



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01560

Date and time of decision: 9 May 2017 09:32:00
Fiona Kerr, 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 an ethnic Tamil of the Hindu faith from Sri Lanka. [In] March 2016 he lodged an application 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 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. In accordance with s.473DC(1) of the Act I have obtained new information relating to the treatment of Tamils and of persons who have departed Sri Lanka illegally and sought asylum while overseas as well as the current situation in Sri Lanka under the new government, and on political freedoms and issues of human rights and reconciliation in Sri Lanka. The information is from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka (the new report)¹. The new report is dated 24 January 2017 and was therefore published after the date of the delegate's decision. The new report is DFAT's most recent assessment of the situation in Sri Lanka and has been prepared specifically for the purpose of protection status determination. The delegate relied upon an earlier DFAT assessment. I am satisfied there are exceptional circumstances to justify considering this new information: s.473DD(a).
4. [In] March 2017 the IAA provided a copy of the new report to the applicant and invited him to comment with specific reference to aspects of the new information, such as the security situation and reconciliation, that would be the reason or part of the reason for affirming the decision (other than information covered by s.473DE(3)).
5. [In] April 2017 the IAA received a response to the invitation from the applicant's representative. The submission provided was in response to the IAA's specific request for information. I am satisfied that the information could not have been provided to the Minister before the decision was made and that there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - In 2007 he worked for the [NGO], in their [name] Department. The applicant worked on a housing project and his role was to determine [role].
 - A member of the Karuna group did not receive the funding he believed he deserved for housing. He pulled a gun on the applicant and threatened him. The Karuna group is in alliance with the Sri Lankan Army (SLA).

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

- The applicant believes the authorities found out about his work. At that time the international community was negatively viewing and commenting on human rights atrocities against Tamils. The applicant states that the government and the army were paranoid that the truth about the human rights atrocities would reach the western world.
- He fears harm on return to Sri Lanka as the authorities know that he collected information against the interests of the army with respect to the human rights atrocities in Sri Lanka.
- In 2012 the applicant joined the Tamil National Alliance (TNA) and was a [election official] for the provincial election. The Karuna group did not like this and consequently came to his house at about 3am looking for him. They tried to hit him. The applicant hid. His father made a complaint to the police.
- Since the applicant's departure the Karuna group has come searching for him two or three times.

Refugee assessment

7. 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

8. 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.
9. The applicant has provided a number of identification documents and other material in support of his claim. I accept that the applicant is a national of Sri Lanka, a Hindu Tamil, from the Batticaloa District of the Eastern Province. I find that Sri Lanka is the applicant's receiving country.
10. I have before me two statutory declarations sworn by the applicant, one is dated [in] February 2016 and was lodged with his SHEV application (the first statement) and the other is dated [in]

October 2016 (the second statement), as well as the applicant's arrival interview conducted by the Department of Immigration and Border Protection (the Department) [in] October 2012. In the second statement, the applicant states that it overrides any previous statutory declaration submitted as part of his claims for protection. He has provided no written explanation for that. It nevertheless forms part of the referred material before me. During his SHEV interview, his migration agent submitted that the first statement was provided with the applicant's SHEV application by mistake; it was an administrative error on her part and the first statement was not, in fact, the applicant's story. I note that the first statement was signed by the applicant as a statutory declaration. I have, nonetheless, given weight to the fact that the applicant indicated in his SHEV application form that he did not read or write English and there is no indication on the face of the first statement that it was read back to the applicant in his first language, Tamil, which would have alerted him to the fact that he was signing a document which did not relate to him. It is also apparent that the claims in the first and second statements differ significantly, in particular, the events related in the first statement occurred in a different geographic area of Sri Lanka (Vavuniya in the Northern Province) than the applicant's claims which centre on Batticaloa in the Eastern Province. The first statement also does not deal with the applicant's substantive claims such as his work for the TNA (referred to in his arrival interview) or his work with the [NGO](referenced in other parts of his SHEV application form), which were referred to in the second statement and about which he gave evidence in his SHEV interview. The applicant should not be disadvantaged because of his representative's error. For these reasons, I have decided to disregard the first statement and in this decision will consider only those claims set out in the second statement and anything further raised in his SHEV interview.

Work for [Agency 1] and [Association 1]

11. The applicant has been consistent in his claim to have had a role in the [Agency 1] and the local [Association 1]. I note that neither of these roles nor his claim to have been subject to extortion attempts by the TMVP and Karuna group because of those roles were referred to in his second written statement of claim. He did, however, refer to both roles in his arrival interview. In his SHEV interview he was forthcoming about his roles as secretary of the [Agency 1] and the [Association 1] and was able to provide what I consider to be a credible level of detail around the work of both organisations and his roles. He has also provided a copy of a letter of recommendation in English on [Agency 1] letterhead. I accept that he was [position] of both the [Agency 1] and the [Association 1] in his area from 2005 to 2007 ([Agency 1]) and from 2005 until 2012 ([Association 1]). In his SHEV interview he claimed that in 2005 and continuing until 2006 the TMVP and Karuna group forced him to withdraw money from the organisation for them. The delegate asked him how that was possible for the TMVP and Karuna group to extort money from him given his evidence that 2 signatures were required for the withdrawal of money from the account. The applicant said he didn't withdraw money for them but they kept bothering him. I accept that that the TMVP and Karuna group attempted to extort money from the applicant in his role as [position] of the [Agency 1] and the [Association 1] but that he did not withdraw money for them. He did not otherwise claim to fear extortion in future from the TMVP and Karuna group and for the reasons given below I have not accepted that he was threatened by the Karuna group in 2012. I am not satisfied that the applicant is at risk of extortion or other harm from them on his return as a result of his role in the [Agency 1] or the local [Association 1].

Work for NGO

12. The applicant's SHEV application indicates that he worked for the [NGO] in 2007 as a construction supervisor. At his SHEV interview he provided spontaneous, detailed responses

to questions about the [NGO] and his role in [the job]. The applicant also provided a copy of letter of recommendation on [NGO] letterhead confirming he worked for the group [in] February 2006 until [date] December 2007 in their [certain] Project at Batticaloa field office. I accept that the applicant worked for the [NGO] for nearly two years from early 2006 until 2007. He claimed that in May of 2007 he was [working] with another [number] people when a person who did not get any assistance threatened him with a gun. He said he knew it was a member of the Karuna group because at that time, they were doing that kind of thing; people in the village also told him the man was Karuna. When he was asked about what he meant by his claim that he collected information against the interests of the SLA with respect to human rights atrocities in Sri Lanka on behalf of the [NGO], he stated that when he was working in a particular village, they would usually collect information on a family and pass it on to the UNHCR, because the project was funded by the UNHCR. He said they would ask if that family was facing other problems, for example, problems with the SLA or the Karuna group. Approximately [number] percent of the villagers were [people] who were [harmed] by the SLA and this was the type of information he collated in his role and passed on.

13. He also stated the SLA takes it that people who work for the NGO are LTTE, that the SLA killed [number] NGO employees; one of them was a friend who worked with him and was killed by the army and the Karuna group in 2009. According to a report by the Office of the United Nations High Commissioner for Human Rights, as at 2013, Sri Lanka figured as one of the countries with the highest number of humanitarian workers killed worldwide; members of the security services explicitly threatened national humanitarian workers and their relatives.² Killings and disappearances of humanitarian workers escalated significantly in the period between January 2006 and December 2007, mostly in the east and north of the country.³
14. I accept that the security forces viewed humanitarian workers, including possibly the applicant, with a degree of suspicion. I also accept that a friend who worked with him was later killed in 2009. No details were provided about this incident which would enable me to be satisfied that it was in any way connected with his friend's humanitarian work. When the delegate put to him that in the five year period between finishing work for the [NGO] and leaving Sri Lanka, the authorities did not show any interest in the applicant, he was unresponsive and simply referred to the issues he had in September 2012 after the election.
15. I am not satisfied that the applicant was ever targeted by the authorities for his work with the [NGO]. He did not provide any evidence of having been questioned, detained, monitored or harassed during the year that he worked for the [NGO] or subsequently (other than his claim relating to work for the TNA). I consider his claims to have collected information about human rights atrocities which the authorities did not want to come to the attention of the western world an exaggeration, noting that the description of his duties in the [NGO] letterhead includes "collect basic data on IDP's/Returnee families". I do, however, accept that his role may have involved collecting some sensitive information regarding conditions for families in the villages he worked. However, his evidence is that apart from the incident with the Karuna group member and his assertion that the 2012 event was also linked to his [NGO] work, a claim that I have rejected for the reasons given below, nothing ever happened to him over the nearly two years he worked for the [NGO] and I am not satisfied that the applicant is at risk of harm because of the work he performed for the [NGO] ten years ago.

² Office of the 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

³ ibid

16. I accept as plausible that a member of the Karuna group threatened him with a gun because he did not get housing assistance. However, this appears to have been an isolated incident which did not have any repercussions for the applicant, notwithstanding that he made a complaint to the police about it. I am not satisfied the applicant is at risk of harm from the Karuna group because one of its members did not get housing assistance through the [NGO] in 2007 when the applicant was working on a [certain] project. His other claims to fear harm from the Karuna group are considered below.
17. In his SHEV interview the applicant stated that in 2014 when he was in Australia he made a complaint to the UNHCR about SLA abuses in his village. He did not claim to fear harm on return on this basis nor that he would pursue complaints about the SLA with the UNHCR on his return. I am not satisfied that the applicant would be at risk of harm on the basis of a complaint he made to the UNHCR in 2014 about the SLA.

Political opinion - TNA involvement

18. In his SHEV interview the applicant described his work for the TNA as a [election official]. He stated this particular role was limited to election day but that he was a member of the TNA. He was able to provide a good level of detail around the TNA and its policies and identify its leader; he also provided convincing reasons for his support for the party saying that the parties in the alliance fight for the rights of Tamil people and because of them, the abuses of the Tamil people have been exposed to the international community. He has also provided a copy of an untranslated document in three languages; in English it is headed "Provincial Councils Elections Act - Appointment of [election official]" with details filled in a Sri Lankan language. No translation has been provided. Nonetheless, I accept that he was a member of the TNA and that on election day on 8 September 2012 he worked at a polling booth as a [election official] for the TNA.
19. When he was asked about his claim that after the election, somebody either SLA or Karuna group people came to his house and he hid from them, he repeated the information in his written statement without providing much in the way of detail. He simply stated that they came in after breaking the front door, his mother came in to him and she opened the back door and he escaped that way. He also stated that he realized they were from Karuna whereas in his written statement he said it was either SLA or Karuna group people who came to his house. He said they were targeting him not only for his [election official] role but because he was involved in the [Association 1] and worked for the NGO. They also took his bike which he used for his work with the [Association 1]. His father complained to police after the incident but said the police asked for a bribe and took no proper action. He said that after this they came to his home 2 or 3 times but he was in hiding at his father's farm and then at a relative's house. The delegate asked him why, if he was staying at the family farm and at a relative's, they couldn't have found him there. The applicant's response was, in my view, evasive. Eventually he stated that his family would alert him and he'd move. He then left for Australia.
20. The applicant provided a copy of a police report and translation dated [in] September 2012 (sic). The report states the applicant was involved in propaganda work for the TNA and that there was an incident after the Eastern Provincial Council Election [in] September 2012 at about 11.30 when [number] unidentified persons came to his home, and assaulted his son (the applicant). The police report states that when they raised a hue and cry, the attackers left; sporadic swelling was noticed on the body of his son; his father was scared to keep his son in the house after this incident.

21. There is ample credible country information that in the years immediately following the end of the civil war, elections in Sri Lanka were attended by allegations of electoral fraud and voter intimidation and violence.⁴ However, considering the applicant's evidence overall, I am not satisfied there was an incident in which unidentified men came to his home, hit him, causing him to flee and go into hiding. The applicant's evidence was that the incident occurred 2 – 3 days after the election [in] September whereas the police statement indicates the incident was on 18 September 2012, some 10 days after the election. Even if I accept that the applicant was mistaken about the date and that it happened later than he recalled, his evidence was that he had no interaction with the unidentified men. He said the men came in the front door and he managed to escape through the back door after his mother opened it for him; they searched for him and told his parents that when they see him they'll shoot him. This is a change from the claim in his second statement that the men tried to hit him. It is also not consistent with the police report he has presented. I do not consider it credible that if the applicant was assaulted as seriously as the police report suggests, he would fail to mention that in his SHEV interview. I am not satisfied that there was an incident at his home in which either the SLA or members of the Karuna group came to his home in the early hours of the morning, hit him and he fled. It follows that I do not accept that after this incident, the applicant went into hiding and that on 2 or 3 occasions following the incident, the same people came looking for him.
22. In his SHEV interview the applicant was asked about his claim that since his departure from Sri Lanka the same people came searching for him a further 2 or 3 times during the 2012 period. He stated they looked like they were from the intelligence wing of SLA and that they would be interested in him because of his NGO role and because, as [position] of the [Association 1] he didn't give them money, so they decided he was anti-government. This claim is not consistent with his claim that it was members of the Karuna group not the SLA who tried to extort money from him when he was [position] of the [Association 1]. I have, in any case, not accepted his claim that there was an incident at his home or that he was forced to go into hiding because of it. There is also no information before me that the Karuna group or TMVP continue to be actively engaged in extortion and election related violence. DFAT stated in its 2015 report, which was before the delegate, that it was aware of credible reports of paramilitary groups, including the Karuna Group, being involved in criminal activities but noted verifying such reports is difficult.⁵ It also stated that extra-judicial killings, disappearances and kidnappings for ransom were a frequent occurrence during the war, particularly in the north and east, and were carried out by, among others, paramilitary groups, but that the number of these incidents, including kidnappings for ransom, had considerably fallen since the end of the war.⁶ The US Department of State in its 2016 report⁷ covering events in Sri Lanka in 2015, mentions the activities of paramilitary groups in relation to allegations of abducting people with LTTE connections, and their historical activities as covered by the Office of the Human Rights Commissioner (OHCHR) report released that in September that year, but not in relation to any criminal activities. Additionally, the same report only specifically mentions the Karuna Group in relation to historical child recruitment activities as outlined in the OHCHR report.⁸ DFAT's most recent 2017 report similarly referred to the OHCHR report and the involvement of paramilitary groups in incidents of extra-judicial killings, disappearances and kidnappings for ransom but

⁴ International Crisis Group, "A Bitter Peace", 1 January 2010, CIS18185; UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka, 21 December 2012, UNB0183EA8; UK Home Office, "Sri Lanka March 2012", 7 March 2012, 3523

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143, 2.35.

⁶ Ibid 4.1.

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

⁸ Ibid

assesses such incidents have significantly reduced since the end of the conflict; its report does not refer to recent any recent incidents involving paramilitary groups.⁹

23. Having regard to the applicant's claims and the evidence before me, I am not satisfied that at the time he left Sri Lanka the applicant was a person of interest to the SLA, members of the Karuna group, or other authorities either as a result of his work for the TNA in 2012 election campaigns, his work for the [NGO] in 2007 or his role with the [Agency 1] or [Association 1]. On that basis, I am not satisfied that if he returns, he is at risk of harm from either the SLA, paramilitary group members or other persons on the basis of his past work for the TNA in 2012 election campaigns, his work for the [NGO] in 2007 or his role with the [Agency 1] or [Association 1].
24. I consider it is possible that the applicant, as a member of the TNA, may have some political involvement on his return. However, I am not satisfied that the applicant faces a real chance of serious harm in this regard. Firstly, the applicant's evidence is that while was a member of the TNA, his involvement with the TNA was limited to one day working as a [election official] and I do not accept that such low-level, administrative work would bring him to the attention of political opponents or that there is a real chance that he would be personally targeted should he again engage in such activities. Secondly, the TNA is now a significant and influential political force in Sri Lanka; its leader R Sampanthan was named leader of the opposition in the new parliament, the first Tamil politician in that position for 32 years.¹⁰ The UNHCR's 2012 Guidelines indicate that certain opposition politicians and political activists are likely to be in need of international protection, depending on their individual circumstances.¹¹ However, the applicant does not himself have a profile as either an opposition politician or as a political activist and while past election campaigns have been attended by allegations of violence¹² the EU Election Observation Mission characterised the most recent August 2015 parliamentary election as "the most peaceful and efficiently conducted elections in the country's recent history".¹³
25. Taking into account the nature of the applicant's political activities and the changed political landscape in Sri Lanka, I am not satisfied that there is a real chance that the applicant would face harm, including serious harm, on the basis of any possible future political involvement or associated activities.

Tamil ethnicity/imputed political opinion generally

26. The applicant states he fears returning as a young Tamil male because he collected information about human rights atrocities. He also states that many Tamil people disappear because they are suspected of LTTE involvement. I have rejected his claim to have been targeted by the authorities because of his work for the [NGO]. The UNHCR's 2012 Guidelines, which while over five years old, remain the UNHCR's most recent assessment of the protection needs of asylum seeker from Sri Lanka, provide that simply originating from an area formerly controlled by the LTTE no longer gives rise to a need for protection.¹⁴ I accept that certain real or perceived

⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 4.1

¹⁰ US Department of State, "Country Reports on Human Rights Practices for 2015 – Sri Lanka", 13 April 2016, OGD95BE926320

¹¹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

¹² UK Home Office, "Sri Lanka March 2012", 7 March 2012, 3523

¹³ US Department of State, "Country Reports on Human Rights Practices for 2015 – Sri Lanka", 13 April 2016, OGD95BE926320

¹⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

links to the LTTE may give rise to a need for protection, however, the simple fact of being a Tamil does not of itself give rise to a well-founded fear of persecution.¹⁵ The applicant stated he was never involved with the LTTE; he was interested in politics and studied [course] at university but did not support the LTTE, nor oppose them. The applicant does not have links to the LTTE. Further, he has not claimed that he has ever been questioned, monitored, detained or otherwise come to the attention of the authorities on the basis of any real or perceived links to the LTTE, his own or that of any other member of his family.

27. The applicant in his response to the IAA states that the information in the DFAT report is very generic and abstract in form and does not demonstrate that the Sri Lankan government has taken any positive step towards reconciliation, in particular, it has not taken steps to address the political situation and reach a lasting resolution. He submits there is a pathological inability to improve the welfare and well-being of the Tamil community; impunity is still the norm and dissent is considered an offence. The situation in the north and east continues unabated.
28. The applicant submits that the Prevention of Terrorism Act (PTA) is still in force and targets a particular group on the basis of race, religion and ethnicity, ie, Tamils and it has been used to suppress any kind of agitation even if it is non-violent. For that reason, there can be no lasting political solution without abolition of the PTA. Tamils suspected of LTTE links continued to be detained under the PTA. The PTA was introduced in 1979; it applies to investigations into national security-related offences and provides for detention without trial for up to 18 months, without bringing the person before a court.¹⁶ The overwhelming majority of cases of torture of people held under the PTA were Tamils.¹⁷
29. After its election the Sirisena government pledged to review the cases of all those still held under the PTA.¹⁸ In October 2015, the government also co-sponsored a resolution in the UNHRC highlighting the need to repeal the PTA.¹⁹ While the DFAT report notes the government has committed to reform of the PTA,²⁰ as the applicant submits it had not implemented that commitment by the end of 2016, notwithstanding the recommendations of the international community.²¹ The applicant submits that a draft policy and legal framework for replacement legislation submitted for cabinet approval in October 2016 retained many of the PTA's most problematic elements. He does, however, concede that the government made a declaration under the UN Convention against Torture recognising the competence of the UN Committee Against Torture to receive and consider communications from individuals alleging violations of their rights under the Convention.
30. I accept that while the PTA remains in place, there continues to be a danger of associated prolonged detention without trial and possible torture. Contrary to the applicant's submission, the DFAT report addresses issues associated with the continuing use by the state of the PTA and states in its 2017 report that it is aware of reported instances of torture but points to the drop in torture complaints made to the Human Rights Commission of Sri Lanka from 600 in 2013 to 208 as at 31 August 2016 and assesses that the risk of torture from

¹⁵ *ibid*

¹⁶ OHCHR, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

²¹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 2.29; United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Mr Juan E. Mendez "Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment", 7 May 2016, CIS38A8012799

military and intelligence forces has decreased since the end of the war.²² Further, its assessment overall is that the risk of mistreatment amounting to torture for Sri Lankans regardless of religion, ethnicity, geographic location or other identity is low.²³ The government has also commenced releasing persons detained for long periods under the PTA; activists and others labelled political prisoners have begun to be released by the government although there is some criticism that the government has not yet established a process to either release those against whom there is insufficient evidence or to expedite the trials of those who remain in prison.²⁴

31. Impunity for the crimes committed during the armed conflict and afterwards continues, as submitted by the applicant, particularly for cases of torture, sexual violence, and human rights abuses.²⁵ However, the government has demonstrated a willingness to take action to address past abuses and in 2015 arrested and detained a number of military, police, and other officials implicated in old and new cases that included the killing of parliamentarians and the abduction and suspected killings of journalists and private citizens.²⁶
32. The applicant's submission also refers to the failure of the government to carry out the recommendations of the OHCHR.²⁷ In particular, the submission points to the recommendation that three international judges be appointed to investigate the gross violations of human rights perpetrated by the security forces and the President's refusal to allow international judges to conduct any kind of enquiry into the armed forces in Sri Lanka. Even if I accept that submission, there are other signs that point to an increased willingness on the part of the Sirisena government to engage with the international community. In November 2015, the UN Working Group on Enforced and Involuntary Disappearances visited Sri Lanka at the government's invitation.²⁸ The government subsequently signed the International Convention for the Protection of All Persons from Enforced Disappearance.²⁹ The government also co-sponsored a resolution on human rights at the UN Human Rights Council and welcomed visits by the UN special rapporteur on transitional justice and the UN Office of the High Commissioner for Human Rights (OHCHR) Office of Legal Affairs team.³⁰
33. The applicant states that the security situation has not improved and submits that any promises for change are, in effect, illusory and just window dressings to please the western/international public; any reform, if at all, is very slow. The government remains sensitive to the re-emergence of the LTTE and paramilitary groups like Karuna and the DFAT report concedes that military forces still maintain a significant presence in the Northern Province, including Jaffna.
34. There is some support for the submission that reform implemented after the election of the Sirisena government has been slow. The International Crisis Group in its August 2015 report noted that nationalist sentiments and party politics had limited what the new government had been able to achieve.³¹ There were, nonetheless, substantial reforms. It assessed that the

²² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 4.16

²³ Ibid

²⁴ International Crisis Group, "Sri Lanka Between Elections – Asia Report No272", 12 August 2015, CISEC96CF13069

²⁵ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

²⁶ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

²⁷ OHCHR, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

²⁸ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

²⁹ Ibid

³⁰ Ibid

³¹ International Crisis Group "Sri Lanka Between Elections – Asia Report No272", 12 August 2015, CISEC96CF13069

President had opened up political debate and ended the former government's authoritarian and repressive practices.³² Within days of assuming power, the new government unblocked websites critical of the former regime, relaxed surveillance of political dissenters, ended intimidation of journalists and removed restrictions on the travel of foreigners to the northern provinces.³³ Its report notes that many people felt able to speak freely, including criticising the government.³⁴ In April 2015 parliament approved the 19th Amendment to the Constitution which re-introduced a two-term limit for the President thereby reducing presidential powers and also established independent oversight commissions to oversee the judiciary, police, elections, human rights and the office of the Attorney-General.³⁵ As DFAT's report notes, further constitutional reforms (including electoral reform and devolution of power) are underway with a view to finalising the text in 2017 although a draft Constitution is yet to be released.³⁶

35. As the applicant notes, DFAT's 2017 report concedes that a sizeable military presence remains and the government remains sensitive to the re-emergence of the LTTE. He also submits that a heavy culture of surveillance, intimidation and harassment persists and former detainees continue to face regular security checks. I accept that there continue to be instances of monitoring and harassment and that this has disproportionately affected Tamils, who because of their ethnicity were frequently imputed as being LTTE supporters.³⁷ The US State Department noted that in 2015, Tamils throughout the country, but especially in the north and east, reported security forces regularly surveilled or harassed members of their community, especially young and middle-aged Tamil men.³⁸ However, DFAT's more recent assessment is that the monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena government.³⁹
36. There are a number of other issues referred to by the applicant in his submission including the fact that large tracts of land remain under military control predominantly in Tamil dominated areas and the Office of Missing Persons, promised by the government, has not yet been created. There is, however, credible information before me that indicates the Sirisena government has implemented measures to address other grievances of the Tamil community, including the return of government-occupied land to its original owners although many of those affected complain that the pace of the return of land is too slow and the military continues to hold land it views as economically valuable.⁴⁰ In addition, the presidentially appointed Office of National Unity and Reconciliation was charged with coordinating the government's efforts towards reconciliation. Its four main focus areas were to promote social integration to build an inclusive society, secure language rights for all citizens, support a healing process within war-affected communities via the government's proposed Commission for Truth, Justice, Reconciliation and Non-recurrence, and provide coordinated development planning for war-affected regions.⁴¹ In the absence of any information to the contrary before me I accept the applicant's submission that the government has not fulfilled its promise to establish the Office of Missing Persons. It has, however, enabled family members of those who

³² International Crisis Group "Sri Lanka Between Elections – Asia Report No272", 12 August 2015, CISEC96CF13069

³³ Ibid

³⁴ Ibid

³⁵ International Crisis Group "Sri Lanka Between Elections – Asia Report No272", 12 August 2015, CISEC96CF13069

³⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 2.28

³⁷ DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.7; DFAT "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 3.8

³⁸ US Department of State "Country Reports on Human Rights Practices for 2015 – Sri Lanka", 13 April 2016, OGD95BE926320

³⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 3.9

⁴⁰ US Department of State, "Country Reports on Human Rights Practices 2015 – Sri Lanka", 13 April 2016, OGD95BE926320

⁴¹ Ibid

are missing to access government benefits by approving the issuance of a “certificate of absentee” for persons reported missing in lieu of a death certificate.⁴² I also place weight on the assessment of the executive director of the Centre for Police Alternatives in Colombo who was quoted in October 2015 as saying that it is relatively safe for people to come back. While acknowledging that there is a long way to go to restore normalcy, for the country as a whole “there is a sense of things having changed and wanting to rebuild”.⁴³

37. Assessing the applicant’s claims and the evidence overall, I am not satisfied that the applicant is at risk of harm if he returns to Sri Lanka. I have accepted that he worked for the [NGO] for nearly two years and on one occasion was threatened by a member of the Karuna group. However, on his evidence this was an isolated incident which did not have any further repercussions for him. Nor have I accepted his claim that the government would be interested in him because he collected information about atrocities in Sri Lanka. I accept that he was subjected to extortion attempts by the Karuna group, however, he did not give them money and on his evidence, nothing further happened to him as a result of that refusal. I accept he was a [election official] for the TNA in September 2012 elections but I have rejected his claim that there was an incident at his home involving unidentified people after the election. I have found that the applicant was not, at the time he left Sri Lanka a person of interest to the SLA, members of the Karuna group, or other authorities. Further, I note the applicant has not claimed to have been the subject of discrimination over and above the group discrimination which I accept has been a feature of life for Tamils in the past. However, I have found that in the years since the applicant left, country conditions in Sri Lanka have changed considerably. The applicant is university educated and has been employed in a number of roles, including in a government job as an [occupation] for the [agency] and has not claimed that he has been otherwise unable to subsist or access basic services. He has also lived at the same place for an extended period of time and overall, I am not satisfied that if he is returned to Sri Lanka the applicant would be at risk of harm on the basis of his ethnicity, gender or origins as a Tamil male from the east.

Illegal departee/returning asylum seeker

38. The applicant departed Sri Lanka by boat and did not use his passport. He submitted that he will be harmed because he left the country illegally, jailed and mistreated and degraded in jail by being asked to clean the toilets of the police or perform sex acts on the police, and that this has happened to a lot of people. He also claimed that if he returns he will be detained as a failed asylum seeker. He fears he will be accused of leaving Sri Lanka because he had LTTE involvement and will be assumed to be an LTTE sympathizer because he is Tamil and therefore detained, kidnapped or killed. The authorities will interrogate him because he collected information perceived to be anti-government about the human rights atrocities against Tamils during the war. The submission to the IAA states that the treatment of returnees entails fines, detention and imprisonment. I accept that the applicant departed Sri Lanka illegally and that by manner of his return, the Sri Lankan authorities will know or infer that he made a claim for asylum in Australia.

39. Returnees who departed Sri Lanka irregularly by boat are generally considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act).⁴⁴ Penalties for persons leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up

⁴² Ibid

⁴³ Australian Broadcasting Corporation (ABC) (News) “Six years after the end of Sri Lanka's civil war, Tamils in Jaffna still struggling to rebuild their lives”, 10 October 2015 CXBD6A0DE14473

⁴⁴ Ibid at 5.18

to 200,000 Sri Lankan rupees, although in practice, penalties are applied to such persons on a discretionary basis and most cases will result in a fine rather than imprisonment.⁴⁵

40. According to DFAT, for those travelling on temporary travel documents, as the applicant would, authorities conduct an investigative process to confirm identity; the process may involve interviewing the returning person, contacting local police, contacting neighbours and family and checking criminal and court records.⁴⁶ DFAT observes that these administrative processes can take several hours to complete and as involuntary returnees are processed en masse, further delays could occur until all returnees are processed.⁴⁷ DFAT further assesses that detainees are not subject to mistreatment during processing at the airport.⁴⁸
41. On the evidence before me, I find that on return the applicant will be subject to a series of investigative processes at the airport. I accept that he may be briefly detained under routine procedures that apply because he will be travelling on a temporary travel document, that his background will be checked. The applicant claims that he will be targeted because most of the time he has worked in the public interest, people know that and he is not just an ordinary citizen. He stated in his SHEV interview that when a Swiss minister met with the Chief Minister of the Northern Province a few days before his interview, the Swiss minister was told not to return asylum seekers because no changes have been made to the constitution.
42. I accept that there are reports of Tamils, including returnees to Sri Lanka, being subjected to arbitrary arrest and torture.⁴⁹ On review, it appears that these people had either LTTE, political or criminal profiles which I have found the applicant does not have. I reject his claim that he will be targeted for his work in the public interest, noting that with the exception of the two incidents I accept occurred involving the Karuna group (threat in 2007 and extortion attempts) he was never subjected to interest from the authorities either during the period he worked for the [NGO] or during his time with the [Agency 1] and [Association 1]. The country information indicates that being a returning asylum seeker or returnee from a western country will not itself result in harm nor does being of Tamil ethnicity. The applicant does not have LTTE connections which the evidence suggests is a risk factor for interrogation and detention and there is no evidence before me that he has engaged in separatist activities outside of Sri Lanka. I find that the process of questioning and investigation itself does not amount to serious harm.
43. The applicant claims he will be subject to fines, detention and imprisonment which I take to be a reference to the fact that he departed illegally. I accept that following investigation at the airport, the applicant will be charged with the offence of illegal departure under the I&E Act. DFAT advises that those arrested can remain in police custody at the CID airport office for up to 24 hours after arrival, and if a magistrate is not available before this time (eg because of a weekend or public holiday) may be held at a nearby prison.⁵⁰ If a person pleads guilty, they are fined and released and if they plead not guilty, will need to obtain bail.⁵¹ An accused will only need to attend court again when the case against them is being heard (or if required to

⁴⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 5.17

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ *Ibid* at 5.20

⁴⁹ Freedom From Torture "Sri Lanka – Update On Torture Since 2009", 4 May 2016, CIS38A8012881; Sri Lankan Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015 CXBD6A0DE6065; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540;

⁵⁰ *Ibid*

⁵¹ *ibid*

give evidence as a witness in another case); there is no general requirement for such persons to report to police or police stations between hearings.⁵²

44. There is no evidence before me to suggest that the penalty or treatment faced by persons charged with illegal departure under the I&E Act varies depending upon their ethnicity, religion, status as failed asylum seekers, imputed or actual political opinion⁵³ I find that there is not a real chance of a custodial sentence being imposed.
45. I find that if the applicant pleads guilty he will be fined and immediately released. If he pleads not guilty, he will be granted bail immediately on personal surety by the magistrate, or may be required to have a family member act as guarantor.⁵⁴ I accept it is possible that, as part of the legal processes associated with the I&E Act, the applicant may be held for a period at the airport CID office and spend some days on remand. He submits that he will be detained in prison and possibly face physical abuse which amounts to serious harm, and that conditions in Sri Lankan prisons are terrible. As noted above, I accept there are reports of Tamils with LTTE, political or criminal profiles being subjected to mistreatment. The applicant does not have such a profile and I consider the chance of him being subject to abuse amounting to serious harm during any brief period of detention to be remote. I accept that, in general, prison conditions in Sri Lanka are poor due to old infrastructure, overcrowding and a shortage of sanitary and other basic conditions.⁵⁵ Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.⁵⁶ Contrary to his submission, I find the prospect of him spending more than a few days in detention pending bail, including the period on remand prior to being brought before a Magistrate, to be remote. Even considering the possibility that he arrives on a weekend and is detained until he can appear before a magistrate and then until bail is granted, the evidence before me is that the period of detention will be brief, at most, a matter of days. In my view, this does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm.
46. Further, I find the treatment of the applicant under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.⁵⁷ In this case, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. Accordingly, I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4).
47. Considering the evidence overall, I am not satisfied that the applicant faces a real chance of serious harm amounting to persecution on the basis of being a returning Tamil asylum seeker who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
48. The applicant states it is not simply one of his claims that places him at risk of harm on return but that his claims should be considered cumulatively. I have rejected his claim to have been targeted after the September 2012 election. Taking into considering the other claims which I

⁵² *ibid*

⁵³ *Ibid* at 5.25

⁵⁴ *Ibid*.

⁵⁵ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

⁵⁶ *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

⁵⁷ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

have accepted, his profile and circumstances as a whole, including his ethnicity as a Tamil man from the east, his work for the [NGO], threat and extortion attempt by the Karuna group, his status as a returning asylum seeker and his illegal departure, even taking his claims together, I am not satisfied the applicant faces a real chance of harm on his return to Sri Lanka now or in the reasonably foreseeable future.

Refugee: conclusion

49. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

50. 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

51. 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.

52. I accept the applicant worked for the [NGO] and was [position] of the [Agency 1] and [Association 1] and that in those roles, was on one occasion threatened by a member of the Karuna group (2007) and subjected to extortion attempts also by the Karuna group. However, on the evidence before me, the Karuna group is no longer involved in criminal activities such as extortion and I have found that there is not a real chance of serious harm to him from the Karuna group or other paramilitary groups on his return. As 'real chance' and 'real risk' involve the same standard,⁵⁸ I am satisfied there is not a real risk of significant harm to the applicant from the Karuna group or other paramilitaries on his return. I also accept that the applicant may have collected sensitive information during the war in his role with the [NGO]. I have found, however, that he has never come to the interest of the authorities, or other persons, because of that role and was not at the time he left Sri Lanka a person of adverse interest to the authorities on the basis of his work for the [NGO]. I accept that the applicant worked as a [election official] for the TNA in the September 2012 elections but have rejected his claim that he was subsequently targeted for the work and find there is no risk of harm to him even if he resumes working on behalf of the TNA on his return, particularly given the influence of the TNA since the election of the Sirisena government in 2015. I am similarly not

⁵⁸ *MIAC v SZQRB* (2013) 210 FCR 505

satisfied that the applicant is at risk of significant harm on the basis of his Tamil ethnicity, any imputed political opinion or his origins in the east.

53. I accept that on return to Sri Lanka the applicant will be identified as an illegal departee and a returning asylum seeker and that there is a real risk that he may be investigated and detained for several hours at the airport, potentially detained on remand for a number of days pending bail, and then fined. I am not satisfied, however, that this treatment amounts to significant harm. As I have found above, the applicant is not a person of interest to the Sri Lankan authorities and I do not accept there is a real risk that the applicant will be mistreated while held and questioned at the airport or in remand, or face a total period of detention of longer than a few days in the worst case scenario. The applicant has family members to act as guarantor if required; accordingly, I find the prospect of him spending more than a few days in detention pending bail, including the period on remand prior to being brought before a Magistrate, to be remote.
54. I accept that the applicant may be detained in crowded and unsanitary conditions while on remand. The applicant submits that prison conditions are terrible. I accept that. However, the evidence is that this treatment arises from the application of Sri Lankan law and the fact that poor prison conditions in Sri Lanka are due to a lack of resources, a situation which the authorities are attempting to address.⁵⁹ I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. The treatment does not consist of the death penalty or arbitrary deprivation of life. Nor does it amount to torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. Accordingly, I find that this treatment does not amount to significant harm within the meaning of s.36(2A). I similarly find that the imposition of a fine under the I&E Act for his illegal departure does not amount to significant harm within the meaning of s.5(1) and s.36(2A).
55. Considering the applicant's circumstances as a whole, I find there is not a real risk that the applicant will suffer significant harm on return to Sri Lanka. I am not satisfied that even considering the claims which I have accepted cumulatively, the applicant is at risk of significant harm within the meaning of ss.36(2A) and 5(1) on his return to Sri Lanka or in the reasonably foreseeable future.

Complementary protection: conclusion

56. 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.

⁵⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 4.25

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.

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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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