



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/02018

Date and time of decision: 6 November 2017 15:38:00  
Mark Oakman, 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 a 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 Tamil of the Hindu faith from the Eastern Province, Sri Lanka. He arrived in Australia [in] October 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) [in] August 2016. [In] February 2017 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 21 March 2017 the IAA received submissions and further information from the applicant's representative. To the extent the submissions discuss evidence which was before the delegate and respond to the delegate's decision based on that material, I consider this does not constitute new information. The further information consists of a letter dated [in] February 2017 from the applicant's Sri Lankan employer. It was submitted that as the letter was dated after the date of the delegate's decision it could not be provided to the delegate and, as the letter mentions that the authorities are looking for the applicant in their shop, had that information been known it may have affected the consideration of the applicant's claims. The letter, on its face, is credible personal information and was prepared after the date of the delegate's decision. Therefore the actual document could not have been provided to the delegate but I note that most of the information in the letter relates to events prior to the applicant's departure from Sri Lanka. However, it also refers to recent events in relation to the authorities visiting their shop. The applicant has satisfied me that the new information was not and could not have been provided to the delegate and I am also satisfied that there are exceptional circumstances to justify considering that new information.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - He fears persecution by the Sri Lankan authorities, namely the Sri Lankan Police and the Criminal Investigation Department (CID), including that he will be arrested, interrogated, detained, subjected to further extortion, physically assaulted, and tortured;
  - He fears persecution based on imputed political opinion as he had received training from the Liberation Tigers of Tamil Eelam (LTTE), some of his family members were actively involved in the LTTE, including his brother who was in the LTTE and served [a sentence] in prison, he is from a former LTTE controlled area and has previously been questioned about his LTTE links;
  - The applicant was subject to extortion at the hands of the Sri Lankan authorities when he was working as [Occupation 1] in [Town 1]. He has also failed to honour an extortion payment of [amount] rupees to the CID;
  - Due to his Tamil ethnicity/eastern province;

- Because of his membership of a particular social group, firstly failed asylum seeker who left Sri Lanka unlawfully and secondly, as a [business person] who was previously subjected to extortion;
- He further claims that he will not be able to survive in his previous [employment];
- The CID's visits to his family after his departure;
- He would be detained for leaving the country illegally if he is unable to raise the fine or possible bail imposed in relation to illegal departure;
- He fears white van abduction which is still in action in 2016; and
- On cumulative grounds.

## **Factual findings**

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### **Receiving country**

5. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from [Town 2], Eastern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

### **Problems in Sri Lanka**

6. The applicant says that he was born in [year] in [Town 3 in] Eastern Province. His village was under LTTE control until 2007, with an LTTE headquarters [close to] his family home. The applicant is divorced. He has [numerous siblings]. His parents, [and some siblings] live in the family home, and the rest of his [siblings] live elsewhere in Sri Lanka. He attended school until he was about [age]. In 1993 the applicant moved to Colombo by himself to commence his [Occupation 1 training]. He worked as a [Occupation 1] his entire life and [worked] until he went into hiding in August 2012. He worked as [Occupation 1] from [1993] [to] August 2012. His father was previously a [Occupation 1], his brother worked for a time [in the same occupation] and other relatives were also [in the same occupation].
7. The applicant claims that in 1990 his [relative], L, joined the LTTE. L worked [in] [a particular section of the LTTE]. L died in the final conflict of the war in 2009. His [relative], K, was abducted in 1990 by the Sri Lankan Army (SLA). K remains missing and the family believes K must have been killed. The applicant's brother, who was [age] at the time, voluntarily joined the LTTE as a combatant in 1995. After [a number of] months his family became fearful for his brother's safety and, using the influence of L, arranged for his brother to leave the LTTE. His parents sent his brother to a Sinhalese area to avoid conscription. His brother also worked as [Occupation 1] in [another town].
8. The applicant states that in [year] there was a bomb blast in [a] Sinhalese area. The Tamil man who planted the bomb was caught by the SLA. The man had been boarding in [the applicant's relative's] shop and knew [the applicant's] brother had been in the LTTE so blamed the bomb blast on his brother and [the relative]. His brother and [relative] were not convicted but were both gaoled in relation to the attack and kept imprisoned for [a period of time].
9. The applicant claims that in [2006] he attended training with the LTTE in his home village of [Town 3]. He had returned home for a religious festival and while there the LTTE ran

mandatory training to teach them how to protect the village. In the training the LTTE taught them self-defence techniques, how to use mock weapons and how to attend to the injured. The training lasted about a week. They were not given real weapons but used sticks instead. [Some time] after he did the training he returned to [Town 1] to work. Within a week he was detained by the police because they became aware he had attended some training and were suspicious of his involvement with the LTTE. He was held for [a number of] days and accused of being in the LTTE. They slapped him and ordered him to confess the truth. His boss came and vouched for him and he was released. He is not sure if his boss paid any money to obtain his release. He knew two or three other Tamils from the north and east who were also taken into custody around the same time as he was and he doesn't know what happened to them.

10. The applicant claims that after this incident he was systematically targeted by the CID. He was living in [Town 1] at the time and he was one of the few Tamils living there and they began to harass him. The harassment was part of the pattern of harassment of Tamils from the north and east living there at the time. CID officers would come to his shop and ask for a bribe of [varying amounts] and speak to him in a degrading manner. They would threaten him saying that if he didn't give them the bribes they asked for they would blame him for something he didn't do. They would accuse him of being a LTTE supporter as they knew about his brother's detention. The applicant doesn't support the LTTE and told the police and CID that he had no association with the LTTE but they wouldn't believe him because he would visit LTTE controlled areas.
11. The applicant states that in September 2006 their family home in [Town 2] was hit by a shell and his father and [a sibling] were [injured]. They were both in a critical condition and still have [injuries]. He believes the shell attack was aimed at the LTTE office near their house. After the shell attack his family moved to another relative's house in [Town 2].
12. The applicant claims that the CID continued to threaten him and said if he didn't pay them protection money they would arrest him on suspicion of being associated with the LTTE. However the amount they asked for began to increase and he feared what would happen if he didn't pay. Each time he went to [Town 2] to visit his family the CID would know about the visits and question him about his activities. They would ask him questions about the LTTE, such as what kind of vehicles the LTTE were driving, what the number plates were, whether the LTTE had visited him and whether any of his relatives were LTTE members.
13. The applicant states he travelled to [Country 1] [in] 2010, 2011 and 2012. He travelled through Colombo airport, using his own passport and stayed for [duration] each time. He confirmed that, other than the extortion, he didn't have any problems during the time he was in [Town 1] and that he was never detained by the authorities other than [in] 2006.
14. The applicant claims that [in 2012] the CID asked him for [amount] rupees. They threatened him and said that if he didn't pay the money they would blame a case on him and he would face serious trouble as a consequence. He said he would give them the money [at a later date] but he was unable to raise the funds and instead returned to Batticaloa district to hide from the CID. [Later in] 2012 someone from the CID approached his brother and said that if they found him they would shoot him. Sometime after that, either the CID or the police spoke to his mother enquiring about him. He went into hiding for [a number of] months. During that time he made arrangements to leave Sri Lanka and left [in] October 2012.
15. The applicant says that after he left Sri Lanka police came looking for him. The first time was [later in] 2012, they came several other times and the last time was [later in] 2012. When they

came looking for him, his parents advised he had gone missing. They told them that if he comes back he had to report to the CID.

16. The applicant provided a number of supporting documents including identity documents, a school reference and a letter from his employer in [Town 1].
17. The UN High Commissioner for Refugees (UNHCR) confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.<sup>1</sup> The Department of Foreign Affairs and Trade (DFAT) assesses<sup>2</sup> that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. Many Tamils, in the north and east in particular, reported being monitored, harassed, arrested and/or detained by security forces under the Rajapaksa government.<sup>3</sup> Country information confirms that all persons living in areas controlled by the LTTE necessarily had contact with the LTTE and its civil administration in their daily lives and parts of the Eastern Province were under LTTE control from 1990 until the end of 2007.<sup>4</sup> Country information indicates that there are a number of reports from 2007 of the involvement of some Sri Lankan authorities in extortion and generally confirms that corruption has long been an issue in Sri Lanka.<sup>5</sup>
18. Based on his generally consistent evidence about his background history and family circumstances, including his relative's involvement with the LTTE, I accept the applicant's claims except as discussed below.
19. I have serious concerns about the truthfulness of the applicant's claims in relation to the extortion and other adverse attention he suffered from the CID between 2006 and 2012.
20. When the applicant initially detailed his working arrangements in [Town 1] at the SHEV interview he said he worked in a [shop] and he also [did private work]. When asked if he ever had his own shop before he left Sri Lanka, he confirmed he didn't own a shop, worked for someone else in a [shop in Town 1] but that he also did private work. Later, when the delegate suggested he was asked for the extortion money in the shop, he said he only attended the shop in the [morning], and sometimes worked there for one or two [hours], but otherwise he did all the work for the shop, together with [various other work], in [another location]. This is a significant change in his evidence.
21. In his SHEV written statement he referred generally to being targeted, extorted and questioned by the CID. At the SHEV interview he claimed for the first time that it was always the [same] CID officers involved. When asked how he knew they were CID officers and not criminals posing as such, he initially said they showed their IDs. Later, when the delegate expressed difficulty in believing that he was extorted by CID officers rather than criminals, he said that when the police were about to release him from his [detention] in 2006, they told him that these were the men that were going to monitor him. His failure to mention in his written statement that the CID officers who extorted, harassed and questioned him for some six years were the same officers and that he had been introduced to them by the police just

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<sup>1</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp17 and 18.

<sup>2</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 4.12 and 4.13.

<sup>3</sup> Ibid 3.8.

<sup>4</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p26; LKA34481: RRT Research Response Number: Sri Lanka, 11 March 2009.

<sup>5</sup> Canadian IRB: Immigration and Refugee Board of Canada, "LKA102744.E Sri Lanka: Reports of extortion by the Sri Lanka Army (SLA)", 24 January 2008, 890; and "Good Governance and Corruption", Groundviews, 31 January 2017, CXC9040661129.

before he was released is a significant omission. Additionally, I do not consider it credible that when first asked how he knew the men extorting him were not criminals posing as the CID, he failed to mention that the CID men had been pointed out to him by the police just before his release but instead claimed he knew it because they showed him their IDs.

22. In his SHEV written statement he said the CID would question him whenever he returned from visiting his family in [Town 2] and asked him about what kind of vehicles the LTTE were driving, what the number plated were, whether the LTTE had visited him and whether his relatives were in the LTTE. I do not consider it credible that the CID or police would be questioning the applicant about details of LTTE vehicles and visits after 2007 once the area, and indeed the whole Eastern Province, was fully under SLA control.
23. At the SHEV interview the applicant described his family as middle class, said that he was living well in Sri Lanka, earning about [amount] rupees a year which enabled him to take care of his family and still have money left over. He also said that the CID would demand [various amounts] from him once or twice a month, the last time they asked for one of these small amounts was in [2012] and then [later in] 2012 the CID demanded he pay [15 times as much]. In his SHEV written statement he said he couldn't raise the [amount] in time so he went into hiding. In his arrival interview he indicated he paid the people smugglers [an even larger amount] in cash himself. I do not consider it credible that the applicant would be living well, including supporting his family and with money left over, if he earned about [amount] rupees a year but was paying [a significant amount] in extortion money each year. I do not consider it credible that the extortionists would after some six years of demanding small, regular amounts of money up to [2012], suddenly come the next month to demand [15 times as much]. Additionally, it is not credible that the applicant could not raise [the larger amount] by [the required date in] 2012 but by his departure [in] October 2012 was able to raise [a much larger amount] in cash.
24. In assessing these issues with the applicant's evidence, I am mindful of the difficulties of recall over time, the scope for misunderstanding in interpreted material, cross cultural communication issues, the problems a person who has suffered trauma may have in providing a cohesive narrative, including that the applicant's post-SHEV submission that he continues to suffer from fear and anxiety, resulting in a somewhat disturbed and confused mind, that may have affected his evidence at the SHEV interview, and that the claim is not inconsistent with the country information. However, the problems identified go beyond any minor discrepancies in his evidence that such issues might be expected to produce. Indeed, it is clear that the applicant's evidence substantially evolved at the SHEV interview as the delegate identified concerns with some of his earlier evidence.
25. Given the significant changes, inconsistencies and implausibility in the applicant's evidence about the extortion and the adverse interest of the CID from 2006 to 2012, I am satisfied that he has fabricated his evidence in order to boost his claims for protection. I do not accept the applicant's claim that he was subject to regular extortion demands from the CID or that he was systematically questioned, harassed or monitored by the CID from after his released from detention in 2006 until he left Sri Lanka in October 2012. It follows that I also do not accept that his brother was approached [in] 2012 about the unpaid money and the CID threatened to shoot the applicant, that his mother was questioned, that the applicant went into hiding for [a period in] 2012, or that the authorities visited his family's home and enquired about his whereabouts on several occasions [in] 2012.
26. The applicant provided a supporting letter dated [in] February 2017 that he says is from his employer at the [shop] in [Town 1]. There are a number of issues with this letter. It is from a

company with a different name to [the name he advised earlier, and] the letter makes no mention of [the previous name]. The letterhead refers to a head office address and two branch office addresses but none of those addresses match the address given by the applicant for the shop in [Town 1]. At the arrival interview the applicant mentioned his boss' first name but none of the names /initials on the letterhead or in the signature block match that name. Although the letter says he was forced to give money, it says it was to unknown people rather than the CID. The letter also states that the CID is looking for him in their shop. Even if I accepted the applicant's claims in relation to the CID's interest in him after his detention in 2006 including that the authorities visited his family [in] 2012 to enquire about him, which I do not, I do not consider it plausible that the authorities would make enquiries about him at the [shop] during the almost five years since he left Sri Lanka but fail to make similar enquiries with his family during that time. Given these issues, I do not attach any weight to the letter dated [in] February 2017.

27. In their submissions his representatives referred to the applicant's fear and anxiety including a somewhat disturbed and confused mind that may have affected his responses at the SHEV interview. I took into account that submission in assessing the applicant's evidence as discussed above. However, the applicant has not mentioned any treatment he was or is receiving and provided no medical evidence in relation to any diagnosed mental illness or other mental health issues. I am not satisfied on the evidence before me that the applicant is suffering from a mental health disorder, illness or condition or that he requires any current or future treatment.

### **Failed Asylum Seeker**

28. The applicant claims to have left Sri Lanka between [date] and [date] October 2012 to travel to Australia as a passenger in a boat organised by a smuggler. His passport went missing in Sri Lanka. I find that, if he were to return to Sri Lanka, he will be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities.

### **Refugee assessment**

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29. 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**

30. 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.

*Tamil male from the east, LTTE links and imputed political opinion*

31. Country information indicates that Tamils were subject to longstanding, systematic discrimination in university education, government employment and other matters controlled by the government.<sup>6</sup> However, there have been a number of significant changes in the five years since the applicant left Sri Lanka and particularly since the election of the Sirisena government in 2015. The new government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms to restrict executive powers, and took steps to restore the independence of the judiciary. In contrast to the approach of the Rajapaksa government, it also initiated a new, more open dialogue with the international community, including human rights organisations.<sup>7</sup>
32. The Sirisena government implemented a number of confidence-building measures to address the long-standing grievances of the Tamil community including truth and accountability for events towards the end of the war.<sup>8</sup> It adopted the 19<sup>th</sup> Amendment to the *Constitution* (Sri Lanka) that limits the powers of the presidency and begins the process of restoring independence to government commissions.<sup>9</sup> It is reported to have engaged more with the UN and prioritised reconciliation and human rights and established the Office of National Unity and Reconciliation with a focus on promoting social integration to build an inclusive society, securing language rights for all citizens, supporting a healing process within war-affected communities, and providing coordinated development planning for war-affected regions.<sup>10</sup> The Tamil National Alliance leader, R Sampanthan, was appointed the leader of the opposition and is the first ethnic minority opposition leader since 1983.<sup>11</sup> The United Nations High Commissioner for Human Rights observed in February 2016 that one of the most important long-term achievements over the past year had been the restoration of the legitimacy and independence of Sri Lanka's Human Rights Commission (HRCSL).<sup>12</sup>
33. DFAT assesses that Sri Lankans of all backgrounds generally have a low risk of experiencing official discrimination as there are no current laws or policies that discriminate on the basis of ethnicity including in relation to access to education, employment or access to housing. DFAT states that Tamil inclusion in the political dialogue in Sri Lanka has increased under the Sirisena government and they have a substantial level of political influence.<sup>13</sup>

<sup>6</sup> US Department of State (USDOS), "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p33.

<sup>7</sup> UK Home Office (UKHO), "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 3.0", 1 August 2016, OGD7C848D77, 6.1.4 [I note that the delegate referred to the UKHO report with the reference number and version number of the August 2016 report but gave the date as May 2016. Based on those version and reference numbers I am satisfied the date is a typo and August 2016 is the correct date].

<sup>8</sup> USDOS, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p34.

<sup>9</sup> Ibid p1.

<sup>10</sup> Ibid pp6, 27, 28 and 34.

<sup>11</sup> UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 3.0", 1 August 2016, OGD7C848D77, 5.1.5.

<sup>12</sup> Ibid 6.1.1

<sup>13</sup> DFAT "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.4 and 3.6.

34. During the war, more Tamils were detained under emergency regulations and the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA) than any other ethnic group. This was primarily due to LTTE members and supporters being almost entirely Tamil, but DFAT notes that there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity. Since 2015 the Sirisena government has reviewed and released some PTA detainees, including Tamils, and DFAT assesses that there are currently fewer individuals detained under the PTA than during the war.<sup>14</sup>
35. DFAT assesses<sup>15</sup> that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena government; the police are now responsible for civil affairs across Sri Lanka; although there is still a sizable military presence in the north and east, it is largely idle and generally restricted to their barracks; and members of the Tamil community have described a positive shift in the nature of interactions with the authorities and they feel able to question the motives of, or object to, monitoring or observation activities.
36. DFAT assesses that some societal discrimination on the basis of ethnicity can occur but does not identify any such specific issues in relation to Tamils. DFAT notes that monolingual Tamil speakers can have difficulties communicating with the police, military and other government officials but assesses that these practical difficulties are as a result of a lack of qualified language teachers, the disruption of civilian life caused by the war and historical discriminatory language policies rather than official discrimination.<sup>16</sup> The applicant does not claim he suffered any incidents of societal discrimination while in Sri Lanka. I note that he spent the majority of his time from 1993 living and working in areas of Sri Lanka other than the majority Tamil areas of the north and east. The country information discussed above indicates the monitoring and harassment of Tamils in the north and east has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation has generally improved.
37. The UNHCR's 2012 Eligibility Guidelines for Sri Lanka<sup>17</sup> note that a person's real or perceived links with the LTTE may give rise to a need for international refugee protection. However, originating from an area that was previously controlled by the LTTE does not in itself do so. Although the nature of these links can vary, this may include:
- Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
  - Former LTTE combatants or "cadres";
  - Former LTTE combatants or "cadres" who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, "computer branch" or media (newspaper and radio);
  - 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;
  - LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; or

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<sup>14</sup> Ibid 3.8.

<sup>15</sup> Ibid 3.9.

<sup>16</sup> Ibid 3.4 and 3.7.

<sup>17</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp26 and 27.

- Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
38. DFAT refers to the UNHCR's guidelines and notes<sup>18</sup> that accurately identifying people according to those categories may be difficult and the UNHCR recognises that each case depends on its individual circumstances.<sup>19</sup> DFAT also confirms<sup>20</sup> that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE.
39. DFAT assesses<sup>21</sup> the number of incidents of extra-judicial killings, disappearances and kidnappings for ransom, including incidents of violence involving former LTTE members, as significantly reduced since the end of the war. There are credible reports of torture carried out by the security forces during the war and its immediate aftermath although DFAT states that Tamils faced a higher risk of torture during the war.<sup>22</sup> DFAT is aware of reports of torture carried out by the police including from the UN Special Rapporteur and the HRCSL but assesses that torture in Sri Lanka, whether perpetrated by the military, intelligence or police forces, is not presently systemic or state sponsored and that the risk of torture from military and intelligence forces has decreased since the end of the war.<sup>23</sup> DFAT also assesses<sup>24</sup> that cases where the police are alleged to have tortured or mistreated an individual generally reflect low capacity, lack of training and due process in arrest and detention procedures, together with poor policing methods that focus on extracting confessions rather than conducting a thorough investigation. DFAT states that as few reports of torture are proved or disproved it is difficult to determine the prevalence of torture. However, it considers<sup>25</sup> that Sri Lankans face a low risk of mistreatment that can amount to torture, mostly perpetrated by the police, irrespective of their religion, ethnicity, geographical location or other identity; that the incidence of torture has reduced in recent years; and that the allegations of torture pertain to a relatively small number of cases compared to the total population.
40. The UK Home Office (UKHO) 2016 report discusses protection claims as based on a person's actual or perceived political opinion of support for or involvement in the LTTE or other Tamil separatist groups, including membership of, or participation with, such groups overseas. The report notes that in the UKHO view simply being a Tamil does not give rise to protection claims.<sup>26</sup> The UKHO notes there have been positive developments in Sri Lanka since President Sirisena came to power in January 2015. White van abductions are now seldom reported, and the number of torture complaints has reduced, although new cases of Tamil victims continue to emerge, both of torture and occasional white van abductions.<sup>27</sup> The authorities continue to monitor people, particularly in the north and east and persons perceived to sympathise with the LTTE continue to be intimidated, harassed, arrested, detained and tortured.<sup>28</sup> UKHO notes that, despite improvements, there continue to be reports, but at much lower numbers, of

<sup>18</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.32 and 3.33.

<sup>19</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p25.

<sup>20</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29.

<sup>21</sup> Ibid 4.1.

<sup>22</sup> Ibid 4.12- 4.14.

<sup>23</sup> Ibid 4.15, 4.16 and 4.18.

<sup>24</sup> Ibid 4.19.

<sup>25</sup> Ibid 4.20.

<sup>26</sup> UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 3.0", 1 August 2016, OGD7C848D77, 1.1.1 and 2.3.1.

<sup>27</sup> Ibid 2.3.6, 2.3.7, 6.6.2, 6.6.6, 6.6.7 and 6.6.11.

<sup>28</sup> Ibid 2.3.8.

abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE.<sup>29</sup>

41. The US Department of State (USDOS) 2016 report notes there were no substantiated reports in Sri Lanka of extra-judicial killings in 2015 but the use of force against civilians, though rare, remained a problem.<sup>30</sup> USDOS notes there are credible reports that the military and security forces have abducted, tortured, raped and sexually abused citizens and in the north and east security forces are responsible for detaining those accused of LTTE connections, with observers reporting that interrogations sometimes included mistreatment and torture, and arbitrary arrests occur but at a reduced rate compared to 2014.<sup>31</sup>
42. I accept that the applicant and members of his family lived in a part of Batticaloa that was controlled by the LTTE until the end of 2007, with a LTTE office near to his family home, and that after he moved away in 1993 he visited his family in [Town 2]. I accept that his [relative] L joined the LTTE, [worked] in [a particular] division and died in the final stages of the war in 2009. I accept that K, his [relative], was abducted by the SLA in 1990 and remains missing. I accept that his brother voluntarily joined the LTTE in 1995 as a combatant for [a number of] months, until L arranged his release, and that after a bomb blast in [year], his brother and [another relative] were kept in prison for [a number of] months until released. I accept that the applicant was forced to undergo LTTE self-defence training for a week or so when he was visiting his family's home in [Town 2] in [2006]. I also accept that, after he completed the training and returned to [Town 1], [some time later] he was detained by the CID for [number] days, the CID slapped him and questioned him about his involvement with the LTTE, and he was released when his boss from [Town 1] came and vouched for him. I also accept he knew two or three other Tamils from the north and east who were taken into custody around that same time and he doesn't know what became of them.
43. Having regard to the UNHCR guidelines and the other information before me, I do not consider the applicant to be at risk of harm for reason of any real or perceived links to the LTTE, or any imputed political opinion, now or in the reasonably foreseeable future, for a number of reasons.
44. First, as the UNHCR Guidelines and UKHO 2016 report note, residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection and, as residents of LTTE controlled areas had to interact with the LTTE on a daily basis and the applicant visited the area, I find that his being made to undertake self-defence training is within such day to day interactions. Secondly, the applicant was never charged or imprisoned for any reason while he was in Sri Lanka and, on my findings, the applicant had no further adverse interactions with the Sri Lankan authorities after he was released from his [detention in] 2006. Thirdly, the applicant doesn't claim that his brother and [relative] received any further adverse attention from the Sri Lankan authorities after they were released after their imprisonment. Nor does he claim that his family members were ever questioned by the authorities about his brother's, his [relative]'s, L's, K's or his own suspected LTTE involvement. Additionally, the applicant doesn't claim he was ever question about or otherwise connected by the authorities with the two or three other Tamils who were taken into custody [in] 2006. The applicant was able to travel legally to [Country 1] in 2010, 2011 and 2012 without encountering any problems from the authorities at the airport. Furthermore, on my findings, the Sri Lankan authorities have not

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<sup>29</sup> Ibid 2.3.10.

<sup>30</sup> USDOS, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p2.

<sup>31</sup> Ibid pp7-10.

shown any interest in the applicant or made enquiries in relation to the applicant's whereabouts since he left Sri Lanka in October 2012.

45. The applicant does not have a profile that country information suggests he is at risk of harm, now or in the foreseeable future, for any real or perceived LTTE links including those based in his family's links, for any imputed political views and/or as a Tamil male from the east. I do not consider that the Sri Lankan authorities had any interest in the applicant at the time he left Sri Lanka, nor, given that the Sri Lankan authorities have not made any enquiries about the applicant's whereabouts in the more than five years since he left Sri Lanka, that he would be of any adverse interest to the Sri Lankan authorities, or at risk of any harm, if he returned.
46. The applicant's representative submitted, among other things, that Tamils are still tortured and persecuted in Sri Lanka and white van abductions continue. I am satisfied the submissions and country information referred to by the applicant's representative, both to the delegate and to the IAA, are broadly consistent with the DFAT 2017 report which does not suggest that no further changes are needed or that such incidents do not occur but overall assesses that these incidents have reduced and the general political and security situation in Sri Lanka has improved as discussed above. The UKHO 2016 report also suggests that while such incidents still occur they are not occurring to the same extent as they were and there has been an improvement since the change of government. Overall, as it was prepared specifically and solely for the purpose of protection status determination in Australia, and provides a general country overview from DFAT's on-the-ground knowledge and discussions with a range of sources, I consider the DFAT January 2017 report a recent and an authoritative source of information on conditions in Sri Lanka and attach greater weight to that report.
47. I am satisfied that the applicant will not face a real chance of persecution due to any links to the LTTE, for any imputed political opinion and/or as a Tamil male from the east, if returned to Sri Lanka, now or in the reasonably foreseeable future.

*Extortion and [Occupation 1]*

48. The applicant submitted that he would not be able to continue to do his normal [work] as [Occupation 1] or survive [in Occupation 1] in Sri Lanka, if returned, because of the persecutory harm he suffered.
49. As discussed above, I rejected the applicant's claim that he was paying extortion money to the CID. The applicant has not claimed that any other members of his family who worked [in the same occupation], including his brother who was in the LTTE, were or are subject to extortion from the authorities or anyone else. Similarly, the applicant has not claimed that any of the [people] who trained him, the [shops] he worked in or the [people] he [worked] for, were or are subject to extortion from the authorities or anyone else.
50. I am not satisfied that he will be unable to return to [Occupation 1] if he wishes to do so, if returned to Sri Lanka, now or in the foreseeable future. Additionally, given that he was not subject to extortion as a [Occupation 1], together with his profile with the authorities as discussed above, I am not satisfied that he would be at risk of harm from a white van abduction incident, if returned to Sri Lanka, now or in the foreseeable future. Nor am I satisfied that his former [work], or if he again takes up [Occupation 1] on his return, could be viewed as increasing his risk profile which is that of a person who will not be of adverse interest to the Sri Lankan authorities if returned.

51. I am satisfied that the chance that the applicant will experience any harm as a former [Occupation 1] or if he again becomes a [Occupation 1], if returned to Sri Lanka, now or in the reasonably foreseeable future is remote.

*Returning asylum seeker and illegal departure from Sri Lanka*

52. I accept that, on his return to Sri Lanka, the applicant would be considered by the authorities to be a failed asylum seeker who departed Sri Lanka illegally.

53. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. In practice, penalties are applied on a discretionary basis and most cases result in a fine and not imprisonment.<sup>32</sup>

54. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration, the State Intelligence Service and a unit of the CID based at the airport who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed en masse and processing can take several hours.<sup>33</sup>

55. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.<sup>34</sup>

56. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted and photographed. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. Should a Magistrate not be available before this time, for example because of a weekend or public holiday, those charged may be held at a nearby prison.<sup>35</sup> DFAT rates<sup>36</sup> general prison conditions in Sri Lanka as not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions.

57. Fines, which can be paid by instalments, are issued to persons who depart Sri Lanka illegally. If a person pleads guilty, they will be fined and are then free to go. Generally, if a returnee pleads not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor.<sup>37</sup>

58. I accept that the applicant will be identified as an asylum seeker on his return. DFAT assesses the risk of mistreatment or torture for the majority of returnees, including those suspected of

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

<sup>33</sup> Ibid 5.19.

<sup>34</sup> Ibid 5.20.

<sup>35</sup> Ibid 5.21.

<sup>36</sup> Ibid 4.25.

<sup>37</sup> Ibid 5.22.

offences under the IE Act, is low and continues to reduce.<sup>38</sup> Country information contains reports of some returnees being tortured.<sup>39</sup> DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with actual or perceived links to the LTTE may be at risk of harm when processed at the airport. However, as discussed above, on my findings the applicant was not of any adverse interest to the Sri Lankan authorities at the time of his departure from Sri Lanka, or indeed since his release from detention in [2006], there have been no enquiries by the authorities since he left Sri Lanka and he does not have a profile that would make him of adverse interest to the authorities if he returned. Taking into account those findings and the country information, I do not accept that the applicant will be at risk of adverse attention from the Sri Lankan authorities when scrutinised on arrival in Sri Lanka.

59. I am not satisfied that there is a real chance that the applicant would face harm on his return as a failed Tamil asylum seeker from Australia. I accept that the applicant, if returned to Sri Lanka, will face action under the IE Act. The country information confirms that the applicant is likely to be detained and questioned at the airport, possibly up to 24 hours, before being taken by the police to the nearest Magistrates Court.
60. Once before the Court, and if not dealt with on the spot if the applicant were pleading guilty, the applicant would ordinarily be released unconditionally or be bailed to return to Court at a later date. If a Magistrate is not available at that time the applicant could be held in a nearby prison for a short time. Although the maximum penalty includes five years imprisonment, the country information indicates custodial sentences are not imposed on returnees who were merely passengers on a people smuggling boat but that fines are issued to act as a deterrent.
61. It was submitted by the applicant that if detained for his illegal departure he may not be able to raise bail or pay a fine. His evidence at the SHEV interview was that his family still live in Sri Lanka and he described his family as middle class. In his SHEV application he stated he contacted his parents and [siblings a number of times] a week. Country information indicates fines can be paid by instalments. Taking into account his family's circumstances, I am satisfied that, even if the applicant has no money himself at the relevant time, his family would be available to provide financial support for any bail, including acting as a bail guarantor if one is required, or in relation to any fine imposed on the applicant.
62. The applicant's evidence is that he was a passenger on the boat. I find, based on the country information discussed above that the applicant may be detained and questioned at the airport for up to 24 hours, faces a fine for breaching the IE Act and, depending on the availability of a Magistrate at the time he is charged under that Act, and/or if a relative is required to guarantee any bail surety, may face a short period of being held in prison.
63. The High Court endorsed in *MIBP v WZAPN*,<sup>40</sup> the position taken in *SZTEQ v MIBP*,<sup>41</sup> that whether a risk of loss of liberty constitutes serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.

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<sup>38</sup> Ibid 4.21 and 4.22.

<sup>39</sup> Including International Truth & Justice Project Sri Lanka (ITJP) "A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015", 1 July 2015, CISEC96CF129455; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; and UKHO, "Sri Lanka December 2012 - Bulletin: Treatment of Returns", 1 December 2012, CIS28615.

<sup>40</sup> *MIBP v WZAP; WZARV v MIBP* [2015] HCA 22.

<sup>41</sup> *SZTEQ v MIBP* [2015] FCAFC 39.

64. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, or if a relative is required to travel to Colombo to guarantee any bail surety, I am satisfied the applicant would face only a brief period in detention. Even having regard to general poor prison conditions, I do not consider that a few days in detention would constitute the necessary level of threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.
65. Similarly, whether considered separately, in combination or cumulatively with a brief period of detention, I do not consider any processing, likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine under the IE Act, to constitute a threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm.
66. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.<sup>42</sup> In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
67. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a failed Tamil asylum seeker who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
68. I accept he will face some non-discriminatory penalties because of his illegal departure from Sri Lanka. However, considering the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

### **Refugee: conclusion**

69. 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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70. 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**

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

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<sup>42</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293, at [20]; and *Applicant A v MIEA* (1997) 190 CLR 225, p233.

- 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.
72. I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political opinion, as a Tamil male from the east, as a former [Occupation 1] or if he again becomes a [Occupation 1], as a returned Tamil failed asylum seeker from Australia or a combination of these. As 'real chance' and 'real risk' involve the same standard,<sup>43</sup> it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.
73. As discussed above, the applicant faces possible action under the IE Act for his illegal departure and DFAT advises that, once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed. Returnees may be questioned for up to 24 hours at the airport and, subject to the unavailability of a Magistrate over a weekend or on a public holiday, may be detained in prison for a brief period while waiting to appear before a Magistrate or if a relative who may have to travel to Colombo is required to guarantee any bail surety. A fine may be imposed. DFAT has assessed the risk of torture or mistreatment of people suspected of an offence under the IE Act as low and that it continues to reduce.
74. The applicant may be subjected to questioning, arrest, fingerprinting and being photographed on his arrival at the airport, poor prison conditions during any brief detention, a bail surety and a fine under the IE Act. Country information indicates that the poor prison conditions are due to overcrowding, poor sanitation and lack of resources, a situation which the authorities working closely with the Red Cross are taking steps to address.<sup>44</sup> I am not satisfied, on the evidence, that there is an intention to inflict pain or suffering, severe pain or suffering or extreme humiliation in any questioning, arrest, fingerprinting, photographing, brief detention, bail surety or fine imposed under the IE Act. These circumstances do not amount to the death penalty, an arbitrary deprivation of life or torture. I am not satisfied that being questioned, arrested, finger printed and photographed, any bail surety imposed, any fine imposed, and the poor prison conditions, to which the applicant may be briefly subjected, of themselves or in combination constitute significant harm as defined under s.36(2A) of the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any processing at the airport, from any brief period of detention, any bail surety or any fine imposed.
75. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason as a returned Tamil failed asylum seeker from Australia, for any links to the LTTE, for any imputed political opinion, as a Tamil male from the east, as a former [Occupation 1] or if he again becomes a [Occupation 1] or any combination of these. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.

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<sup>43</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

<sup>44</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 4.25

76. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

**Complementary protection: conclusion**

77. 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.