



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

**Decision and Reasons**

**Referred application**

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SRI LANKA

IAA reference: IAA16/01615

Date and time of decision: 14 September 2017 15:45:00

Fiona Kerr, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a Hindu Tamil from Sri Lanka. [In] February 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 given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 4, 5, 12 and 23 January 2017 the applicant provided new information to the IAA. The new information comprises a statutory declaration made by the applicant on 3 January 2017 (the 2017 declaration), a letter from his doctor dated [in] December 2016, a [medical] assessment dated [in] January 2017, a second copy of the [medical] assessment, and a set of photographs purportedly of the applicant in support of information provided in the 2017 declaration.
4. The 2017 declaration makes the new claim that the applicant was a combatant member of the Liberation Tigers of Tamil Eelam (LTTE) who rose through the ranks to be [on a higher post] and who led fighters into a number of battles. In support of the information in the 2017 declaration, the applicant provided photos purportedly of him in LTTE uniform engaged in a combat role and visiting an LTTE cemetery. The 2017 declaration and the photos are new information.
5. The applicant stated in the 2017 declaration that he did not mention he was a senior member of the LTTE because he feared being sent to rehabilitation for a longer period and prosecuted. He also did not trust the Australian officials not to share the information with the Sri Lankan authorities despite being assured at interviews by Australian officials that information he shared would remain confidential. The CID have visited his parents and told them they know he was in the LTTE and he will be punished on his return. He has also heard from friends that if he had disclosed his LTTE links to the Australian authorities he could be imprisoned in Australia or at risk of being returned to Sri Lanka.
6. In his entry and SHEV interviews the applicant was asked specific questions relating to the LTTE. In his entry interview he stated he had lived in an area controlled by the LTTE but had no involvement with them and in response to the questions whether he had ever received training in preparation for conflict or participated in armed conflict or fighting, he said he had not. In his SHEV interview he stated he was not a member of the LTTE and had never had any weapons or combat training by the LTTE.
7. With the exception of two photos which the applicant's representative states were taken "a few weeks ago", presumably for comparison purposes, the information regarding his LTTE membership pre-dates the delegate's decision. I accept that a person with the history that the applicant now claims may initially fear disclosing his LTTE membership for the reasons stated in the 2017 declaration. However, no credible explanation has been provided for why the applicant waited until being informed of the delegate's decision to raise this important new claim. I also place weight on the fact that the applicant stated under oath in his SHEV interview that he was not a member of the LTTE. This new information directly contradicts his earlier

sworn evidence and leads me to doubt the applicant's credibility. The photos are taken from some distance away and generally not of high resolution; in two of the three where the person said to be the applicant has been circled, the person is not looking at the camera. They do not assist in persuading me that the person pictured is, in fact, the applicant. The applicant has not satisfied me that the new information regarding his membership of the LTTE is credible personal information or that it could not have been provided before the Minister made the decision (apart from the two photos that are said to post-date the delegate's decision).

8. The applicant's former representative (who states he does not intend to represent the applicant at this stage) asserted that there were exceptional circumstances to consider the 2017 declaration. He does not, however, elaborate and his assertion does not assist. Despite being asked in both interviews specific questions relating to his prior involvement with the LTTE the applicant did not provide the information he now seeks to rely on. It is expected that all fast track applicants articulate their protection claims accurately and in full at the earliest possible opportunity, and in any case, before a primary decision is made on their application. The applicant was advised at the start of his SHEV interview of the limits on the IAA's ability to accept new information, had explained to him the need to put forward all his claims as soon as possible and was told that he may not have another opportunity to provide further information later on. The applicant has been represented by an experienced registered migration agent throughout the process who was also present at his SHEV interview and provided submissions by telephone at the end of his interview. Having regard to all the circumstances, I am not satisfied that exceptional circumstances exist to justify considering the new information comprising the 2017 declaration and the photographs. I accept that the more recent photos post-date the delegate's decision and could therefore not have been provided before the delegate's decision and that they are credible personal information. However, as I have decided not to accept the other photos and the recent photos appear to have been provided for comparison purposes, I am not satisfied that exceptional circumstances exist to justify considering them.
9. The information regarding the applicant's [medical] conditions (doctor's letter and [medical] assessment) has not previously been provided and is new information. The letter and the assessment are dated [in] December 2016 and [in] January 2017 respectively. On that basis, I accept that both documents could not have been provided to the delegate before the decision was made. The information relates to the applicant and has been provided by registered Australian health professionals. I am satisfied that it is credible personal information which was not previously known and had it been known may have affected consideration of his claims.
10. Turning to whether exceptional circumstances exist to justify considering the new information, while I accept that the doctor's letter and [medical] assessment could not have been provided before the date of the decision, it is apparent from information in the [medical] assessment that the applicant has been consulting medical practitioners in Melbourne (including the author of the doctor's letter) since May 2013 in regard to both his physical and mental well-being. As noted above, the applicant has been assisted throughout the SHEV application process by a registered migration agent who I consider would have been aware of the importance of providing all relevant information before the decision was made. No claim was advanced before the delegate as to the applicant's mental health issue. I also note that it appears that both documents were prepared specifically for the purpose of assisting in the assessment of the applicant's claims. It is not clear to me why the letter and the assessment could not have been obtained earlier or why the claim relating to his mental health generally could not have been provided earlier. I am not satisfied that exceptional circumstances exist to justify considering either the claim about his mental health or the letter and assessment.

### *New country information*

11. In accordance with s.473DC(1) of the Act I have obtained new country information about Sri Lankans who have departed Sri Lanka illegally and sought asylum while overseas from the most recent Department of Foreign Affairs and Trade report<sup>1</sup> (the DFAT 2017 report). The DFAT 2017 report is dated 24 January 2017 and was therefore published after the date of the delegate's decision. The delegate relied on information in DFAT reports dated up to 18 December 2015. The DFAT 2017 report is DFAT's most recent assessment of country conditions in Sri Lanka. It has been prepared specifically for the purpose of protection status determination and updates the earlier reports relied on by the delegate. I am satisfied that there are exceptional circumstances to justify considering this new information.

### **Applicant's claims for protection**

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

- [In specified years] he was employed with [a Government Agency] as a [manager] on [Project 1], [assisting] farmers in the LTTE controlled Vanni area. The LTTE was in charge of the projects and he had to liaise with LTTE members and senior LTTE administrative staff.
- [In specified years] he was employed by the non-governmental organisation (NGO) [NGO1] as [an occupation 1]. He assisted with various [recovery projects] after the tsunami in late 2004. The LTTE was overall in charge of all tsunami [recovery] projects in its area. During the course of this work the applicant attended regular weekly progress meetings where LTTE officers, including senior officers, were present. The LTTE told him who should receive assistance.
- In 2009 he and his father were captured at [town 1] and were transferred to the [Location 1] where they were interrogated on suspicion of being LTTE cadres. They were taken to [camp 2] for 15 days. He was then transferred to [camp 1] for a further 15 days during which he was interrogated, beaten, slapped, pushed and kicked and ordered to remove his clothes while being interrogated (tortured) by Criminal Investigation Department (CID) officers and forced to sign a document written in Sinhala that he did not understand.
- He was then transferred to a series of rehabilitation centres. His rehabilitation ended in July 2011 after approximately two years and three months.
- During his final placement he was shown a video clip on a mobile phone by a drunk CID officer of LTTE cadres being interrogated and tortured by Sri Lankan authorities. The applicant recognised a senior LTTE cadre who had previously resided close to his village.
- In detention, he was interrogated about whether he had sent photographic evidence of those who were injured during the war overseas while working for the NGO. He could be perceived as a humanitarian worker.
- On his release from rehabilitation he was required to report weekly to the army camp in [Town 2], which he did, until he departed Sri Lanka in October 2012. A number of other conditions were attached to his release including that he should leave Sri Lanka for a year.

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

- About one month prior to leaving Sri Lanka (approximately September 2012) he told the brother of the LTTE cadre he had seen on the video footage that he believed his family member was no longer alive due to what he had seen on the mobile phone. He was told to report to the army camp and was interrogated by the army commander about any knowledge he had of LTTE cadres being arrested, tortured and killed. He was warned not to disclose any such incidents and was told to attend at [camp 1] by [the end of] October 2012. The applicant then departed Sri Lanka for Australia by boat [earlier in] October 2012.
- CID officers have come in search of him and continue to check with his family whether he has returned to Sri Lanka. On one visit in 2015 prior to the Sri Lankan presidential elections, the CID officers took the applicant's voting card from his parents' home.
- He has several [injuries and] scar marks that the applicant believes could lead to him being perceived as a combatant.
- He has been told by a community based asylum seeker that his entry interview recording was sent to another asylum seeker seemingly as a result of a Department of Immigration and Border Protection (DIBP) Freedom of Information (FOI) error. As a result his personal information has been disclosed.

### **Refugee assessment**

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13. 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**

14. 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.
15. The applicant has consistently claimed to be a Hindu Tamil and a national of Sri Lanka. His SHEV interview was conducted with the aid of an interpreter in the Tamil language, and he submitted copies of various documents in support of his claimed identity. I accept that the

applicant is a national of Sri Lanka, of Tamil ethnicity and the Hindu faith, and that Sri Lanka is his receiving country.

### *Employment and detention*

16. The evidence given by the applicant in his SHEV interview about his employment in the [earlier period] presented some inconsistencies with his written statement of claims submitted with the SHEV application regarding the circumstances of his employment. For example, he claimed to have been employed by an NGO rather than the [government agency] as stated in his written statement of claims. I do not place particular significance on these inconsistencies and I accept that the applicant was employed by [a government agency] on [Project 1] in the Vanni [in specified years]. Country information indicates that the Ministry of Defence retained ultimate authority over any relief assistance that entered the Vanni including during the ceasefire and at the local level, the Sri Lankan army (SLA) and Navy were able to withdraw or delay authorisation for goods to travel.<sup>2</sup> I therefore consider it implausible that the LTTE would have been in charge of projects under the aegis of a Government department, particularly as the project was funded by the World Bank which provides funding at a government level. I accept that, as he was working in the Vanni, he was subject to the LTTE's, as well as the government's, travel restrictions and was required to show passes and documentation at [Location 1] and other checkpoints when he travelled between government and LTTE controlled areas.<sup>3</sup> As he would have been required to obtain the relevant travel permissions from the LTTE I accept he had some contact with administrative staff of the LTTE. However, I reject his claim that the LTTE was in charge of [Project 1] and had the power to approve projects as an exaggeration and on that basis, I reject his claim that he was required to liaise at a senior level with members of the LTTE while employed on the [project].
17. The applicant has consistently claimed that it was his work for a humanitarian organisation that led to his arrest and subsequent detention. He made this claim in his entry interview on [in] December 2012 and provided further detail in the written statement submitted with his SHEV application and in his SHEV interview. He has also provided a number of letters in support of his claims for protection, a number of which refer to his employment with the [NGO1] in the [Town 3] area. I note that, having worked at the organisation for around four years, he has not provided a document from [NGO1] itself verifying his employment over that period. Nonetheless, I accept that from around the beginning of 2005 until his capture in 2009, the applicant worked for an NGO, [NGO1], and was involved in providing humanitarian assistance including the [recovery work] in tsunami affected areas, and providing food and clothing for those affected by the war.
18. However, I reject the claims in his written statement and expanded on in his SHEV interview that, essentially, the work of [NGO1] during the period of his employment was under the control and direction of the LTTE.
19. Information provided by the applicant indicates that the [NGO1] partnered at various times with international agencies working throughout Sri Lanka, including [several agency names] and others to deliver community based aid programs throughout Sri Lanka. Information extracted and considered by the delegate in her decision indicates that [NGO1]'s activities in the north were implemented "only after receiving proper clearance and approval from the authorities ..... [deleted]."<sup>4</sup> This suggests the organisation operated with the approval of the

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<sup>2</sup> 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 at 951

<sup>3</sup> Ibid at 953-954

<sup>4</sup> Information considered by the delegate in her decision from the website of [NGO1].

government which is consistent with country information that while the LTTE controlled territory, the Government maintained a presence in those areas through Government Agents and provided services including humanitarian assistance to the war-affected displaced and the tsunami-affected populations with assistance from humanitarian organisations.<sup>5</sup> I consider this information to be incompatible with the applicant's claim that [NGO1]'s humanitarian work during the period of his employment was under the control and direction of the LTTE. While I accept that in other respects the LTTE strictly controlled those areas under its administration and that it may have had a certain amount of input regarding priorities for assistance in its areas, the applicant's claims are not consistent with the country information considered above. Nor do I consider it credible that [NGO1] and its international aid partners would compromise their independence, integrity and reputation by working at the direction of the LTTE to benefit only those whom the LTTE favoured and supported. On the basis of the information before me, I am not satisfied that the LTTE was overall in charge of all tsunami [recovery] projects carried out by [NGO1] inside LTTE controlled areas, that the LTTE determined who should receive assistance, that he reported to senior LTTE people in his role as a [NGO1] [occupation 1], that the LTTE closely monitored and controlled [NGO1]'s activities, or that the LTTE favoured certain families and instructed him who was to receive assistance. I do not consider these claims consistent with country information about humanitarian work throughout this period and I reject these claims as an exaggeration designed to bolster his protection claims. I accept that during the final phase of the war [NGO1] staff (including the applicant) were involved in providing food and clothes to those affected by the war. However, I do not accept that as part of his work he was involved in identifying specific locations where dead bodies were and informing the Tamil Rehabilitation Organisation (TRO) or that he was involved specifically with transporting injured LTTE cadres and civilians. Again, I consider these claims incompatible with [NGO1]'s apolitical role in humanitarian relief and I reject them as an exaggeration designed to boost his protection claims.

### *Detention*

20. The evidence provided by the applicant in his SHEV interview was broadly consistent with his written statement regarding what happened to him in March 2009 when the SLA surrounded the area where he was temporarily living, captured him along with his father and transferred them to [Location 1]. His account is consistent with country information which confirms that tens of thousands of civilians crossed into Government territory in the last phase of the war.<sup>6</sup> The surrendeers (as they were termed) were selected at various checkpoints and [screening points], and taken into the custody of military and police forces for "rehabilitation" and/or for further investigation because of their real or suspected links with the LTTE.<sup>7</sup>
21. The Office of United Nations High Commissioner for Human Rights (OHCHR) in its September 2015 report on Sri Lanka noted that the military authorities made no distinction at the screening points between LTTE military cadres who had been taking part in hostilities and others who were not military cadres.<sup>8</sup> On this basis I accept that he and his father were captured by the SLA in March 2009 near [Town 4], taken to the [Location 1] and interrogated. While I have rejected his claims to have worked closely with, and at the direction of, the LTTE in his role with [NGO1], country information confirms that humanitarian workers were frequently suspected or accused by the government of having links with the LTTE.<sup>9</sup> For that

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<sup>5</sup> 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 at 935

<sup>6</sup> OHCHR "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)" 16 September 2015, CISEC96CF13358

<sup>7</sup> *ibid*

<sup>8</sup> *ibid*

<sup>9</sup> *Ibid* at 935

reason, I accept as plausible that the authorities suspected the applicant and his father of being LTTE cadres. I accept that they were transferred to the [camp 2] and that his father was subsequently released and rejoined the other members of his family in an IDP camp.

22. The applicant has provided a number of documents in support of his claim to have been subsequently detained for over two years in a series of rehabilitation camps. These include letters signed by people in Sri Lanka and documents including a copy of an International Committee of the Red Cross (ICRC) ID card, an International Organisation for Migration (IOM) 'Information Counselling and Referral Service' (ICRS) photo ID card issued in the applicant's name [in] June 2011, a Certificate of Reintegration certifying that the applicant was reintegrated from [a camp] [in] July 2011 and three different language versions (Tamil, Sinhala and English) of a document on the letterhead of the Bureau of the Commissioner General of Rehabilitation, Ministry of Rehabilitation and Prison Reforms, as well as various letters which state he was detained.
23. The dates on the ICRS ID card and the Certificate of Reintegration correspond with information provided by the applicant in his SHEV application and both his arrival and SHEV interviews about the time he spent in rehabilitation camps. In regard to the document on the letterhead of the Bureau of the Commissioner General of Rehabilitation, while it correctly records the applicant's date of birth, the quoted Sri Lankan national identity number is not that of the applicant; it also states he completed educational training which the applicant stated in his SHEV interview he did not. Accordingly, I do not view this document as reliable and give it no weight.
24. Country information confirms the widespread use by the Sri Lankan authorities of administrative detention for up to two years without judicial review or access to legal representation.<sup>10</sup> In total, thousands of former LTTE members were arrested and detained by the Sri Lanka security forces; in many cases, civilians were detained alongside admitted or alleged combatants in the rehabilitation centres.<sup>11</sup>
25. However, I have a number of concerns with the applicant's claims to have been detained in a series of rehabilitation camps for over two years. Notwithstanding that he was afforded limited opportunity to expand on his claims, I found his evidence at the SHEV interview about his detention vague and repetitive. He was unable to describe anything of what happened to him over the period of two years in other than extremely general terms which suggests to me that he was not speaking from his own lived experience.
26. As noted by the delegate, the applicant's written statement does not give details of the circumstances of how or why he was transferred from [town 1] to [Location 1] and when he was arrested. Three letters of support for the applicant from [various people] state the applicant was wounded, came to a cleared area for treatment, was suspected and detained by the Army, but after hearing his evidence released him. Although the letter from the MP for [location] states the applicant was detained it does not state for how long. None of these letters support his claim that after this, he was arrested on suspicion of LTTE involvement and taken to another camp, tortured and beaten, and subsequently spent over two years in rehabilitation camps.

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<sup>10</sup> DFAT "DFAT Thematic Report – People with Links to the Liberation Tigers of Tamil Eelam" 3 October 2014 CIS2F827D91260 at 2.7

<sup>11</sup> Ibid at 3.8 – 3.11

27. I also note the following. Firstly, other than in relation to claims about the implications of scarring for his return, the applicant did not claim in either his written statement or his SHEV interview that he was wounded and that this was one of the reasons he was detained. He only agreed that this was the case when he was asked about the letters by the delegate. I consider this as an explanation for his subsequent lengthy detention a significant omission. Secondly, the letters indicate that once the applicant was identified as a [NGO1] employee he was released. This is not consistent with the applicant's evidence that when he was taken to [camp 2] the authorities verified that he worked for [NGO1] by looking at the [NGO1] ID card he had with him but shortly afterwards arrested him on suspicion of being in the LTTE and took him to [camp 1]. Later in his interview he suggested the reason he was arrested was because he worked for [NGO1] in contrast to his earlier evidence that it was because of his shrapnel wounds that he was suspected of LTTE involvement.
28. Thirdly, the applicant suggested a further reason for his detention. In his SHEV interview he said that the paper in the Sinhala language which he signed was a confession and it was on that basis that he was sent for rehabilitation. In contrast, his written statement says that he had not confessed to being involved in the LTTE. Fourthly, in my view, it is extremely doubtful that having identified the applicant as an employee of a Sri Lankan NGO known to have worked within government controlled areas as well as LTTE controlled areas, the authorities would have subsequently detained him in a rehabilitation camp for such a lengthy period of time.
29. Nonetheless, as discussed above, other evidence provided by the applicant supports his claim in that regard (also a Reintegration Certificate, JP letter [of] December 2012 and [another] letter [of] December 2012). While I have my doubts, I am prepared to accept that the applicant was detained, interrogated and beaten over 10 to 12 days at [camp 1], that he signed a paper in Sinhala, and then was transferred to a series of rehabilitation camps where he remained until his release in July 2011.
30. I accept that on his release in July 2011, he was told not to leave Sri Lanka for a year, not to get involved in politics and not to disclose anything that may have happened during the war or in detention, specifically not to NGO's. I do not, however, accept his claim that until he left in 2012, he was under an obligation to report and sign every week as a condition of his release. Country information confirms that many rehabilitees may be subject to ongoing monitoring and reporting requirements, the level of which can vary from district to district, but which generally depends on the background of the individual.<sup>12</sup> A condition of his release was that he not leave Sri Lanka for a year. I do not consider it consistent with that condition that any reporting obligation imposed would have extended beyond that one year period. While I accept that he was required to report weekly on his release from rehabilitation, I find that the applicant's reporting obligation ceased one year after his release (ie July 2012) and I reject his claim that at the time he left Sri Lanka in October 2012, he was subject to an ongoing reporting obligation and by leaving Sri Lanka, breached the army's orders to report weekly at the camp. Following his release he reported as required until that obligation ceased and with the exception of the questioning about the video footage (discussed below) had no further interactions with the authorities. Notwithstanding his status as a rehabilitee, he was not questioned, detained or harassed by the authorities and while I accept he was monitored by being required to sign, this obligation ceased in July 2012, following which he did not come to the attention of the authorities again. Country information before the delegate indicates that the Sri Lankan authorities may monitor any member of the Tamil diaspora returning to Sri Lanka depending on their risk profile<sup>13</sup> and on that basis, I accept it is possible that as a former

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<sup>12</sup> Ibid at 3.20

<sup>13</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.47

rehabilitatee, he may be subject to some form of monitoring on his return. However, I find that monitoring is not serious harm and for these reasons, I am not satisfied that if he is returned to Sri Lanka there is a real chance that the applicant will be subject to serious harm on the basis of his detention from 2009 to 2011.

### *Leaking of information*

31. In the written statement submitted with his SHEV application the applicant claimed that while in detention and during interrogation he was asked whether, while he worked for [NGO1], he had sent photographic evidence of those who were injured during the war overseas. He claimed he could be perceived as a humanitarian worker for that reason. His claims shifted somewhat in his SHEV interview. He said [NGO1] had sent videos overseas to publicise what was going on and because he was a [NGO1] worker, the authorities thought he'd done that and because of that he was observed closely and had special conditions put on him. He did not otherwise provide evidence of how he knew [NGO1] had sent videos overseas nor did he claim that after his release he was ever again questioned about the leaking of sensitive human rights footage overseas.
  
32. Journalists and human rights defenders who documented and reported on human rights abuses during the war were frequently labelled 'terrorists' and 'traitors' by the Sri Lankan government.<sup>14</sup> In one case, a human rights activist accused of submitting information about disappearances and detention to international organisations faced threats, intimidation and torture.<sup>15</sup> Others received death threats and were subject to questioning and surveillance.<sup>16</sup> In some cases, humanitarian workers were killed or victims of disappearances, suspected as linked to the state.<sup>17</sup> On the basis of this country information I am prepared to accept that he was questioned while detained about the leaking of sensitive human rights footage overseas and that his role with [NGO1] may lead to him being identified as a humanitarian worker. I do not, however, accept that this means that he is at risk of harm if he is returned. These matters occurred during and in the immediate aftermath of the war under the Rajapaksa government which continued to deny allegations of war crimes.<sup>18</sup> Since then, there has been a change of government in Sri Lanka and country information indicates that the Sirisena government is taking a more conciliatory approach than its predecessor to issues of human rights and reconciliation. The government co-sponsored a Human Rights Council resolution, endorsed the Declaration of Commitment to End Sexual Violence and implemented a consultation process of transitional justice mechanisms.<sup>19</sup> Freedom from Torture assesses that these moves indicate an increased willingness to address the legacy of conflict-related human rights abuses.<sup>20</sup> In light of this information which indicates a different human rights environment from that which prevailed when he left, I am satisfied that the applicant is not at risk of harm on the basis of a perception that he was a humanitarian worker who was questioned about sending footage of human rights abuses overseas during the war.

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<sup>14</sup> Networking for Rights in Sri Lanka "Human Rights Defenders, Freedom of Assembly, Freedom of Association and Dissent in Sri Lanka" 23 April 2012, CIS961F9401996

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> OHCHR "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)" 16 September 2015, CISEC96CF13358

<sup>18</sup> United Kingdom Home Office "Country Information and Guidance Sri Lanka: Tamil separatism" Version 2.0 19 May 2016 OGD7C848D17

<sup>19</sup> Freedom From Torture "Sri Lanka – Update on torture since 2009" 6 May 2016 CIS38A8012881

<sup>20</sup> Ibid

### *Phone footage incident*

33. The applicant's evidence in his SHEV interview about the incident in which he claimed he was shown some footage of war crimes against LTTE cadres on a mobile phone by a drunk CID officer while at [a rehabilitation centre] and recognised a senior LTTE cadre in the footage was brief. It was generally consistent with his written claims and I accept that in 2012 he told the brother of the person in the footage that on the basis of what he had seen, he believed the person was no longer alive. I also accept that a month later the applicant was told to report to the SLA camp and was interrogated. The applicant's evidence was that he was interrogated about the person who had shown him the footage in the camp rather than about his own knowledge of LTTE persons or their family connections. I accept that he may have been not to disclose such incidents to any person or organisation. However, he did not refer to the claim in his written statement that he was required to attend again at the [camp 1] prior to the end of [October] 2012. Given the nature of the questioning and the fact that he did not press his claim to have been required to report again at [camp 1], I am not satisfied that after this incident, the applicant was told to report to [camp 1]. It follows that I am not satisfied that it was this incident that led the applicant to 'flee' Sri Lanka.
34. Nor do I accept that his family was visited by members of the CID searching for the applicant or that in 2015 CID officers went to his family home and confiscated his voting card. Neither of these claims were made in his SHEV interview. I do not consider it credible that the applicant would fail to mention such significant claims when asked by the delegate what he feared on his return to Sri Lanka and why he claimed the SLA would arrest him on his return. I reject these claims as fabrications.

### *Breach of privacy*

35. The applicant claims that as a result of an error in the processing of a Freedom of Information (FOI) request, an audio recording of his entry interview was inadvertently released. He stated at his SHEV interview that he complained about the government in that interview, he'd mentioned his detention and treatment and that will be sufficient to bring him harm. The basis for this claim appears to be that a copy was inadvertently sent to a Tamil working at a farm where Sinhalese were also working; the details of his case were being discussed which puts him at risk. I consider this claim speculative and while regrettable, I am not satisfied that the FOI processing error put the applicant at risk of harm if he is returned to Sri Lanka.

### *Tamil ethnicity/imputed political opinion*

36. The applicant stated in his SHEV interview that he totally denied that with the change of government in Sri Lanka that the situation had improved for Tamils. He claimed he personally knew 100 people, either from rehabilitation camps or before who had been either abducted or arrested for trying to leave the country or some other charges. He also claimed the main aim of the current and any future Sinhalese government was to eradicate all those who were former members of the LTTE. He said the government is paying lip-service but their main aim to harass and harm former LTTE fighters or those who helped the LTTE because they present a risk of the LTTE rising again.
37. I accept that Tamils have in the past been regarded as LTTE supporters on the basis of ethnicity<sup>21</sup> and that the Sri Lankan government remains vigilant for any sign of the possible re-

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<sup>21</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.7

emergence of the LTTE. I do not, however, consider this places the applicant at risk of harm if he returns. The 2012 Guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) stated that certain real or perceived links with the LTTE which go beyond residency in an LTTE controlled area may, in some circumstances, continue to expose individuals to treatment which may give rise to a need for protection.<sup>22</sup> However, the applicant does not fall within any of the profiles identified by the UNHCR Guidelines. The Guidelines are, in any case, over five years old and for that reason, I give them less weight than other more recent country information before me. The UK Home Office assessed in 2016 that the focus now of the Sri Lankan government is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state.<sup>23</sup> The applicant has not claimed to have any involvement in political activities either while still living in Sri Lanka or since he left and I am satisfied he is not at risk of harm on this basis.

38. I accept that there continue to be reports of surveillance and harassment of young and middle-aged Tamil men, particularly in the north and east.<sup>24</sup> However, DFAT's latest assessment is that monitoring and harassment of Tamils in day-to-day life has decreased significantly; while some cases of monitoring continue to be reported, the overall prevalence of monitoring has greatly reduced.<sup>25</sup> I accept that Tamils have in the past suffered longstanding, systematic discrimination in university education, government employment, and other matters controlled by the government.<sup>26</sup> Recent country information, however, indicates that the Sirisena government has taken a number of steps, real and symbolic, towards reconciliation. 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.<sup>27</sup>
39. More generally, Human Rights Watch in its 2016 annual report also reported on steps by the government to improve the human rights situation in Sri Lanka including abolishing the censorship of media and civil society groups, embarking on constitutional reforms to restrict executive powers, and taking steps to restore the independence of the judiciary.<sup>28</sup> It stated that in contrast to the combative approach of the Rajapaksa government, the government initiated a new, more open dialogue with the international community, including human rights organizations although it notes the government had not yet taken significant measures to end impunity for security force abuse.<sup>29</sup> The UN High Commissioner for Human Rights reported in 2016 that one of the most important long-term achievements over the past year was the restoration of the legitimacy and independence of Sri Lanka's Human Rights Commission.<sup>30</sup> He also commented that the element of fear had considerably diminished and that virtually

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<sup>22</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNBOI83EA8

<sup>23</sup> United Kingdom Home Office "Country Information and Guidance Sri Lanka: Tamil separatism" Version 2.0 19 May 2016 OGD7C848D17

<sup>24</sup> US Department of State, "Country Reports on Human Rights Practices 2015 - Sri Lanka", 13 April 2016, OGD95BE926320

<sup>25</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 3.9

<sup>26</sup> US Department of State, "Country Reports on Human Rights Practices 2015 - Sri Lanka", 13 April 2016, OGD95BE926320

<sup>27</sup> *ibid*

<sup>28</sup> UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016 OGD7C848D17.

<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

everyone agrees that there has been progress although opinions differ markedly about the extent of that progress.<sup>31</sup>

40. In considering the applicant's claims, his personal circumstances and the country information before me, I am not satisfied that at the time he left Sri Lanka he was a person of interest to the authorities or that he is at risk of harm if he returns. I have accepted that he worked for an NGO and was detained for over two years in a rehabilitation camp. However, the fact that he was released with no further action by the authorities indicates that his situation was resolved in the eyes of the authorities. I accept that he was subject to a weekly reporting obligation for a year following his release. He continued to report as required with no further action being taken. I accept he was summoned and questioned about video footage shown to him but have rejected his claim that following this, he was required to report to [camp 1]. I have also rejected that he may be at risk of harm on his return on the basis that he may be perceived as a humanitarian worker. Following his release from detention the applicant found work as a self-employed [occupation] and he has not claimed he was subject to harassment, discrimination or other difficulties in the course of that employment, even during the period he was regularly reporting to the authorities. I am not satisfied that at the time he left Sri Lanka the applicant was a person of interest or that there is a real chance of him being seriously harmed for reasons of his imputed political opinion, suspected LTTE involvement, his ethnicity, gender, his work for an NGO, his detention, origins in an area formerly controlled by the LTTE, or any combination of those circumstances.

#### *Illegal departure/returning asylum seeker*

41. The applicant claims that as he departed Sri Lanka illegally and claimed asylum, he believes the authorities could perceive him to be an LTTE cadre and he could attract adverse attention for this reason as well. He also has scars from shrapnel wounds and the authorities could perceive him as a combatant due to his scarring. I accept that the applicant left Sri Lanka illegally and that on his return he will be perceived as a returning asylum seeker from the west. I also accept that both of these will have consequences for the applicant on return.
42. Departing Sri Lanka by other than an authorised port of departure (seaport or airport) is an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act). Applicable penalties for doing so can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees.<sup>32</sup> Returnees who depart the country irregularly are generally considered to have committed an offence under the I&E Act.<sup>33</sup>
43. On arrival in Sri Lanka, involuntary returnees are subject to a series of administrative checks by the Sri Lankan authorities who verify their travel documents and identity, and check for any outstanding criminal matters, including checks against immigration and intelligence databases.<sup>34</sup> The same screening process applies to all persons returning to Sri Lanka whether voluntarily or by escort and is not impacted by ethnicity.<sup>35</sup> DFAT advises that returnees are not subjected to mistreatment during processing at the airport.<sup>36</sup> There is information before me that the Sri Lankan authorities have continued to arrest, interrogate and, in some cases detain

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<sup>31</sup> *ibid*

<sup>32</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.17

<sup>33</sup> *ibid*

<sup>34</sup> *ibid* at 5.19

<sup>35</sup> Immigration and Refugee Board of Canada (IRB), "Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions upon return for not having proper government authorisation to leave the country such as a passport", 22 August 2011 LKA103815.E

<sup>36</sup> *ibid*

for extended periods, arrivals identified as having had a previous connection to the LTTE or Tamil separatist activities.<sup>37</sup> The applicant has not, however, been involved in such activities and the country information does not support a conclusion that simply being a Tamil asylum seeker will lead to an imputation of a pro-LTTE or anti-government opinion, or otherwise lead to harm on his return.

44. I accept that background checks will be undertaken and that it is possible that as a rehabilitee his time in detention may come to the attention of the authorities on his return. I do not accept, however, that he will be at risk of harm for this reason. The applicant did not breach the conditions of his release and with the exception of one instance of questioning shortly before he left (in which he was questioned not about his own activities but other matters), did not again come to the attention of the authorities and I am not satisfied that in the course of routine investigations the applicant will be identified as a person of adverse interest. There have been reports that some of those released from rehabilitation have been re-arrested; such arrests are generally made due to additional information about involvement in acts of terrorism.<sup>38</sup> The applicant does not fit this profile and I am not satisfied that he is at risk of re-arrest if his previous detention comes to light during routine investigative processes on his arrival. As discussed above, I accept that it is possible that he may be subject to monitoring on his return on the basis of his rehabilitee status. However, even if this occurs, I do not accept that monitoring is serious harm.
45. The applicant still has a number of scars from the shrapnel injury he suffered. He claims that because he has visible scarring and left while under a reporting obligation, the Sri Lankan authorities will suspect he has links to the LTTE. I have rejected his claim that he left while under a reporting condition and do not accept that he is at risk of being identified as a person of interest on that ground. In 2012, the UK Home Office reported that returnees with visible scarring may be asked how they got the scar or injury but there were no reports of any further action as a result.<sup>39</sup> DFAT in 2014 referred to a 2011 Freedom From Torture report and noted that the cases raised date from the immediate end of the conflict and states it has no more recent evidence to indicate that people have been detained due to conflict-related scarring.<sup>40</sup> The most recent DFAT report before the delegate makes no reference to scarring being used to identify possible LTTE combatants on return. I am not satisfied the applicant faces a real chance of harm on return to Sri Lanka on the basis of the scars he has.
46. I accept that the applicant will be identified as having departed Sri Lanka illegally. Where police suspect an illegal departure, the person can be charged under the I&E Act and, in most cases, is arrested at the airport.<sup>41</sup> Returnees are transported to the closest Magistrates Court at the earliest available opportunity after investigations have been completed although they 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.<sup>42</sup> If a returnee pleads guilty, they will be fined and released.<sup>43</sup> If

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<sup>37</sup> Tamil net "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015 CXBD6A0DE7540; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lankan Mirror "Another Tamil returnee arrested", 1 July 2015 CXBD6A0DE16698; United Kingdom Home Office "Country Information and Guidance. Sri Lanka: Tamil separatism" Version 2.0 19 May 2016 OGD7C848D17

<sup>38</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 3.7

<sup>39</sup> UK Home Office, "Sri Lanka – Bulletin: Treatment of Returns", 1 December 2012, CIS3853

<sup>40</sup> DFAT "DFAT Thematic Report – People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014, at 2.28 CIS2F827D91260

<sup>41</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.21

<sup>42</sup> *ibid*

<sup>43</sup> *ibid*

they plead not guilty, returnees are immediately granted bail by the magistrate on personal surety or may be required to have a family member act as guarantor, in which case the person may need to wait until a family member comes to court to collect them.<sup>44</sup> There are rarely any conditions in relation to the bail and if they are, they are imposed on a discretionary basis; the person will only need to return to court when the case against them is being heard (or if required to give evidence as a witness in another case).<sup>45</sup>

47. There is no evidence before me that the penalty or treatment faced by persons charged with illegal departure under the I&E Act, who were passengers on a boat, varies depending upon their ethnicity, religion, status as returning asylum seekers, imputed or actual political opinion. DFAT has been advised by Sri Lanka's Attorney-General's Department that no returnee who was merely a passenger on a people smuggling boat has been given a custodial sentence; instead, a fine is issued to act as a deterrent towards departing illegally in future and can be paid by instalment.<sup>46</sup> Where a returnee pleads guilty, they will be fined and released.<sup>47</sup>
48. I find that if the applicant pleads guilty he will be fined and released. If he pleads not guilty, he will be granted bail and required to return to court at a later time where, if he is found guilty, he will also be fined. In most cases, bail is granted either on personal surety, or otherwise requires a family member to act as guarantor. The applicant has family in Sri Lanka and has not claimed that, if required, there would be nobody to guarantee his bail. I find the prospect of the applicant 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. The applicant did not claim any inability to pay the fine and I find that as he has a history of employment, the imposition of a fine will not amount to serious harm.
49. It is possible that while he is detained pending bail, he may be subjected to poor prison conditions.<sup>48</sup> 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.<sup>49</sup> In the applicant's case, 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 period of detention will be, at the most, a few 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.
50. In considering the totality of the treatment that the applicant will experience including being detained and investigated for several hours at the airport, then potentially being detained on remand for a number of days during which he will be held in overcrowded and unsanitary conditions, and having to pay a fine, I find that this treatment does not amount to serious harm. Further, 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.<sup>50</sup> 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

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid at 5.22

<sup>47</sup> Ibid

<sup>48</sup> US Department of State, "Country Reports on Human Rights Practices 2015 – Sri Lanka", 13 April 2016, OGD95BE926320.

<sup>49</sup> *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

<sup>50</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

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). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is a returning asylum seeker or an illegal departee.

51. Assessing those of the applicant's claims which I have accepted overall, I am not satisfied that if he is returned to Sri Lanka, there is a real chance that he will suffer serious harm for any of the reasons claimed.

#### **Refugee: conclusion**

52. 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**

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53. 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**

54. 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.

55. I do not accept that, at the time he left Sri Lanka, the applicant was a person of interest to the Sri Lankan authorities either because of his work for [NGO1], his detention, or for any other reason. I accept he was released subject to reporting conditions. However, I have found that this obligation ceased in July 2012, he did not breach any of the conditions of his release and that his situation was resolved in the eyes of the authorities following the expiration of a year following his release. As the applicant was not a person of interest at the time he left Sri Lanka, I have found that there is not a real chance of serious harm to the applicant on his return on the basis of his detention, work history, imputed political opinion, suspected LTTE involvement, his ethnicity, gender, or because he originates from an area formerly controlled by the LTTE. I have also concluded that there is not a real chance of him being harmed on the basis of a perception that he was a humanitarian worker because of his work for [NGO1]. Real chance and real risk involve the same standard<sup>51</sup> and on that basis, I am not satisfied there is a real risk of the applicant facing significant harm in relation to any of these matters. I accept

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<sup>51</sup> *MIAC v SZQRB* (2013) 210 FCR 505

that as a former rehabilitee he may be monitored. I am not satisfied, however, that this treatment amounts to significant harm.

56. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes and identified as an illegal departee and a returning asylum seeker. He is likely therefore, as discussed above, to be investigated and detained for several hours at the airport, and depending on the availability of a magistrate, may be detained for a number of days pending bail for the offence of illegal departure, and fined accordingly. I have found he is not a person of interest to the Sri Lankan authorities and I do not accept there is a real risk of torture or that he will be mistreated while being held and investigated at the airport or in remand, or face a total period of detention of longer than a few days in the worst case scenario.
57. The conditions to which he may be subject if detained on remand for a few days are likely to be poor. However, I do not accept that amounts to significant harm. The treatment does not consist of the death penalty or arbitrary deprivation of life. 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. Nor am I satisfied that it amounts to serious pain or suffering, pain or suffering that is cruel or inhuman in nature, or extreme humiliation. 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).
58. 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**

59. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

## Applicable law

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### ***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.