



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/01813

Date and time of decision: 17 March 2017 08:55:00
Kanwal Josan, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka who fears harm from Sri Lankan authorities because he operated a [vehicle] during the civil conflict in Sri Lanka and the Sri Lankan Army (SLA) targeted him for having links to the Liberation Tigers of Tamil Eelam (LTTE). [In] December 2015 the applicant applied for a Protection visa (PV).
2. [In] January 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa. The delegate did not accept that the applicant had any links to the LTTE or that Sri Lankan authorities had any interest in him. The delegate found the applicant was not a refugee as defined by s.5H(1) of the *Migration Act 1958* (the Act) and was not a person in respect of whom Australia has protection obligations under s.36(2)(aa) of the Act.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the Act.
4. On 19 February 2017 the IAA received a submission from the applicant's representative. The submission in part responds to issues arising from the delegate's decision. I do not consider this to be new information and have considered these aspects of the submission.
5. The submission includes reference to an October 2016 comment from the Chief Minister of Sri Lanka's Northern Province. This was not before the delegate and I consider it to be new information. The applicant states he could not provide this information to the delegate as he only discovered it early in February 2017.
6. The delegate's decision was taken [in] January 2017, some three months after the comment that constitutes the new information. The applicant had the benefit of legal representation when he made his PV application in December 2015 and was accompanied by his legal representative at the PV interview in August 2016. A comprehensive seventeen page post-interview submission was provided by the applicant's legal representative on 10 October 2016. In addition to this, a six page response to a request for further information from the delegate under s.56 of the Act was submitted by the applicant's legal representative on 21 December 2016.
7. The issue to which the new information relates was discussed at the PV interview. The applicant had ample opportunity between the PV interview in August 2016 and the delegate's decision in January 2017 to present additional information, but did not do so. I accept that the applicant may not have become aware of the comment until February 2017, however I do not consider that this lack of knowledge constitutes exceptional circumstances to justify considering the new information.
8. The submission also contains the following statement from the applicant:

I strongly believe that I fit into one of the four categories identified by the Upper Tribunal relevant to the assessment of asylum claims by the Tamils and/or associates from Sri Lanka. I believe that I am a person whose name appears on a computerised list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. I also believe that I will be stopped at the airport and handed over to Criminal Investigation Department (CID) and the Prevention of Terrorism Act (PTA). I will be targeted

as mentioned above due to my history with the Sri Lankan authorities (friends' LTTE association).

9. I consider this to be new information as the applicant did not advance these specific claims during the PV process. The applicant did not provide any explanation as to why this new information was not provided earlier. The applicant had the benefit of legal representation throughout the PV process and had ample opportunity to present additional information prior to the delegate's decision in January 2017. I do not consider that there are exceptional circumstances to justify considering this new information.
10. In making the PV decision the delegate relied on the 18 December 2015 Department of Foreign Affairs and Trade (DFAT) Country Information Report for Sri Lanka. DFAT issued a new Country Information Report for Sri Lanka on 24 January 2017.¹ From the 2017 report I have obtained new information regarding Tamils, persons with links to the LTTE and Sri Lankan citizens who have sought asylum overseas. This information is not specifically about the applicant and is just about a class of persons of which the applicant is a member. The 2017 report was issued after the delegate's decision [in] January 2017. I consider DFAT to be an authoritative source of country information and as its January 2017 report updates its December 2015 one, I am satisfied that there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

11. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:
 - From 2002 to 2006, during the Cease-Fire Accord (CFA) between the SLA and the LTTE, the applicant operated a [vehicle]. The SLA and the LTTE co-existed in the applicant's area. If SLA personnel asked him to drive them somewhere he did. Similarly if LTTE members asked him to drive him somewhere he did. The SLA personnel often forced him to drive without payment. The LTTE would often pay for fuel that was used.
 - He also drove people around during special events and celebrations. For SLA events, he flew the lion flag and for LTTE events he flew the tiger flag. He had to do this otherwise he would not be allowed to drive the [vehicle] and either side would beat him up and he would be banned from driving in the area.
 - When the CFA between LTTE and the SLA broke down in 2006, the SLA targeted him for driving the [vehicle] for the LTTE. SLA personnel accused him of supporting the LTTE and of attending LTTE training conducted in 2004 for all [vehicle] drivers.
 - One day in 2006 he was driving home through an SLA checkpoint, when he was stopped and detained. He was hit in the chest with the butt of a gun, stomped on and accused of being an LTTE supporter and member.
 - He was detained by the SLA for around [number] days. Every day he was harassed and accused of being an LTTE member. Whenever he was interrogated, he was also beaten.
 - He was released from detention after his [Relative 1]'s friend who speaks Sinhala, spoke to an SLA officer. Only one officer released him, but the others did not know. He believes the other officers did not approve of his release and so they wanted to track him down again.

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

- He needed medical attention, but could not go to a hospital, as he would have been found and re-detained. He was taken directly to a Christian church in [location] where he was treated for his injuries. He was given medication but did not see a doctor. His leg was [injured]. His chest was also injured. He still has pain and trouble walking. He often feels tense in the chest and fatigues easily.
- He knew he had to hide, so he stayed at the church from 2006 to 2012, as the priest is [Relative 1]'s friend. He assisted with services and tasks around the church and hardly ever went outside. He never went to the market. The priest looked after him and gave him food and shelter.
- The authorities went to his family home a few times looking for him. SLA personnel threatened his family, especially [Relative 2] who owned a shop in [another location]. His [Relative 2] had to close the shop due to the harassment. SLA personnel would go to the shop and ask about his whereabouts and threaten [Relative 2]. He closed the shop so he could hide from them.
- In 2012, the priest began to have trouble. SLA personnel approached him at his house in pursuit of the applicant. They asked the priest where the applicant was, but he did not tell them. He was threatened and accused of harbouring an LTTE supporter.
- After this, the applicant knew he had to leave Sri Lanka and began making arrangements to escape. Within a week of the threats to the priest, he left [City 1] in a private van and travelled to Colombo where he obtained a passport. He was worried about his ability to safely acquire a passport given his profile and the fact that the authorities were after him. An agent helped him obtain a passport. The applicant paid him money and gave him his photograph. He was told it was a genuine passport and it was in his name, but he did not obtain it through regular channels.
- He paid about [amount] rupees to the agent to leave Sri Lanka for [another country]. The agent told him he would ensure safe passage and accompanied him through the airport. At the passport checkpoint, the officers looked at the applicant's passport and talked between themselves. They took the applicant to a different room. The agent saw this and spoke to someone else at the airport. The applicant was then able to depart.
- Since the applicant has left Sri Lanka, his family has been harassed every few months about his whereabouts. To avoid this harassment his family frequently moves around. The last time they were visited was around June 2015. Masked men harassed his parents, asking about the applicant's whereabouts. His parents told them he had gone overseas. The men accused the applicant's parents of hiding him and said that he was linked to the LTTE.
- [Relative 2] has been unable to reopen his shop due to the army harassment because of the applicant. His family has described the difficulties still faced by Tamil people. The SLA still controls large areas and people do not have the freedom to move into their houses and it is still unsafe.
- He has seen on the news that there are still killings happening in Sri Lanka. His cousin's husband was imprisoned and tortured for a crime he did not commit. This shows the difficulties Tamil people still face and the harm that happens when they are detained.

Refugee assessment

12. 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

13. 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.

14. I accept that the applicant is a Sri Lankan citizen. He has consistently made this claim since his arrival in Australia and his citizenship is supported by copies of his national identity card and birth certificate. I find that Sri Lanka is the receiving country for the purposes of the Act.

15. I accept that in 2006 the applicant was detained for around [number] days, accused of being an LTTE supporter or member and mistreated by SLA personnel. During the years of civil conflict in Sri Lanka, Tamils were routinely rounded up and detained on suspicion of LTTE involvement.²

16. The applicant claims that a friend of [Relative 1] who speaks Sinhala spoke to one of the SLA officers and arranged his release. At the PV interview the applicant could provide no further details as to how his release was facilitated. When asked how [Relative 1]’s friend persuaded the SLA officer to release him, the applicant stated ‘I don’t know how he convinced him or what he told him.’ The post-interview submission argues that the as the applicant was in pain from the beatings by SLA personnel it is reasonable that he was unaware of the details of these events at the time.

17. Country information from 2006³ is that the Sri Lankan government's respect for the human rights of its citizens declined due in part to the breakdown of the CFA. Credible sources reported human rights problems, including unlawful killings by government agents, high profile killings by unknown perpetrators, politically motivated killings by paramilitary forces associated

² US Department of State, "Sri Lanka- Country Reports on Human Rights Practices Mar 2006", 6 March 2006

³ US Department of State, "Sri Lanka- Country Reports on Human Rights Practices Mar 2006", 6 March 2006

with the government and the LTTE and disappearances. The government also strengthened emergency regulations that broadened security forces' powers in the arrest without warrant and non-accountable detention of civilians for up to twelve months.

18. I accept that the applicant may have been in pain at the time of his release from SLA detention, however when considering the country information above regarding the security environment following the breakdown of the CFA, his explanation of the manner of his release is implausible. If the applicant had been detained and beaten as badly as claimed on suspicion of having links to the LTTE, I do not consider it plausible that in the heightened security environment prevailing at the time, his release could be secured through simple persuasion of an SLA officer. I accept that the applicant was released from SLA detention, however not in the manner claimed.
19. The applicant's release from SLA detention in these circumstances is a strong indicator that despite his work as [a] driver, Sri Lankan authorities had no ongoing interest in him at the time. I find that at the time the applicant was released from SLA detention in 2006, Sri Lankan authorities including the SLA, had no interest in him.
20. The applicant claims that immediately upon his release from SLA detention in 2006, until January 2012, a period of around six years, he hid from Sri Lankan authorities in a Christian church where he was given food and shelter by the priest. He stated that his parents took him straight to the church after his release from the SLA and that he had no contact with anyone in the six years he remained there, apart from the priest. Despite his claimed length of residence in the church, at the PV interview the applicant could provide no detail of the church's name, its denomination, environment or surrounds. He stated that [Relative 1] and the priest were acquainted, but did not know how and did not think to ask the priest. The applicant claims that he had to leave the church after Sri Lankan authorities questioned the priest about the applicant's whereabouts. He was not aware of the circumstances in which the priest was questioned or what was said, however he states he left the church about a week later. This vagueness and lack of detail leads me to seriously doubt the credibility of the applicant's claim to have hidden at the church for six years, with his only human interaction being with the priest.
21. The post-interview submission states that the fear the applicant held for his life, coupled with his experience of harm while detained by the SLA, explains his lack of engagement with his surroundings while seeking refuge in the church. The applicant has provided a letter from a Counsellor [who] states that the applicant presented with symptoms consistent with Post Traumatic Stress Disorder with insomnia and frequent intrusive memories of traumatic events. The representative has argued that the applicant's credibility ought not to be called into question given the history of trauma and that due to his history of trauma, the applicant could not go back to that period to recall the memories.
22. I have noted the counsellor's report and the submissions and note also that the applicant was able to recall other events in detail, including the actual assault. I do not accept that this accounts for the applicant's inability to provide any meaningful detail about the six years he purportedly spent hiding in the church. I accept that the applicant may have suffered mistreatment while detained by the SLA in 2006, however for the reasons given earlier, am satisfied that the Sri Lankan authorities had no ongoing interest in him when he was released in 2006. I do not accept as credible that he then went into isolation and hid in a church for six years as he feared being killed.

23. Adding to this lack of credibility is the fact that the applicant renewed his driver's licence in 2008, when in the words of his then-representative, he remained in hiding at the church as 'he was in constant fear of being killed.' I do not accept that if the applicant was in such fear of his life that he hid in isolation for six years, he would renew his licence so that if he was able to flee to another country, he would be able to find work as a driver. The applicant states that [Relative 1] received the licence renewal notice at home and conveyed it to the priest at a location outside the church. The priest then assisted the applicant to complete the form, pay the fee and post the completed form to the Registry Office with three photographs for identification which the applicant happened to have in his possession. I do not accept this as credible. I find that the applicant did not spend six years hiding in a church and that the priest was not questioned about the applicant's whereabouts by Sri Lankan authorities.
24. The applicant's claim that he went into isolation and hiding from 2006 to 2012 as he feared being killed is also inconsistent with his account of travelling by van from [City 1] to Colombo in 2012 and remaining there for some time at a lodge while he obtained a passport.
25. At the PV interview the applicant stated that he was never a member of the LTTE and did not undertake the training given by the LTTE to [vehicle] drivers in 2004, but may be imputed with LTTE links due to his transportation of LTTE members in his [vehicle]. In its current guidelines, the United Nations High Commissioner for Refugees states that certain links to the LTTE may give rise to a need for protection.⁴ The post-interview submission states that one category of particular relevance to the applicant is: 'Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE.'
26. I do not accept the applicant faces a real chance of harm for this reason. I accept that the applicant originates from an area previously controlled by the LTTE, was displaced from his home area during Sri Lanka's civil conflict and that he experienced personal upheaval. At the height of its influence, the LTTE controlled and administered around three quarters of what are now the Northern and Eastern provinces of Sri Lanka. As a result, all persons residing in these areas necessarily encountered the organisation and its administration in their daily lives.⁵
27. There is no evidence before me that the applicant was ever a member or supporter of the LTTE and no credible evidence that he was suspected of being so after 2006. On his own evidence the applicant earned his living as a driver and did so by operating [a] commercial vehicle for hire. I accept that the applicant may have on occasion ferried members of the LTTE, however the evidence is that he did so not to demonstrate political or separatist opinions, but on a purely commercial basis.
28. I accept that the applicant may have obtained a passport with the assistance of an agent. I do not accept as plausible that the applicant would obtain a fraudulent passport in his own name. I find that he obtained a genuine Sri Lankan passport in his name, albeit with the assistance of an agent.
29. I do not accept as credible the applicant's claim that he experienced difficulties at the airport's passport checkpoint that were resolved through the intervention of his agent. As noted, the applicant claimed to be in such fear of harm from Sri Lankan authorities that he remained in isolation and hiding for six years. I find it implausible that a person at such a risk would

⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.27

⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.26

nevertheless be able to depart Sri Lanka from an international airport using his own passport through the verbal intervention of a third party.

30. The applicant claims that his family members have been harassed by Sri Lankan authorities and that [Relative 2] had to close his shop due to this harassment. At the PV interview he claimed that [Relative 2] began experiencing harassment from Sri Lankan authorities from 2013, as they could not locate the applicant. I have found that the applicant was not of interest to Sri Lanka authorities at the time he was released from SLA detention in 2006. There is no evidence that he had any further interaction with authorities while he remained in Sri Lanka after 2006. I do not accept as plausible that masked men have been to the applicant's parent's house looking for him. I also do not accept as plausible that seven years after his release from the SLA, Sri Lankan authorities would commence looking for the applicant and harass [Relative 2] as they could not locate the applicant.
31. I do not accept that the applicant was of interest to Sri Lankan authorities, including the SLA, when he departed Sri Lanka or that Sri Lankan authorities have visited the applicant's family in the time since he departed Sri Lanka. For these reasons I consider the applicant does not face a real chance of harm from Sri Lankan authorities, including the SLA, due to the applicant's profile as [a] driver or any imputed links to the LTTE.
32. The applicant claims that arrests and disappearances of Tamils are still taking place in Sri Lanka and that his cousin's husband was imprisoned and tortured for a crime he did not commit. I accept that the applicant may fear harm on return to Sri Lanka on account of his Tamil race, however for the following reasons, I am not satisfied the applicant will face a real chance of harm on the basis of being a Tamil.
33. DFAT assesses⁶ that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015. Information before the delegate is that Sri Lanka's August 2015 parliamentary election was deemed credible by international and domestic observers, with the Tamil National Alliance (TNA), gaining sixteen seats and TNA leader, Rajavaothian Sampanthan appointed opposition leader.
34. DFAT reports that monolingual Tamil speakers, including in the Northern Province, can have difficulty communicating with the police, military and other government authorities but that these practical difficulties are the result of a lack of qualified language teachers, the disruption to civilian life caused by the conflict and the legacy of earlier discriminatory language policies rather than official discrimination.
35. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces under the former Rajapaksa government. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity.⁷
36. Information before the delegate is that since taking power in 2015, the Sirisena government has established a new reconciliation taskforce mandated with 'healing the wounds of mistrust and social and cultural stress generated from extended conflicts between different communities in Sri Lanka', replaced military governors with civilians governors in the Northern and Eastern Provinces, reduced high security zones, released land formerly held by the military

⁶ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105, 3.4 – 3.7

⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, 3.7-3.9

and engaged constructively with the TNA. In addition, some individuals held under the PTA have been released.

37. DFAT has recently confirmed that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. While some cases of monitoring of Tamils continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities.⁸
38. The post-interview submission states that s.45(1)(b) of Sri Lanka's *Immigrants and Emigrants Act* (the I & E Act) makes it an offence to depart Sri Lanka other than via an official port of entry or exit and that returnees are generally considered to have committed an offence if they depart Sri Lanka irregularly by boat. I accept this to be the case. However, I have found that the applicant departed Sri Lanka legally from Colombo's international airport using a passport issued in his name. Contrary to the post-interview submission, the available evidence is that s.45(1)(b) does not apply to the applicant as he departed Sri Lanka lawfully from an official port of exit.
39. The applicant claims to fear harm in Sri Lanka as a returned asylum seeker. DFAT has assessed that such persons are treated according to standard procedures, regardless of their ethnicity or religion and are not subject to mistreatment during their processing at the airport.⁹
40. DFAT has reported the risk of harm for the majority of returning asylum seekers is low.¹⁰ On the available evidence, I am not satisfied the applicant has any real or perceived connection to the LTTE. I do not accept that the applicant will be imputed with separatist or anti-government dissident beliefs by the authorities because of his extended residence in a western country or imputed asylum seeking there, either individually or cumulatively. In light of this I find that the applicant does not face a real chance of persecution from Sri Lankan authorities either as a failed asylum seeker or as returnee from the west or for any other reason.

Refugee: conclusion

41. 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

42. 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

43. Under s.36(2A), a person will suffer 'significant harm' if:

⁸ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.8 – 3.9

⁹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.20

¹⁰ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 4.21-4.22

- 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.

44. I have not accepted the applicant's claims to have been imputed with links to the LTTE and do not accept that his method of departure from Sri Lanka or period of residence overseas will impute him with any such links. DFAT and the UNHCR¹¹ do not indicate in their recent reporting that Tamils are at risk of harm in Sri Lanka purely on account of their race.

45. I have found that there is not a real chance that the applicant faces harm in Sri Lanka on the basis of being imputed with LTTE links, his past interactions with Sri Lanka authorities, due to his Tamil race, or as a failed asylum seeker. The Full Federal Court¹² has held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear'. For the reasons set out above, I find that the applicant does not face a real risk of significant harm on return to Sri Lanka.

Complementary protection: conclusion

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

Decision

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

¹¹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

¹² *MIAC v SZQRB* (2013) 210 FCR 505

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.