



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01623

Date and time of decision: 14 August 2017 15:33:00
Katrina Fairburn, Reviewer

Decision

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

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a young, Hindu Tamil from the [town 1] District in the Eastern Province of Sri Lanka. He fears returning to Sri Lanka because he would be at risk of being harmed by the Sri Lankan authorities for imputed association with the Liberation Tigers of Tamil Eelam (LTTE) due to his ethnicity, area of origin and for having previously been detained and seriously mistreated by the government from May 2006 until December 2010. On about [date], the applicant made an invalid application for a Protection (subclass 866) visa. On [date], he lodged an application for a Safe Haven Enterprise (subclass 790) visa.
2. [In] December 2016, a delegate of the Minister for Immigration and Border Protection refused to grant the visa.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 27 January 2017, the applicant's representative forwarded to the IAA a submission containing argument about the basis for the delegate's findings and the basis of their decision.
5. Included as part of the submission was reference to a claim the applicant had developed [a medical condition] when having to face any kind of authorities. I consider that this is information that may be relevant, was not before the delegate and is new information. No additional information was included in the submission to support this claim, including any explanation as to why it could not have been provided to the delegate prior to their decision or how it is credible personal information which may have affected consideration of the applicant's claims for protection. The applicant has not satisfied me that s.473DD(b) is met.
6. I have obtained new information. On 24 January 2017 the Department of Foreign Affairs and Trade published an updated Country Information report on Sri Lanka.¹ Relevantly to this decision, the report provides information about the position of Muslims, Tamils, persons perceived to have connections to the LTTE, persons who departed Sri Lanka illegally and returning asylum seekers. As the report was published after the delegate's decision and updates an earlier DFAT report on Sri Lanka published on 18 December 2015, I am satisfied there are exceptional circumstances to justify considering the new information.
7. I have also obtained the preliminary report of the United Nations Special Rapporteur on human rights and counter-terrorism following an official visit to Sri Lanka.² The preliminary report, published on 14 July 2017, provides recent information about people detained under the Prevention of Terrorism Act and persons suspected of association, including indirectly, with the LTTE. As the report was published after the delegate's decision, contains current country information about the treatment of people suspected of being associated with the LTTE, and

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

² Office of the United Nations High Commissioner for Human Rights (OHCHR), "Human rights and counter-terrorism UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka preliminary report", 14 July 2017, CXC90406610453

an earlier report of the United Nations Human Rights Commission (OHCHR) on Sri Lanka was referred to by the delegate as part of their decision, I am satisfied there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

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

- He is a young male, Hindu Tamil from [town 1] District in the Eastern Province of Sri Lanka.
- Prior to his birth, his father attempted to depart Sri Lanka and travel to [Country 1] but the Sri Lankan army detained and assaulted him. He sustained injuries to [body parts].
- One of the applicant's [relatives] was harmed by the Indian army and sustained an injury to [his body part, with an associated disability].
- When the applicant was young, his family moved frequently and resided in [town 1], [town 2] and Jaffna. In 1990, the family travelled to India where they spent two years residing in a refugee camp in Tamilnadu.
- In 1992, the applicant's family returned to [town 1]. The LTTE attempted to recruit his [siblings], but they did not join.
- In about 2000 or 2002, during the ceasefire, the applicant felt compelled to attend meetings held by the LTTE. The meetings promoted recruitment to the LTTE and were closely watched by the Sri Lankan army. During this time, the applicant was regularly stopped on the way to and from school and questioned by Sri Lankan army officers about LTTE activities.
- In [specified years], the applicant managed a [business]. Members of the Sri Lankan army regularly came to the [business], questioned him about what he knew of the LTTE and searched for any LTTE-related [information].
- His [siblings] were suspected of being involved with the LTTE and were harassed by the military. In 2006, when his [sibling] was fishing with a friend, they were stopped by another boat containing 6 or 7 people and beaten.
- In May 2006, when the applicant was returning home one evening from studying at the [college], he was stopped by four or five unidentified men in a van. He was pushed inside the van, verified his name, tied him up and assaulted him causing him to lose consciousness. When he regained consciousness, he was in a prison with many other Tamils. He was detained at the prison until December 2010.
- During his detention, the applicant was repeatedly questioned and mistreated. He was not charged with any offences, brought before a court to face charges or able to access people outside the prison.
- In early 2010 some unidentified men went to his parent's house and asked about him.
- While the applicant was in prison, the Karuna Group killed [number] of his friends who had also attended LTTE meetings like he had. In late 2010, the Sri Lankan army began to target people who had returned from India who were perceived to have had past connections with the LTTE. This happened to a relative of the applicant's wife living in his neighbourhood who was detained and mistreated in prison for [number of] years.

- He was released in December 2010 by being transported to [town 1] town by bus and left there. He was not issued with any release papers, required to report or subjected to any other conditions on release.
- On release, he went to his [sibling's] home where he remained in hiding for about three months. He did not inform other members of his family that he had returned. Not long after his release, the authorities came to his family home a couple of times to identify whether he had returned home. In about March 2011, he told his parents where he was.
- He married his wife in October 2011 and maintained a low profile, residing with his in-laws in [town 1], visiting his parents and working as [an occupation].
- He departed Sri Lanka illegally [in] August 2012 and travelled by boat to Australia.

Refugee assessment

9. 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

10. 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.
11. The applicant provided detailed information about his background and family connections in both his applications and during his visa interview. As part of both of his visa applications and also at interview, he provided documents to support his identity. Based on the documentation provided by the applicant and his personal information, I accept the applicant's identity is as claimed and that he is a Hindu Tamil from the [town 1] District in the Eastern Province of Sri Lanka, who is aged approximately [age].
12. I accept that he is a national of Sri Lanka and of no other country.

13. The applicant provided a detailed and credible account of his background including harm sustained by his father and [relative] during an early stage of the conflict, the displacement experienced by his family their relocation to a refugee camp in Tamilnadu between 1990 and 1992. He stated that when his family returned to [town 1] in 1992, the LTTE attempted to recruit his [siblings] (aged between [age range] years). At the time the applicant was aged about [age]. I accept the applicant's account of his background as plausible and consistent with country information before the delegate about the impact of the civil conflict on many Tamils.
14. The applicant gave evidence during his visa interview of his experience in his home village as a teenager during the ceasefire period between 2000 and 2002. He described that in his local area both the LTTE and the Sri Lankan army maintained a strong presence and as a young, unmarried Tamil, he felt compelled to attend LTTE meetings as a representative of his family. He noted that the meetings often contained discussion by LTTE members aimed at encouraging recruitment to the LTTE but that he did not join. Country information before the delegate indicates that all persons living in areas formerly controlled by the LTTE necessarily had contact with the LTTE and its civilian administration in their daily lives.³ I accept the applicant's testimony about his encounters with the LTTE to be credible and consistent with country information about LTTE activity at this time. I am satisfied the applicant had incidental exposure to LTTE activities through attending their meetings during the ceasefire period but did not join them or engaged in any fighting on their behalf.
15. The applicant stated that during this time, the Sri Lankan army observed people who interacted with the LTTE and attended their meetings. He described being regularly stopped on his way to and from school and questioned by Sri Lankan army officers about LTTE activities and any meetings he had attended. Given the protracted history of the civil conflict, I consider it plausible that despite the ceasefire being in place, officers from the Sri Lankan army would maintain an interest in the LTTE's activities in the area and take note of people who engaged with them.
16. The applicant stated in his visa application that following the completion of his studies in [year], he managed the family's [business] in [town 1]. During this time, he claimed that the [business] would be visited regularly by army officers who questioned him about the LTTE and checked to see if any LTTE-related [information was] in the [premises]. Despite the regularity of the visits, the army did not discover any LTTE-related [information] or other material. He also referred to his [siblings] experiencing harassment from the authorities and cited an example where his [sibling] had been fishing with a friend and was approached by a boat with military people who beat them and made them take the people to shore. Country information indicates that many Tamils in the east reported being monitored and harassed during the conflict.⁴ I consider the applicant's claim that his [siblings] were harassed by the military to be plausible and consistent with country information. Having regard to country information, and the credibility of the applicant's testimony that he was observed engaging with LTTE meetings during the ceasefire, I am also satisfied the applicant was harassed and questioned, and his activities monitored by the Sri Lankan army as he has claimed.
17. At the beginning of 2006, the applicant commenced attending the [local college] to obtain a [higher qualification]. One evening in May 2006, when he was riding his bicycle home from class, he was stopped by a van containing a number of unidentified men, taken into the van where his identification was verified, accused of being involved with the LTTE, assaulted and

³ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.26

⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.12

lost consciousness for the remainder of the journey. In his written claims provided to the department in 2013, he stated that when he regained consciousness, he found himself at a large detention centre but did not know its location. During the first ten to fifteen days, he was placed in a dark room by himself. Afterwards he was subjected to regular questioning and was seriously mistreated including having his head covered with a plastic bag containing petrol. He stated that his memory of the time he spent in prison is hazy and during this time he was not informed of any charges against him or allowed contact with a lawyer. In his later application of 2016 and during the visa interview, the applicant provided more detail about the conditions under which he was kept and questioned and the mistreatment he claims he experienced. I consider the later details to be an amplification of his claim and have not drawn any adverse inference about his credibility about this evidence.

18. Country information before the delegate indicates that [town 1] was one of the primary locations where Tamils were arbitrarily detained, abducted or disappeared during this time.⁵ During the visa interview, the applicant stated that the people who abducted him did not tell him who they were or if they were from the government. He was not charged with any offence or brought before a court or had any contact with people outside the prison, including his family. Despite this, he considered the size of the facilities indicated he was being held by government authorities. Country information before the delegate indicated long-standing patterns of arbitrary arrest and detention by Government security forces, where detainees were held for long periods, not informed of the specific reasons for their detention, not presented with any charges or brought before a judge and without access to the outside world.⁶ Having regard to the country information, his plausible description of the facilities and his testimony about the conditions he experienced and the treatment he received (which was also accepted by the delegate), I am satisfied he was abducted in 2006 and was detained, questioned and seriously mistreated by the Sri Lankan authorities for a number of years, notwithstanding he did not know the identity of his captors or location of the centre.
19. The applicant stated that he became aware that while he was in prison, the Karuna Group killed [number] of his friends who had also attended LTTE meetings like he had. In late 2010, the Sri Lankan army began to target people who had returned from India who were perceived to have had past connections with the LTTE. This happened to a relative of the applicant's wife living in his neighbourhood who was detained and mistreated in prison for six years. Given country information referred to previously, I accept it is possible that people who share the applicant's ethnicity and background may have been targeted and mistreated by the Sri Lankan security forces and paramilitary groups. Although the circumstances of the incidents contain some aspects similar to the applicant's background, I note that he was in prison at the time they occurred and I am not satisfied that, taken alone, they indicate the applicant would be targeted by the Sri Lankan security forces or paramilitary groups.
20. The delegate put to the applicant during the visa interview discrepancies in the applicant's account of the period of his detention and date of his release. The applicant's entry interview and 2013 application reflect that he had been released from prison in 2009. In his 2016 visa application, he corrected the time of his release from 2009 to December 2010. The applicant explained the inconsistency by stating that when in Australian detention he had been extremely stressed and anxious and struggled to precisely recall dates during his entry interview. He repeated the error in his 2013 application in order to remain consistent with earlier information that he had presented. He had sought to correct the error as part of his 2016 application.

⁵ OHCHR, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

⁶ Ibid, p.220

21. I am mindful of the difficulties faced by the applicant when presenting information in support of his claims for protection, including challenges associated with translation and the impact of previous traumatic events. Noting the applicant's circumstances at the time of the entry interview and his remark as part of his 2013 visa application that his memory of his time spent in prison being hazy, I accept that he made an error with the date of his release from prison at the time of his entry interview. I am willing to accept that the error in his release date was replicated in his 2013 application to preserve consistency and not to embellish his claims for protection and that this occurred despite being assisted by a legally qualified registered migration agent. In reaching this position, I have taken into account that the applicant identified and corrected the error as part of his visa application rather than at a later stage in the process. I note that this application, on its face, appears to be an opportunity where the applicant sought to correct a number of details previously provided, not just the date of his release from prison. Accordingly, I am satisfied the applicant's explanation for the inconsistency is genuine and I have not made any adverse credibility findings against the applicant on this basis. I am satisfied he was released from prison in December 2010.
22. The applicant stated that he became aware that in early 2010, some unidentified men came to his parent's house and asked about him. There is no other information before me to indicate the identity of the men or their purpose in asking about the applicant. I am willing to accept that his parents may have received a visit by some men who asked about the applicant.
23. The applicant was consistent in his description about the circumstances of his release in that he was not told anything about his release, but was driven for approximately four to five hours and dropped off in [town 1] town. He was not provided with any release papers or placed under any conditions. Given the country information about the arbitrary detention of Tamils during this time and other irregularities about the applicant's detention such as being detained in excess of two years without charge and the consistent and credible testimony by the applicant that he did not formally know the reason why he was detained or released, I accept that he was also arbitrarily released, unconditionally and without explanation. I also accept that release in these circumstances left the applicant disoriented and in fear of further detention. I do not consider that the circumstances and lack of paperwork provided to the applicant on release, necessarily indicates there are no records held by the Sri Lankan authorities in relation to the applicant's detention or that he was no longer of interest to them.
24. The applicant stated that upon his release he went to his [sibling's] home where he remained in hiding for approximately three months, during which time he did not tell his parents of his return. He claimed to have been told that during this time some men visited his parents to investigate his whereabouts but his parents told them that they did not know where he was. Although the applicant appears to have been released without conditions or requirement to report, given the length of time he was in detention, I do not consider that it necessarily follows that he ceased to be monitored or of interest to the Sri Lankan authorities. Having regard to my finding that his detention occurred through actions of the Sri Lankan government and was preceded by adverse encounters with the Sri Lankan army between 2000 and 2006, I consider it plausible that the applicant's movements may have also been monitored shortly after his release. In the circumstances, I accept it is plausible his parent's received visits from men enquiring about the applicant's whereabouts.
25. During the visa interview, the delegate suggested that the applicant's account of his movements following release were inconsistent with his written claims outlined in the 2013 application which indicated he resided with his parents until January 2010 before living with his [sibling] for three months. His statutory declaration indicated that he that he returned to his family home as soon as he was able to, and following a visit with his family decided to go into

hiding by residing with different relatives, including his [sibling]. I note that information before the delegate indicated that members of his family (his [sibling] and father) had made statements to the Australian government that the applicant was missing in early 2010 and January 2011 respectively.

26. I note that the revised chronology outlined in the applicant's 2016 application better mirrors his family's statements to the Australian government that he was missing during 2010 and in early 2011. However, I consider that as he had maintained contact with his [sibling] and parents since arriving in Australia, he would have had access to this information prior to lodging his 2013 application. Given no attempt was made to align his testimony with statements by his [sibling] and father in the 2013 application, I am not satisfied the applicant has altered his claims about when his parents came to know he had been returned in order to embellish his claims for protection. In any event, I do not consider that this aspect detracts from the persuasiveness of his overall claim that from the time of his release until departure from Sri Lanka, he maintained a low profile to avoid the attention of the authorities. As part of his written claims and confirmed during the visa interview, he stated that at different times he resided with his [sibling] and his parents and following his marriage he spent time residing with his in-laws, visiting his parents and earning an income through [an occupation]. I accept the reason he did not obtain a passport or attempt to leave Sri Lanka legally was for fear of being arrested when using his passport.
27. I acknowledge that the applicant maintained a low profile and avoided any further encounters with the Sri Lankan authorities in the months leading up to his departure from Sri Lanka in 2012. However, I consider the earlier encounters the applicant had with the army, in conjunction with the duration and circumstances of his detention indicate that the applicant held a profile with the authorities of being suspected for LTTE support or involvement. In the absence of any further encounters with the authorities after his release from detention, there is no positive information before me to indicate that this profile had changed. I am not satisfied that it had.
28. On 14 July 2017, the United Nations Human Rights Commission (ONHCR) published the preliminary report of the United Nations Special Rapporteur on human rights and counter-terrorism following an official visit to Sri Lanka. The preliminary report found that the use of torture remains today to be endemic and routine for those arrested and detained on national security grounds, and assesses that any person suspected of association, however indirect, with the LTTE remains at immediate risk of detention and torture.⁷ I place some weight on this report as it is very recent, addresses the issue of risks faced by Tamils currently who are perceived to have links with the LTTE, and was prepared by a Special Rapporteur of the United Nations.
29. DFAT reports that according to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases.⁸ I consider the applicant's profile with the authorities, evidenced by his detention, is such that his inclusion on a database as a person of interest cannot be discounted. I am satisfied, given the duration and circumstances of his detention that there is a small but real chance, he is included as part of a 'stop' or 'watch' list.

⁷ OHCHR, "Human rights and counter-terrorism UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka preliminary report", 14 July 2017, CXC90406610453

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.15

30. On this basis, I consider it plausible that in circumstances where authorities have access to records about his detention, that this of itself would lead to a small but real chance further suspicion about his involvement with the LTTE would be triggered on return, notwithstanding the irregularities of his release from detention or that he avoided further encounters with the authorities prior to his departure.
31. The applicant left Sri Lanka illegally and I consider it is likely he will come to the attention of airport authorities as a person travelling on a temporary document. As part of the checks undertaken in these circumstances, the delegate noted that the applicant would be referred to the CID as well as the Security and Intelligence Service and his identity checked against relevant intelligence and criminal databases. DFAT notes that while the Emergency Regulations which provided for the arbitrary arrest and lengthy detention without charge of LTTE suspects was repealed, the Prevention of Terrorism Act remains in force, allowing suspects to be held without charge for three-month periods, not exceeding a total of 18 months.⁹ I am satisfied as part of these identity checks there is a real chance the applicant will be identified in connection with previous suspected LTTE activity and resulting detention and will be detained for further questioning as a result. This further questioning is likely to involve a longer period of detention than that experienced by other returned asylum seekers who do not have a similar profile and possible serious mistreatment.
32. Country information indicates there is potential for ongoing detention and torture of people imputed with links to the LTTE, including returned asylum seekers, with information set out by DFAT indicating that there have been reports of torture made by those held in relation to suspected LTTE connections, including in recent years.¹⁰ The UNHCR guidelines identify a list of non-exhaustive risk profiles for imputed membership of the LTTE.¹¹ Despite the applicant not knowing the specific reason for his detention, I consider that the term of imprisonment and mistreatment he experienced to be indicative of the applicant being imputed by the authorities with LTTE involvement consistent with risk profiles identified in the UNHCR guidelines. I am satisfied that should the applicant be detained on return to Sri Lanka, there is a real chance he would face similar treatment.
33. For reasons already stated, I am satisfied adverse information about the applicant's previous detention would be accessible by Sri Lankan authorities and on the basis of this information, he would be a person of interest to the authorities for imputed LTTE activity on his return to Sri Lanka. I am satisfied there is a real chance that on return to Sri Lanka the applicant may be detained on arrival and subjected to ill-treatment amounting to serious harm within the meaning of s.5J(4)(b) of the Act. This harm would be inflicted on the applicant for the essential and significant reason of an imputed political opinion and would be systematic and discriminatory conduct. I am satisfied it amounts to persecution under s.5J(4).
34. As the harm would be inflicted by the Sri Lankan authorities, who control the entirety of the country, I am satisfied that effective protection measures are not available to the applicant and the real chance of harm relates to the whole of the receiving country. As the harm arises as a result of the applicant's background, s.5J(3) does not apply.

⁹ DFAT, DFAT Country Information Report – Sri Lanka”, 18 December 2015

¹⁰ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105, p.15, p.28

¹¹ UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8, p.28

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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