴ OHCHR, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358, paragraphs 1071-1080 and 1106-1112.

⁵ Ibid paragraphs 360-367 and 1037-1055.

resistance or anti-government activity.⁶ Many Tamils, in the north in particular, reported being monitored, harassed, arrested and/or detained by security forces under the Rajapaksa government.⁷ According to a 2013 UNHCR survey, 87 per cent of Tamil IDPs who had returned to their homes in the north and east had been registered by the SLA and 71 per cent had been visited by the SLA and CID for interviews.⁸

21. Based on his generally consistent evidence on the incidents, his supporting documents and the country information, I accept the claims the applicant made in his SHEV application and SHEV interview, except as discussed below. I accept that he lived in a LTTE controlled area during the war; that he was displaced from late 2008; that in early 2009 he was made to do physical and arms training by the LTTE for five days but he fled on the sixth day; that around April 2009 he and his family were placed in an IDP camp in [Town 1] by the SLA where they were held until about April 2010; that he was questioned and photographed by the CID when he was first placed in the camp, he was questioned by the CID on a number of occasions while held in the camp and when he was released from the camp; and that he and his family had to fill in forms and photos were taken when they were released. I accept that he started working for himself as [a vehicle] driver in 2010; that sometimes at night he would take SLA members in his [vehicle] but the soldiers didn't always pay for the trips; he was scared of, but wasn't harmed by, the SLA; that his [vehicle] was frequently searched by the CID; that the trips for the SLA and the searches by the CID made it difficult to work; and he knew other [vehicle] drivers who had weapons planted in their [vehicles].
22. However, having considered his evidence from his interviews and written statements, I have concerns about the truthfulness of aspects of the applicant's other claims.
23. The applicant alternatively claimed that his leaving Sri Lanka for Australia was triggered by the CID taking his [vehicle] (September 2012 entry interview), the CID stopping him by the roadside to question him about being a member of the LTTE in February 2012 (January 2013 arrival interview) or the CID stopping him and taking him away to their office to question and threaten him about suspected LTTE links in July 2012 (2013 and 2015 written statements and SHEV interview). He first mentions the July 2012 incident in his 2013 written statement and says he was threatened and photographed, along with stating that he was constantly stopped and questioned, but makes no mention of the CID placing a gun in his mouth and threatening to kill him until his 2015 written statement. I do not consider it credible that the applicant provided different events as the trigger for his decision to leave Sri Lanka. Similarly, the applicant's failure to mention something as significant as a threat to kill him where a gun was placed in his mouth when he first describes the July 2012 incident in his 2013 written statement is not credible. When asked by the delegate why he didn't mention the July 2012 incident earlier he said when he first arrived he was scared and his representative referred to the stress of a long sea voyage. However, the arrival interview occurred some four months after he first arrived in Australia and it is difficult to see how, if such a fear was genuine, he considered it safe to initially mention the CID taking his [vehicle] and the February 2012 questioning by the CID but not the July 2012 questioning by the CID. Based on these credibility concerns, I am satisfied that the applicant has embellished his evidence to boost his claims for protection. I reject his claim that the CID took the applicant to their office in July 2012 and threatened to kill him while placing a gun in his mouth as a fabrication. I accept that the applicant was stopped by the side of the road and questioned by the CID in February 2012 and, based on the country information, I am prepared to accept that the applicant was on other

⁶ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 2.39.

⁷ Ibid 3.7.

⁸ Ibid 3.37.

occasions stopped and questioned on the side of the road by the CID and his [vehicle] may have been taken some time to be searched.

24. The applicant claimed in his 2015 written statement that the CID visited his home three times after he left Sri Lanka and asked his wife about him and his whereabouts. At the SHEV interview he confirmed this and said the most recent visit occurred in 2014. Based on the country information about the general level of monitoring of Tamils in the north and the visits and interviews conducted by the Sri Lankan authorities of those released from IDP camps under the Rajapaksa government, I accept that the CID visited his home on three occasions from September 2012 to 2014 as part of their routine monitoring at the time. In his response to the IAA he said the military intelligence unit comes to his house in Sri Lanka at least once or twice a month and asks for him. The applicant doesn't claim any earlier adverse attention from military intelligence in his written statements and made no mention of such visits at the SHEV interview in October 2016. I do not consider it plausible that Sri Lankan military intelligence would suddenly become interested in the applicant some four years or so after he left Sri Lanka and almost two years after the last visit to his home by the CID. I reject this claim as an embellishment by the applicant.

Failed Asylum Seeker

25. The applicant claims to have left Sri Lanka in August 2012 to travel to Australia as a passenger in a boat organised by a smuggler. He does not have his passport. I find that, if he were to return to Sri Lanka, he will be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities.

Refugee assessment

26. 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

27. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and

- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

Tamil male from the north, Tamil [vehicle] driver, LTTE links and imputed political opinion

28. In the presidential election in January 2015, Maithripala Sirisena defeated Mahinda Rajapaksa who had been president since 2005. Sirisena won 51.3 per cent of the vote with a historically high voter turnout of 81.5 per cent. The Tamil vote, together with a split in the Sinhalese vote, was significant in Sirisena's victory. The parliamentary election in August 2015 reinforced the outcomes of the presidential election and ushered in a 'national unity government' of major parties including the former opposition United National Party and Sirisena's Sri Lanka Freedom Party faction. The successful campaign was run on a good governance platform, with an expressed commitment to economic growth, transparency, ethnic reconciliation and protection of individual freedoms and rights. Former President Rajapaksa conceded defeat and issued a statement accepting the result of the election and vowed to work within the Parliament. The Tamil National Alliance (TNA) won 16 seats and its leader was appointed Opposition Leader. The current Sri Lanka government, under President Sirisena, is focused on post-conflict reconciliation, transitional justice, and governance and economic reform.⁹
29. DFAT assesses that Sri Lankans of all backgrounds generally have a low risk of experiencing official discrimination as there are no current laws or policies that discriminate on the basis of ethnicity including in relation to access to education, employment or access to housing. DFAT states that Tamil inclusion in the political dialogue in Sri Lanka has increased under the Sirisena government and they have a substantial level of political influence.¹⁰
30. DFAT states the Sirisena government has made significant progress in relation to human rights and reconciliation. It has replaced military governors in the Northern and Eastern Provinces with civilians, returned some land held by the military, released some individuals held under the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA), committed to reforming the PTA, engaged constructively with the UN and established the Office of National Unity and Reconciliation to develop national policy on reconciliation.¹¹ In 2015 the Government changed the name of Victory Day, which commemorates the end of the war, to War Heroes Remembrance Day and for the first time gave official approval for memorials in the north and east. The 2015 Independence Day ceremony was attended by the TNA leaders for the first time in many years, a Declaration for Peace was delivered in Sinhala, Tamil and English, and at the 2016 ceremony the national anthem was sung in Tamil as well as Sinhala. The Government has also committed to implementing a range of transitional justice mechanisms and reconciliation projects following the September 2015 release of the report of the UN's Office of the High Commissioner for Human Rights investigation into grave human rights violations committed during the war. A Consultation Task Force on Reconciliation Mechanisms was appointed in January 2016 and the Sri Lankan parliament passed a bill establishing an Office of Missing Persons in August 2016.¹²
31. DFAT reports that during the war and under the Rajapaksa government many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and detained by security forces. During the war, more Tamils were detained under emergency regulations and the PTA than any other ethnic group. This was primarily due to LTTE members and supporters being almost entirely Tamil, but DFAT notes that there were also likely instances of

⁹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 2.3, 2.22 and 2.23.

¹⁰ Ibid 3.4 and 3.6.

¹¹ Ibid 2.29.

¹² Ibid 2.30-2.33.

discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity. Since 2015 the Sirisena government has reviewed and released some PTA detainees, including Tamils, and DFAT assesses that there are currently fewer individuals detained under the PTA than during the war.¹³

32. DFAT assesses¹⁴ that monitoring and harassment of Tamils has decreased significantly under the Sirisena government; the police are now responsible for civil affairs across Sri Lanka; although there is still a sizable military presence in the north and east, it is largely idle and generally restricted to their barracks; and members of the Tamil community have described a positive shift in the nature of interactions with the authorities and they feel able to question the motives of, or object to, monitoring or observation activities. DFAT notes that the security situation in Sri Lanka has dramatically improved since the end of the war, with greater freedom of movement and the military's involvement in civilian life has reduced.¹⁵ DFAT assesses that some societal discrimination on the basis of ethnicity can occur but does not identify any such specific issues in relation to Tamils. DFAT notes that monolingual Tamil speakers can have difficulties communicating with the police, military and other government officials but assesses that these practical difficulties are as a result of a lack of qualified language teachers, the disruption of civilian life caused by the war and historical discriminatory language policies rather than official discrimination.¹⁶ The applicant does not claim he suffered any specific harm from or incidents of societal discrimination while in Sri Lanka. I note he completed some [years] of schooling and has worked in a number of jobs both as an employee and while self-employed. The country information discussed above indicates the monitoring and harassment of Tamils in the north and east has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation has generally improved, including in relation to the security situation and overall military involvement in civilian life, including in the north.
33. I accept that the applicant was harassed as [a vehicle] driver, with the CID frequently stopping and questioning him and searching his [vehicle], and SLA members took some free trips on his [vehicle]. Although the monitoring and harassment of Tamils has significantly decreased, based on country information that suggests there continues to be a significant military presence in the north,¹⁷ I am prepared to accept that the applicant may face the same situation of his [vehicle] being used for some free trips, as well as occasional searches, if he returns to Sri Lanka and resumes his [vehicle] driving business. I accept that this is discriminatory and systematic conduct by the Sri Lankan authorities based on his Tamil ethnicity and results in a level of day to day harassment while undertaking [vehicle] driving that may impact in the future on the applicant's capacity to earn a living. However, his evidence does not suggest that he was unable to support himself and his family through his previous work as [a vehicle] driver or that he would be unable to do so in the future. I am not satisfied that the harassment of his [driving] work is or would be to such an extent that it threatens the applicant's capacity to subsist or otherwise constitutes serious harm.
34. The UNHCR's current Eligibility Guidelines for Sri Lanka¹⁸ note that a person's real or perceived links with the LTTE may give rise to a need for international refugee protection. However,

¹³ Ibid 3.8.

¹⁴ Ibid 3.9.

¹⁵ Ibid 2.39.

¹⁶ Ibid 3.4 and 3.7.

¹⁷ Ibid 2.38.

¹⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp26 and 27.

originating from an area that was previously controlled by the LTTE does not in itself do so. Although the nature of these links can vary, this may include:

- Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
 - Former LTTE combatants or “cadres”;
 - Former LTTE combatants or “cadres” who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, “computer branch” or media (newspaper and radio);
 - Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
 - LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; or
 - Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
35. DFAT refers to the UNHCR’s guidelines and notes¹⁹ that accurately identifying people according to those categories may be difficult and the UNHCR recognises that each case depends on its individual circumstances.²⁰ DFAT also confirms²¹ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE.
36. DFAT assesses²² the number of incidents of extra-judicial killings, disappearances and kidnappings for ransom, including incidents of violence involving former LTTE members, as significantly reduced since the end of the war. DFAT assesses²³ that there are credible reports of torture carried out by the security forces during the war and its immediate aftermath. DFAT states that Tamils faced a higher risk of torture during the war.²⁴ DFAT is aware of reports of torture carried out by the police including from the UN Special Rapporteur and the Human Rights Commission of Sri Lanka.²⁵ DFAT assesses²⁶ that torture in Sri Lanka, whether perpetrated by the military, intelligence or police forces, is not presently systemic or state sponsored and that the risk of torture from military and intelligence forces has decreased since the end of the war. DFAT also assesses²⁷ that cases where the police are alleged to have tortured or mistreated an individual generally reflect low capacity, lack of training and due process in arrest and detention procedures, together with poor policing methods that focus on extracting confessions rather than conducting a thorough investigation. DFAT states that as few reports of torture are proved or disproved it is difficult to determine the prevalence of torture. However, DFAT assesses²⁸ that Sri Lankans face a low risk of mistreatment that can

¹⁹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.32 and 3.33.

²⁰ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p25.

²¹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29.

²² Ibid 4.1.

²³ Ibid 4.12 and 4.13.

²⁴ Ibid 4.14.

²⁵ Ibid 4.15 and 4.16.

²⁶ Ibid 4.18.

²⁷ Ibid 4.19.

²⁸ Ibid 4.20.

amount to torture, mostly perpetrated by the police, irrespective of their religion, ethnicity, geographical location or other identity; that the incidence of torture has reduced in recent years; and that the allegations of torture pertain to a relatively small number of cases compared to the total population.

37. The UK Home Office (UKHO) 2016 report discusses protection claims as based on a person's actual or perceived political opinion of support for or involvement in the LTTE or other Tamil separatist groups, including membership of, or participation with, such groups overseas. The report notes that in the UKHO view simply being a Tamil does not give rise to protection claims.²⁹ The UKHO notes there have been positive developments in Sri Lanka since President Sirisena became President in January 2015. White van abductions are now seldom reported, and the number of torture complaints has reduced, although new cases of Tamil victims continue to emerge, both of torture and occasional white van abductions.³⁰ The authorities continue to monitor people, particularly in the north and east and persons perceived to sympathise with the LTTE continue to be intimidated, harassed, arrested, detained and tortured.³¹ UKHO notes that, despite improvements, there continue to be reports of abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE.³²
38. I accept that the applicant and his family lived in a LTTE controlled area during the war; that he was forced by the LTTE to undergo physical and weapons training for five days before he escaped; that he and his family were held in an IDP camp in [Town 1] from April 2009 to April 2010; that he was questioned by the CID about suspected LTTE links when first taken to the camp, on a number of occasions while held at the camp and when he was released from the camp; and that he was photographed when first questioned at the camp and he and his family were required to complete some forms and were photographed when released from the camp. I accept that while working as [a vehicle] driver from 2010 until he left Sri Lanka the applicant was frequently stopped and questioned by the CID; that the CID frequently searched his [vehicle]; and the SLA took trips on his [vehicle] and didn't always pay for those trips. I also accept that the CID visited his home three times since he left Sri Lanka to ask his wife about him and his whereabouts.
39. Having regard to the UNHCR guidelines and the other information before me, I do not consider the applicant to be at risk of harm for reason of any links to the LTTE, or any imputed political opinion, now or in the reasonably foreseeable future, for a number of reasons. First, on the evidence, residing in a LTTE controlled area of itself does not give rise to a need for protection and many people living in LTTE controlled areas were obliged to undergo training. Secondly, although the applicant was questioned by the CID a number of times at the IDP camp, country information indicates that such questioning was common and that those with suspected LTTE links at the camps were separated and taken to Rehabilitation Centres but the applicant was ultimately released from the camp. Thirdly, the photographing of the applicant and his family, together with the forms they were required to complete prior to their release from the IDP camp are consistent with country information about the registration requirements imposed on Tamils and the subsequent visits and interviews the Sri Lankan authorities routinely made to IDP camp returnees. Fourthly, although the applicant was frequently stopped and questioned by the CID and the CID searched his [vehicle], the applicant was never subsequently arrested or charged after any of those incidents. Fifthly, country information suggests that harassment and

²⁹ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, 1.1.1 and 2.3.1.

³⁰ Ibid 2.3.6, 2.3.7, 6.6.2, 6.6.6, 6.6.7 and 6.6.11.

³¹ Ibid 2.3.8.

³² Ibid 2.3.10.

monitoring of Tamils in the north was routine as was the monitoring and questioning of Tamils who were released from IDP camps. Sixthly, the CID has shown no further interest in the applicant after their three routine visits to ask his wife about his whereabouts. Seventhly, the SLA interest in the applicant when he was [a vehicle] driver was in order to occasionally obtain free trips as discussed above, and was not in relation to any suspected LTTE links. The applicant does not have a profile that country information suggests he is at risk of harm from the Sri Lanka authorities, now or in the foreseeable future, for any links to the LTTE or for any imputed political views. I do not consider that the Sri Lankan authorities would have had any adverse interest in the applicant other than as part of the former Rajapaksa government's then general monitoring of Tamils had he remained in Sri Lanka or that he would be of any adverse interest to the Sri Lankan authorities on return.

40. I am satisfied that the applicant will not face a real chance of persecution from the Sri Lankan authorities due to any real or perceived links to the LTTE, for any imputed political opinion, as a Tamil [vehicle] driver and/or as a Tamil male from the north, if returned to Sri Lanka, now or in the reasonably foreseeable future.

Failed asylum seeker and illegal departure from Sri Lanka

41. I accept that, on his return to Sri Lanka, the applicant would be considered by the authorities to be a failed asylum seeker who departed Sri Lanka illegally.
42. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. In practice, penalties are applied on a discretionary basis and most cases result in a fine and not imprisonment.³³
43. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration, the State Intelligence Service and a unit of the CID based at the airport who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed en masse and processing can take several hours.³⁴
44. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.³⁵
45. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted and photographed. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. Should a Magistrate not be available before this time – for example,

³³ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.17.

³⁴ Ibid 5.19.

³⁵ Ibid 5.20.

because of a weekend or public holiday – those charged may be held at a nearby prison.³⁶ DFAT rates³⁷ general prison conditions in Sri Lanka as not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions.

46. Fines, which can be paid by instalments, are issued to persons who depart Sri Lanka illegally. If a person pleads guilty, they will be fined and are then free to go. Generally, if a returnee pleads not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor.³⁸
47. I accept that the applicant will be considered a failed asylum seeker on his return. DFAT assesses the risk of mistreatment or torture for the majority of returnees, including those suspected of offences under the IE Act, is low and continues to reduce.³⁹ Country information containing reports of some returnees being tortured was before the delegate.⁴⁰ In his response to the IAA the applicant submitted that people with connections to the LTTE still faced problems. DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that an asylum seeker with actual or perceived links to the LTTE may be at risk of harm when processed at the airport. However, as discussed above, the applicant was never arrested or charged in relation to suspected LTTE involvement and his questioning by the CID at the IDP camp, the CID questioning and searches while [a vehicle] driver and the questioning of his wife after he left Sri Lanka were part of the Rajapaksa's routine monitoring of Tamils at the time. The country information does not suggest, and I do not accept, that being an asylum seeker in Australia increases a person's risk profile with the Sri Lankan authorities. Taking into account those findings and the country information, I do not accept that the applicant will be at risk of adverse attention from the Sri Lankan authorities when scrutinised on arrival in Sri Lanka.
48. I am not satisfied that there is a real chance that the applicant would face harm on his return as a failed Tamil asylum seeker. I accept that the applicant, if returned to Sri Lanka, will face action under the IE Act. The country information confirms that the applicant is likely to be detained and questioned at the airport, possibly up to 24 hours, before being taken by the police to the nearest Magistrates Court.
49. Once before the Court, and if not dealt with on the spot if the applicant were pleading guilty, the applicant would ordinarily be released unconditionally or be bailed to return to Court at a later date. If a Magistrate is not available at that time, for example due to the weekend or a public holiday, the applicant could be held in a nearby prison for a short time. Although the maximum penalty includes five years imprisonment, the country information indicates custodial sentences are not imposed on returnees who were merely passengers on a people smuggling boat but that fines are issued to act as a deterrent.
50. The applicant's evidence is that he was only a passenger on the boat. I find, based on the country information discussed above that the applicant may be detained and questioned at the airport for up to 24 hours, faces a fine for breaching the IE Act and, depending on the availability of a Magistrate at the time he is charged under that Act, or if a relative is required to guarantee any bail surety, may face a short period of being held in prison.

³⁶ Ibid 5.21.

³⁷ Ibid 4.25.

³⁸ Ibid 5.22.

³⁹ Ibid 4.21 and 4.22.

⁴⁰ Including Freedom From Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881; and Human Rights Watch, "'We Live in Constant Fear': Lack of Accountability for Police Abuse in Sri Lanka", 23 October 2015, CISEC96CF13673.

51. The High Court endorsed in *MIBP v WZAPN*,⁴¹ the position taken in *SZTEQ v MIBP*,⁴² that whether a risk of loss of liberty constitutes serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.
52. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, or if a relative is required to travel to Colombo to guarantee any bail surety, I am satisfied the applicant would face only a brief period in detention. Even having regard to general poor prison conditions, I do not consider that a few days in detention would constitute the necessary level of threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.
53. Similarly, whether considered separately, in combination or cumulatively with a brief period of detention, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine under the IE Act, to constitute a threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm.
54. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.⁴³ In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
55. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a failed Tamil asylum seeker who departed Sri Lanka illegally, now or in the reasonably foreseeable future.

Cumulative circumstances

56. I accept that the applicant may experience some harassment if returned to Sri Lanka and he again becomes [a vehicle] driver. I accept that the applicant will face some non-discriminatory penalties because of his illegal departure from Sri Lanka. However, considering the applicant's circumstances as a whole I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future, either in the period following his arrival or on his return home, because of his illegal departure, for having made a claim for asylum in Australia, for any links to the LTTE or imputed political opinion, as a Tamil male from the north, as a Tamil [vehicle] driver or any combination of these. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

57. 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).

⁴¹ *MIBP v WZAP; WZARV v MIBP* [2015] HCA 22.

⁴² *SZTEQ v MIBP* [2015] FCAFC 39.

⁴³ *Chen Shi Hai v MIMA* (2000) 201 CLR 293, at [20]; and *Applicant A v MIEA* (1997) 190 CLR 225, p233.

Complementary protection assessment

58. 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

59. 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.

60. I accept that the applicant may face some level of harassment as a Tamil [vehicle] driver from the north. Having considered the evidence discussed above however, I am not satisfied that the treatment the applicant may face as a Tamil [vehicle] driver amounts to significant harm as defined in ss.36(2A) and 5 of the Act. I accept that applicant may face having to give some free trips to the SLA and occasional searches of his vehicle if he takes up [vehicle] driving again. However, I am not satisfied on the evidence that any of the harassment the applicant may suffer will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, such actions may be harassing but they do not amount to extreme humiliation. I am not satisfied that the applicant faces discriminatory treatment, as a Tamil and as a Tamil [vehicle] driver, that amounts to significant harm as defined in ss.36(2A) and 5 of the Act.

61. I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, for any LTTE links or imputed political opinion, as a Tamil from the north, as a returned Tamil failed asylum seeker from Australia or a combination of these. As 'real chance' and 'real risk' involve the same standard,⁴⁴ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.

62. As discussed above, the applicant faces possible action under the IE Act for his illegal departure and DFAT advises that, once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed. Returnees may be questioned for up to 24 hours at the airport and, subject to the unavailability of a Magistrate over a weekend or on a public holiday, may be detained in prison for a brief period while waiting to appear before a Magistrate or for a relative to arrive if a bail guarantor is required. A fine may be imposed. DFAT has assessed the risk of torture or mistreatment of people suspected of an offence under the IE Act as low and that it continues to reduce.

63. The applicant may be subjected to questioning, arrest, fingerprinting and being photographed on his arrival at the airport, poor prison conditions during any brief detention, a bail surety and a fine under the IE Act. Country information indicates that the poor prison conditions are due

⁴⁴ *MIAC v SZQRB* (2013) 210 FCR 505.

to overcrowding, poor sanitation and lack of resources. I am not satisfied, on the evidence, that there is an intention to inflict pain or suffering, severe pain or suffering or extreme humiliation in any questioning, arrest, fingerprinting, photographing, brief detention, bail surety or fine imposed under the IE Act. These circumstances do not amount to the death penalty, an arbitrary deprivation of life or torture. I am not satisfied that being questioned, arrested, finger printed and photographed, any bail surety imposed, any fine imposed, and the poor prison conditions, to which the applicant may be briefly subjected, of themselves or in combination constitute significant harm as defined under s.36(2A) of the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any processing at the airport, from any brief period of detention, any bail surety or any fine imposed.

64. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason as a returned Tamil failed asylum seeker, for any links to the LTTE or imputed political opinion, as a Tamil male from the north, as a Tamil [vehicle] driver or any combination of these. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.
65. 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

66. 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.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

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