



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01550

Date and time of decision: 25 August 2017 15:54:00
Jessica McLeod, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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 citizen of Sri Lanka. [In] March 2016 he applied for a Safe Haven Enterprise visa (SHEV). [In] December 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this visa.
2. While the delegate commented that there were some inconsistencies in the applicant's account and that he considered there was some exaggeration in his description of some incidents, he accepted the applicant's claims as to the events which occurred to himself and his family members leading up to his departure from Sri Lanka. This included claims of repeat interrogations, beatings and threats against the applicant over suspected links to the Liberation Tigers of Tamil Eelam (LTTE) in 2011 and 2012, claims that he was regularly required to report to the Criminal Investigation Department (CID) and were visited by them at home, that in October 2012 he was detained [a camp] on suspicion of LTTE involvement and released through payment of ransom. However notwithstanding this, the delegate found the applicant was of no real interest to the authorities when he departed Sri Lanka a few weeks later. The delegate made no comment on the applicant's claims as to post-departure visits from the authorities or threats against him communicated to his brother by unknown persons in the week preceding the SHEV interview.

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). This includes inter alia, a post-interview submission accompanied by photographic evidence.
4. Further submissions and information were received by the IAA on 28 December 2016 and 16 January 2017. The submissions contain legal and other arguments responding to the department's and the IAA's decisions, refers to policy advice that may be described as 'argument' rather than information. In part, the documents also reference country information and claims that were before the Ministerial delegate and are already before me.
5. The applicant has also provided a report which post-dated the decision.¹ The report relates to recent meetings and updated recommendations issued by the Committee Against Torture. I am satisfied the report could not have been made available to the delegate prior to his decision. I consider the report contains the most up to date available information regarding torture in Sri Lanka. I am satisfied there are exceptional circumstances to justify considering this information.
6. The submission provided on 16 January 2016 also contains new information in the form of information regarding further visits to the applicant's family in September, October and November 2016, a statement to police from the applicant's cousin dated [in] November 2016 and information relating to the applicant's [injury] and surgery which took place in October 2016. I accept the information and police statement regarding the further visits are credible personal information. I accept this was not known to the applicant until he contacted his family at home to tell them about the decision and only then they disclosed the information about the further visits, not having told him because they did not want to worry him while he was having surgery and follow-up medical treatment. I accept this is plausible given the applicant's

¹ The report relates to recent meetings and updated recommendations issued by the Committee Against Torture

earlier claims and that it relates to ongoing interest from the authorities in the applicant. I am satisfied there are exceptional circumstances to justify considering this information.

7. Further new information was provided to the IAA through a phone call on 17 February and in writing on 1 March 2017. The applicant submitted that his cousin had informed him that in February 2017 the CID visited his house again asking if he had been in contact with the applicant. His cousin denied that he was but the CID checked his mobile phone and found a message from the applicant confirming he had recently transferred money to them. The CID took down the Australian phone number and did not believe the cousin when he tried to claim the message was from someone else in Australia. The cousin called the applicant and asked him to change his phone number which he has now done. I accept that this amounts to credible personal information. I accept it relates to ongoing developments directly relating to the authorities' interest in the applicant and that there are exceptional circumstances to justify considering this information.
8. I have obtained new information from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017.² Specifically from this report I have obtained information on the treatment of Sri Lankans of Tamil ethnicity, those suspected of LTTE links and citizens who have departed Sri Lanka illegally and sought asylum abroad. The information obtained is not specifically about the applicant but about a class of persons of which the applicant is a member. The delegate relied on the then current 18 December 2015 DFAT report for Sri Lanka and the 2017 report was only published after the delegate's decision. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - He is a Tamil Hindu, born in [Batticaloa] in [year]. He grew up in Batticaloa, an area which was previously under LTTE control.
 - The non-government organisation (NGO) [supported] him throughout high school and helped him to get accepted into [university].
 - The applicant claims his problems started when he was a student leader at university in December 2011 as some students held an LTTE remembrance ceremony. He claims that he was not attending university that week and was not present but that the CID had beaten the students at the ceremony and sought the student leaders' names. He and three other student leaders were then called to a meeting with the CID. He claims the Sinhalese student was released but he and the other two Tamils were photographed, fingerprinted, beaten, threatened and interrogated them about having LTTE involvement and demanding information about other students and who in the LTTE had asked them to organise the event. The CID said that their university and area had been under LTTE control and all the students have LTTE links. He claims they were released but required to present to the CID again nine days later and they were separately interrogated. He claims he was again questioned about the ceremony and accused of being in the LTTE. The interrogator said they had received information that the applicant was receiving help from the [NGO] and two other organisations which were banned by the government. He said those organisations were known to help students

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

with LTTE connections so it proves he was LTTE. The applicant denied any LTTE links and told them lots of students were receiving their help. They beat him and released him on the condition that he stay in the area and report to them regularly with information about LTTE activity at university. They threatened to kill him if he did not comply. He claims that over the next few months he regularly reported to the CID as required. They would interrogate him about the other student leaders and on most visits would also beat him. Sometimes the CID would also visit his home.

- The applicant claims that in April 2012 he was abducted by two armed men on a motorbike, taken to a remote area where they interrogated him about who he knew in the LTTE and beat him until they heard someone coming and left. He claims that his friend then took him to stay at his house [but] the neighbours informed the police a Tamil was in the area. His friend's friend in the police force informed them they would be coming to investigate so he returned to [Town 1]. He stayed there at his friend's house for about three months until he heard the police and military had been asking a friend for his whereabouts. He claims he then went to stay with his [friend] in [Town 1], whose relative, '[Mr A]', was standing as a candidate for the Tamil National Alliance (TNA) in the upcoming Eastern Provincial Council election. [Mr A] promised that if he got into power he could help the applicant (by protecting him and also with his studies) but he first needed help with his campaign. The applicant was wary but thought [Mr A] could help him if he got into power so he agreed.
- He claims that during the campaign period he was attacked and beaten by opposition party supporters. The applicant claims that around 2-3 days after the TNA won the election he was called again to the CID office but he agreed not to go because he was frightened. Instead, [Mr A] (who had just been elected) took the applicant to the police station to complain. He stated the police informed them that they were aware of the problems and they received similar complaints but because the problems were coming from the CID, they could not do anything to help.
- The applicant was frightened and decided to move to [Town 2]. He visited his grandmother before leaving and upon returning, he was arrested by the CID and taken to [a camp] where he was again accused of being LTTE (by the same CID interrogator as before) and was beaten, tortured and threatened. The guards told him he was on a 'kill list'. He claims that two of the guards conspired to secretly release him for a [fee] which his brother paid. He claims they released him in [Town 2] and he then made arrangements to leave Sri Lanka.
- He claims that the authorities continued looking for him after he departed Sri Lanka.
- In his SHEV application he stated that the CID had looked for him at his grandmother's house and although his grandmother had passed away, they told his aunty they would continue to look for him.
- At the SHEV interview the applicant stated the previous week he had donated money to his village temple for a festival. He has provided photographs of banner and translations indicating that the banner reads '~~[deleted]~~' and 'Donated by: [name], Australia'. A photograph of a poster with detailed writing was also provided but there was no accompanying translation. The applicant claims that after the prayers finished, his brother was called to the front and presented him with a plate acknowledging the applicant's donation. He claims some unidentified members of the authorities approached his brother at the temple and asked about his whereabouts and they also visited him later at home. His brother denied that they still had connections but since they knew about the donation they continued to question him and requested the applicant's phone number. His brother admitted they were in contact but said he didn't

have his number as the applicant only contacts him from a landline. According to the applicant, they told his brother that he had escaped from them and when they catch him they will not let him go.

- In his submission and a phone call to the IAA the applicant claimed the CID questioned his cousin about his whereabouts in February 2017. When his cousin denied knowledge, they searched the cousin's phone and found evidence of recent contact between the applicant and his cousin and took down the applicant's Australian phone number. They threatened to assault and kill the applicant upon return. The cousin warned the applicant to change his phone number which he did.

Factual findings

10. The applicant has provided documentary evidence and a consistent and plausible narrative of issues relevant to his identity, movements within Sri Lanka and education history. I accept the applicant is a Tamil Hindu from Batticaloa District, in the Eastern Province of Sri Lanka and that this is his receiving country.
11. I consider that some aspects of the post-interview submission have conflated the applicant's claims. For example it was submitted that the applicant's *"...involvement in organising a remembrance day for fallen LTTE in 2011 led to his being investigated and tortured..."* However according to the applicant's SHEV application and interview, it was organised by other students and he was not even attending university that week. I am satisfied he had not previously claimed he organised the event. It was also submitted that the applicant fears persecution on account of his *"...actual and imputed political opinion as a member or supporter of the LTTE, in opposition to the unitary state of Sri Lanka"*. I am satisfied however, that the applicant has never claimed that he was ever a member or supporter of the LTTE. I have considered the applicant's evidence overall and while I do not accept these aspects of the applicant's claims, I am satisfied these issues do not detract from his overall credibility.
12. The applicant made no specific mention in his Entry interview of the LTTE Remembrance ceremony or any of the problems he claims flowed from that event, including having any problems or interactions with the CID or of anyone accusing him of having LTTE involvement or links. He proffered an explanation for the omission in his SHEV application. He stated that during his Entry interview he was scared. He stated the interview was relatively quick and he didn't go into much detail. For example, he did not provide the full list of his various student accommodation places. Moreover, he stated *"I had experienced many interrogations from authorities and they often began with assurances of my safety, only to end in beatings and torture. I didn't want to divulge the names of people who had helped me for fear of retribution."* I note that during this interview, after discussing his role in the election campaign he stated he was called to a meeting and was scared to attend because of this, and *'another previous issue'*. At another point in the interview he described the incident regarding being taken away on the motorbike and stated he had been questioned between December 2011 and March 2012. I am prepared to accept the applicant was referring to his problems with the authorities in relation to suspected LTTE involvement and I accept his explanation as to why he had not provided details at that stage.
13. Taking into account that I accept the applicant's explanations about the Entry interview, I am satisfied that the applicant has been broadly internally consistent in his material claims and on the discrepancies that arose during the SHEV process, I accept his proffered explanations. At the SHEV interview he provided detailed, apparently spontaneous recollections on his material claims.

14. I have scrutinised the plausibility of the applicant's claims. In particular, I have carefully considered the plausibility of the applicant being a person of a sustained and serious interest from the authorities from the end of 2011 and throughout much of 2012 and yet not being taken into custody and held for more than a day prior to October 2012. However I note he was subject to regular reporting requirements and was regularly interrogated harassed, threatened and interrogated for information. Country information that was before the delegate notes that while during the war any association was grounds for arrest, many civilians were also questioned and monitored towards the end of the conflict and in its aftermath, many Tamils in the north and east reported being monitored and harassed. Overall, I find the applicant's claimed experiences are generally plausible when considered against the country information before the delegate about Tamils in the Eastern Province during and in the aftermath of the war.
15. I have also considered the plausibility of the applicant campaigning for the TNA when he was subject to regular reporting and harassment from the CID and had been making efforts to avoid interaction with them. However I accept his explanation that he hoped the [Mr A] would help him if he got into power and I note that while he claims he was trying to avoid contact with the authorities he was not actually in hiding before or during the campaign period. I am prepared to accept the applicant supported [Mr A] even during this time when he was of interest to the authorities.
16. I concur with the delegate and accept all of the applicant's claims as they relate to events preceding his departure. Given the consistent interest in him from the authorities in the preceding year and that he absconded from their custody (albeit from ransom paid to corrupt officers), I accept he was of interest to the authorities when he departed Sri Lanka and that this was on account of suspected LTTE links as opposed to his TNA campaigning. Given this it is not implausible that the authorities sought him following his departure and that they still have an interest in him, as demonstrated through their recent approaches and questioning of his brother in 2016 and his cousin in 2017. I accept the applicant's claims as to these recent post-departure events.

Refugee assessment

17. 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

18. 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.

19. Guidance from the UK Home Office indicates that with the LTTE now a spent force, the Sri Lankan government's focus has shifted to identifying persons perceived to be a threat to the integrity of Sri Lanka due to a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, journalists or human rights activists critical of the government, individuals who gave evidence to the 'Lessons Learned and Reconciliation Commission' implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes, and persons whose name appears on a computerised "stop" list accessible at the airport.³ However, the UK Home Office also indicates that government forces continue to detain suspected LTTE sympathisers⁴ and that there continue to be reports (albeit in smaller numbers) of abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE.⁵

20. DFAT's 2017 report contains information indicative of eased restrictions and lesser consequences for former LTTE members under the Sirisena government and advises that the situation for Tamils has generally improved and monitoring harassment has decreased including the North. However, DFAT notes that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and that low-profile LTTE members who came to the attention of Sri Lankan authorities would be detained and may be sent to rehabilitation centres and subsequently monitored.⁶ DFAT also notes there are unverified reports of close relatives of former LTTE members being arrested and detained due to their family connections and that close relatives of high-profile LTTE members wanted by Sri Lankan authorities are likely to be subject to monitoring.

21. I accept that in the [number] months leading up to his departure the applicant was regularly required to report to the CID and received additional visits from them outside of these reports. I have accepted he was frequently harassed, threatened and interrogated about LTTE links and to get information about any LTTE information or activities at university and that in October 2012 their interest in him escalated and he was detained and physically harmed in [a camp]. I accept he absconded from custody and left the country while their interest in him was heightened. I also accept the authorities have questioned the applicant's family members a number of times since his departure, most recently in February 2017. I therefore accept he has been of ongoing concern to them since his departure. I accept he would be of adverse interest to the Sri Lankan authorities on his return in relation their previous and ongoing interest in him. I accept he would also now be identifiable to authorities at the airport as a failed asylum seeker who departed illegally.

³ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

⁴ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

⁵ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

⁶ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105

22. Upon arrival in Sri Lanka, involuntary returnees, including those on charter flights from Australia, are processed by different agencies, including the Department of Immigration and Emigration, the State Intelligence Service and the CID.⁷ These agencies check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are also processed en masse, and individuals cannot exit the airport until all returnees have been processed, which may take several hours due to administrative processes and staffing constraints at the airport.⁸
23. I accept the applicant will be subject to police investigations to confirm his identity and to address whether he would be trying to conceal his identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. I accept this may involve interviewing him, contacting his claimed home suburb or town police, contacting his claimed neighbours and family and checking criminal and court records. I also accept he will be checked against the authorities' sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases.⁹
24. I accept that the applicant's profile, the authorities' continued interest in him and the fact that he illegally departed just after absconding from custody and following [number] months of reporting and interrogations, will become known to the authorities processing the applicant's return. I accept that this would trigger further investigation processes which may entail detention and questioning. There are reports of physical violence against Tamils with suspected LTTE links while in police or military custody, including after returning to Sri Lanka from overseas.¹⁰ Some of these reports also allege incidents of torture, enforced disappearance and other mistreatment against Tamils by Sri Lankan authorities following the 2015 change of government. Between 2008 and 2015, over 1,500 asylum seekers were returned from Australia to Sri Lanka as well as thousands from the US, Canada, the UK and other European countries, the majority of which have been Tamil. Of the thousands of returnees who have returned since 2009 there have been relatively few allegations of torture or mistreatment. DFAT assesses the risk of harm for the majority of returnees is low and continues to reduce.¹¹ However, in December 2015 DFAT acknowledged that it does not routinely monitor the situation of returnees (at the airport nor subsequently)¹² and its more recent report does not indicate it has started monitoring returnees. The UK Home Office assesses that if a person is detained by Sri Lankan security services, there remains a real risk of ill treatment or harm and that persons perceived to sympathise with the LTTE continue to be intimidated, harassed, arrested, detained and tortured.¹³ While the improvements since the Sirisena government are acknowledged, as are the reduction in the numbers of reports of abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE, the UK notes it is still too early to depart from its identified risk categories.¹⁴

⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

¹⁰ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Freedom From Torture, "Sri Lanka – Update on torture since 2009, Freedom From Torture", 6 May 2016, CIS38A8012881; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; Sri Lankan Mirror, "Another Tamil returnee arrested", Sri Lankan Mirror, 1 July 2015, CXBD6A0DE16698; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

¹² DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

¹³ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

¹⁴ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

25. I have had regard to the above information and the applicant's individual circumstances. I have considered that he is a Tamil male from a former LTTE controlled area who was accused of LTTE involvement in December 2011 and then subject to ongoing reporting requirements, ongoing harassment, and periods of detention and interrogations from the authorities under suspicion of LTTE links, who travelled overseas just after absconding from detention in [a camp] in October 2012 and whose family were subsequently visited and questioned by the authorities including in 2016 and 2017. I accept there is a small but real chance that the applicant will be subjected to significant physical ill-treatment in the course of questioning, on arrival and on return to his home area, where country information indicates that he may be monitored by the authorities.
26. While the situation under the Sirisena government has generally improved in Sri Lanka and the monitoring and reporting requirements for Tamils has eased, including in the East, I accept that some harassment and mistreatment amounting to serious harm still continues and for the applicant, I find the chance is not remote. I find that he faces a real chance of a threat to his liberty, and of physical ill-treatment or physical harassment of a nature amounting to serious harm within the meaning of s.5J(4)(b) of the Act. I am satisfied that the conduct of the authorities in inflicting such mistreatment is systematic and discriminatory, and that it would be inflicted on the applicant for the essential and significant reason of his imputed former link with the LTTE, an imputed political opinion as a member or supporter of the LTTE, arising from cumulative factors. These include his support from organisations previously banned in Sri Lanka on suspicion of helping LTTE affiliates and the accusation that he had organised the Remembrance day celebration at university on behalf of the LTTE and had links with the LTTE, the ongoing problems he had with authorities on account of these matters, that the authorities' interest in the applicant escalated and they detained him in October 2012 and that he subsequently absconded and departed Sri Lanka in lieu of their concern in him. I accept the applicant faces a real chance of harm amounting to persecution within the meaning of s.5J(4).
27. DFAT advises that Sri Lankan security forces retain effective control throughout Sri Lanka. As the harm feared by the applicant would be inflicted by the Sri Lankan authorities, I find that effective protection measures are not available to him and that the real chance of harm relates to all areas of the receiving country. As the harm arises as a result of the applicant's past history, I find that there are no reasonable steps available to the applicant to modify his behaviour to avoid a real chance of harm. The applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

28. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.