



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/02551

Date and time of decision: 14 February 2018 11:26:00  
Lesley Hunt, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant), who is [age], claims to be a national of Sri Lanka of Tamil ethnicity. He arrived in Australia by boat [in] November 2012. [In] May 2016 he applied for a Temporary Protection Visa (TPV).
2. [In] April 2017 a delegate of the Minister for Immigration and Border Protection refused the visa. The delegate found the applicant to be a credible witness. The delegate accepted that the applicant's [relatives] were killed during the war between the Sri Lankan military and the Liberation Tigers of Tamil Eelam (LTTE) in the circumstances outlined by the applicant. The delegate did not accept that the applicant faces a real chance or a real risk of harm in Sri Lanka because of his Tamil ethnicity or because he would be returning as a failed asylum seeker who departed Sri Lanka illegally with his family in 1990.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - The applicant was born in [City 1], in the Northern Province of Sri Lanka. His father was [occupation] and his mother a housewife. His father has passed away. His mother lives in a refugee camp in Tamil Nadu, India with one of the applicant's [siblings]. The applicant's [other siblings live in various other countries].
  - When the applicant was [age] he went with his family to India as refugees. He lived from 1990 to 2000 in [a refugee camp] and from 2000 to 2012 at another camp in [India]. The applicant was educated in local schools and completed his year twelve qualification. He then completed a [course] at a college followed by a [further studies in] India. He has worked as [in a particular occupation] for [an employer] in India.
  - In 1990 in Sri Lanka the applicant's [Relative A] was taken by the Sri Lankan Navy when he was trying to leave Sri Lanka. He has never been seen or heard from again and the family does not know what happened to him in spite of making inquiries through the police.
  - In 1991 the applicant's [Relative B] was killed in a bomb blast in [City 1].
  - The applicant's [Relative C] was shot and killed by the Sri Lankan Army (SLA) when he was [undertaking a particular activity]. The applicant's aunty was told he was killed in a case of mistaken identity.
  - The applicant heard from relatives that Tamil men were being abducted by the SLA. He has read many news reports of the SLA arresting Tamil youth and of the disappearance of many Tamil youths.
  - The applicant has copies of the death certificates of his [Relative B] and his [Relative C].

- The applicant fears that if he is returned to Sri Lanka he will be abducted or arrested by the SLA and harmed or killed by them because he is Tamil and because of what they did to his family members and other members of the Tamil community in Sri Lanka. He cannot rely on the protection of the State and cannot relocate safely to any other part of Sri Lanka.

### **Refugee assessment**

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5. 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**

6. 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.

### **Does the applicant have a well-founded fear of persecution?**

#### **Nationality and Identity**

7. The referred material includes copies of the applicant’s Sri Lankan Birth Certificate and Refugee Identity Card issued by the Government of Tamil Nadu, India, and other documents all of which confirm that the applicant is a national of Sri Lanka from the Northern Province of Sri Lanka. I note that as a refugee in India the applicant has no legal right to return to India. Based on the documentation provided and the applicant’s oral evidence, I accept that the applicant is a national of Sri Lanka and no other country. I therefore find that Sri Lanka is the receiving country for the purposes of the Act.
8. The applicant provided information in his Arrival Entry Interview in February 2013, a written statement of claims and at his TPV interview held in March 2017. The applicant has provided consistent information and spoken about his fears of harm in Sri Lanka in a forthright and credible manner. The applicant’s claims regarding the past harm his family suffered during the

war in Sri Lanka is consistent with country information reports regarding the conflict between the Sri Lankan military and the LTTE from 1983 to May 2009.<sup>1</sup>

9. After assessing all the evidence I accept that the applicant is a Tamil male from the Northern Province of Sri Lanka and that he fled with his family to Tamil Nadu, India when he was [age]. I accept that the applicant's [Relative A] was taken by the Sri Lankan Navy in 1990 and has not been seen or heard of since that time; the applicant's [Relative B] was killed in a bomb blast in 1991 and the applicant's [Relative C] was shot and killed by the SLA in 2006.
10. The applicant claims that he will be harmed by the Sri Lankan authorities because he is a young Tamil and many Tamils have been abducted and killed by the Sri Lankan authorities. In assessing this claim and whether the applicant's Tamil ethnicity and his family's past experiences of serious harm give rise to the applicant facing a real chance of serious harm now and in the foreseeable future in Sri Lanka I have had regard to the following.
11. The applicant is from [City 1] in the North of Sri Lanka. Country information indicates that most of the Northern Province of Sri Lanka was under LTTE control for much of the war.<sup>2</sup> The main aim of the LTTE was to establish a Tamil state in the north and east of Sri Lanka and from 1983 it pursued this aim through a military campaign. There was a cease-fire from 2002 to 2006. Then the conflict resumed and ended in May 2009 when the Sri Lankan resumed control of the entire country.<sup>3</sup>
12. According to Australia's Department of Foreign Affairs and Trade (DFAT) at its peak in 2004, the LTTE exercised effective control of approximately three-quarters of the territory in the north and the east of Sri Lanka with an armed force of approximately 18,000 combatants. The LTTE also maintained an intelligence wing and a political wing, all supported by an extensive administrative structure from its de-facto capital in Kilinochchi in Sri Lanka's north. The mostly Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE's military and civil administration as a matter of course. This included the payment of personal income taxes, sales taxes, licence fees and customs duties at the border of LTTE-controlled areas. The LTTE also supported its administration through foreign funding and both voluntary and forced recruitment of Tamils.<sup>4</sup> In these circumstances the Sri Lankan authorities at that time suspected most Tamils from the North of being involved with or supporters of the LTTE.<sup>5</sup>
13. However, as noted above, the war ended in May 2009 when the Sri Lankan military decimated the LTTE as a fighting force. As stated by the delegate in the SHEV interview, since that time there has been a change of government in Sri Lanka. Country information reports indicate that the Presidential election held on 8 January 2015 was "relatively peaceful". The election saw Maithripala Sirisena defeat President Mahinda Rajapaksa winning 51.3 per cent of the vote, with a historically high voter turnout of 81.5 per cent. The Tamil vote was reported to be significant in Sirisena's victory. Sirisena campaigned on a platform of democratic reform, good governance and anti-corruption. A relatively peaceful parliamentary election on 17 August 2015 ushered in a 'national unity government' of major parties. The Tamil National Alliance (TNA) now formally leads the opposition. The parliamentary election was described by the

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<sup>1</sup> UK Home Office, "Sri Lanka: Tamil separatism", Version 4.0, March 2017; DFAT, "Sri Lanka – Country Information Report", 24 January 2017; UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012.

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

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> Ibid

Commonwealth Observer Group as credible, and meeting the key criteria for democratic elections, with an outcome that reflected the will of the people.”<sup>6</sup>

14. The Sirisena government is reported to have a more proactive approach to human rights and reconciliation than the previous government. The Sirisena Government has replaced military governors in the Northern and Eastern Provinces with civilians; reduced High Security Zones and released land held by the military; released some individuals held under the Prevention of Terrorism Act (PTA); engaged constructively with the Tamil National Alliance and the UN and other international partners; and established the Office of National Unity and Reconciliation (ONUR).<sup>7</sup> The ONUR is charged with coordinating the government’s efforts toward reconciliation, and the government has implemented a number of confidence-building measures, to address grievances of the Tamil community.<sup>8</sup> In November 2015 the government removed the ban on eight Tamil diaspora organizations and the 267 individuals who were on the terrorism watch list established by the previous government.<sup>9</sup> In contrast to the previous government, the Sirisena administration permitted visits by United Nations staff.<sup>10</sup>
15. According to the most recent report from DFAT the security situation in the north and east has greatly improved; the number of military personnel in the north and the east has reduced by approximately 30 per cent since the end of the conflict; most check-points have been removed in the north, the main checkpoint on the highway between the north and south, the Omanthai checkpoint, was removed on 29 August 2015 and there are no restrictions on travelling to the north and east.<sup>11</sup> DFAT assesses that monitoring and harassment of Tamils has decreased under the Sirisena government and, on a day-to-day basis.<sup>12</sup>
16. The United Nations High Commissioner for Refugees (UNHCR) stated in 2012 that being a Tamil and from an area previously under LTTE control does not of itself lead to a real chance of harm.<sup>13</sup> More recent reports, including the UK Home Office report state that: “Simply being a Tamil does not of itself give rise to a well-founded fear of persecution or serious harm in Sri Lanka. The onus will be on the person to demonstrate that they will face on return ill-treatment from the current, as opposed to the previous, government.”<sup>14</sup> According to the UK Home Office, a person who evidences past membership or connection to the LTTE would not warrant international protection unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.<sup>15</sup>
17. The applicant clarified at the TPV interview that his family had no involvement with the LTTE. Given this and the changed circumstances in Sri Lanka since the applicant’s departure from there in 1990; his very young age at the time of his departure from Sri Lanka; the length of time that has passed since the applicant lived in Sri Lanka; the length of time that has passed since the end of the war (more than eight years); I am satisfied that the chance of the applicant facing harm in Sri Lanka because of his Tamil ethnicity and his family’s past experiences of harm is very remote.

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<sup>6</sup> UK Home Office, “Country Information and Guidance – Sri Lanka: Tamil Separatism”, Version 4.0, March 2017.

<sup>7</sup> DFAT, “Sri Lanka - Country Information Report”, 24 January 2017

<sup>8</sup> US Department of State, “Sri Lanka – Country Report on Human Rights Practices 2015”, 13 April 2016

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> DFAT, “Sri Lanka - DFAT Country Information Report”, 24 January 2017.

<sup>12</sup> Ibid

<sup>13</sup> UNHCR, “Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 21 December 2012

<sup>14</sup> UK Home Office, “Country Information and Guidance – Sri Lanka: Tamil Separatism”, Version 4.0, March 2017.

<sup>15</sup> Ibid.

18. Country information indicates that approximately 104,000 Sri Lankan Tamils reside in the southern Indian state of Tamil Nadu, the majority of whom fled from Sri Lanka following the outbreak of conflict in the mid-1980s or are the descendants of those who did so. According to DFAT there is no evidence to suggest that Tamil refugees from Tamil Nadu would experience official or societal discrimination upon their return to Sri Lanka and ex-LTTE returning from Tamil Nadu would likely be subject to monitoring.<sup>16</sup>
19. After assessing all the evidence I am satisfied that the applicant will be able to live in Sri Lanka without facing a real chance of harm from the Sri Lankan authorities including the CID and the SLA, arising from his Tamil ethnicity, his being a young Tamil male, or as a person from the North of Sri Lanka, or as a person who lived in an area previously under LTTE control, or as a person imputed to have supported the LTTE and Tamil separatism, or as a person who fled Sri Lanka in 1990 and has lived since then as a refugee in India. I find that the applicant's fears of persecution in this regard are not well-founded.
20. I have considered whether the applicant faces a real chance of serious harm because of having departed Sri Lanka illegally with his family in 1990 when he was [age] and would be returning there as a Tamil failed asylum seeker.
21. Country information indicates that the applicant will go through the following procedure if returned to Sri Lanka. "Upon arrival in Sri Lanka, involuntary returnees, including those on charter flights from Australia, are processed by different agencies, including the Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department. These agencies check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters. Officers of the Australian Department of Immigration and Border Protection (DIBP) based in Colombo may meet charter flights carrying involuntary returnees. DIBP has observed that processing returnees at the airport can take several hours, primarily due to the administrative processes interview lengths, and staffing constraints at the airport."<sup>17</sup>
22. According to DFAT, returnees are processed en masse, and individuals cannot exit the airport until all returnees have been processed.<sup>18</sup> Individuals who return to Sri Lanka voluntarily and are eligible for an Australian Government Assisted Voluntary Return package are usually met by the International Organization for Migration.<sup>19</sup>
23. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would address 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, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion. DFAT further assesses that detainees are not subject to mistreatment during processing at the airport.<sup>20</sup>
24. Where a person has departed Sri Lanka illegally they can be charged under the Immigration and Emigration Act. DFAT understands that in most cases, these individuals have been arrested by the police at Colombo's Bandaranaike International Airport. As part of this process, most

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<sup>16</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017.

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Ibid

returnees will have their fingerprints taken and be photographed. At the earliest available opportunity after investigations are completed, the individual would be transported by police to the closest Magistrate's Court. The Magistrate then makes a determination as to the next steps for each individual. Those who have been arrested can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. 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>21</sup>

25. According to the Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. However, fines had been issued to act as a deterrent towards departing illegally in the future. Fine amounts vary on a case-by-case basis (but can be up to 200,000 Sri Lankan rupees / AUD 2,000) and can be paid by instalment. If a person pleads guilty, they will be fined (which they can pay by instalment) and are then free to go.<sup>22</sup>
26. If a returnee pleads not guilty, in most cases they will be immediately granted bail by the magistrate on the basis of personal surety or they may be required to have a family member act as guarantor. Where a guarantor is required, returnees may sometimes need to wait until a family member comes to court to collect them. There are rarely any conditions in relation to the bail, and if there are, they are imposed on a discretionary basis. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a people smuggling venture. There is no general requirement to report to police or police stations between hearings.<sup>23</sup>
27. According to DFAT, the same processes outlined above are applied to returnees who travelled illegally to India and then onwards to a third country. DFAT has been advised by the Sri Lankan Government that no returnee from Australia to Sri Lanka has been charged under the Prevention of Terrorism Act (PTA). While credible, DFAT cannot verify this claim.<sup>24</sup>
28. DFAT states that the Sri Lankan Attorney-General's Department distinguishes between those suspected of being passengers and those suspected of facilitating or organising the irregular migration of people from Sri Lanka. Facilitators or organisers can be charged with an offence under Section 45C of the Immigration and Emigration Act. DFAT assesses that ordinary passengers on a people smuggling venture are generally viewed as victims and penalties are more likely to be pursued against those suspected of being facilitators or organisers of people smuggling ventures.<sup>25</sup>
29. According to DFAT returnees are treated according to the standard procedures outlined above, regardless of their ethnicity and religion.<sup>26</sup> I note that the applicant left Sri Lanka with his family when he was [age] and he and his family fled to India as refugees escaping the war. I find it reasonable to assume these circumstances will be taken into consideration in determining any penalty that may be imposed on the applicant in relation to his illegal departure. In any event, I find the treatment outlined above does not amount to serious harm. I also find the procedures under which the applicant, as a returnee would be dealt with, and

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<sup>21</sup> DFAT, "Country Information Report: Sri Lanka", 24 January 2017

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Ibid

any penalties to which he may be subjected, will be applied in a non-discriminatory basis under a law of general application, and as such do not constitute persecution for the purpose of the Act.

30. Given the circumstances of the applicant's illegal departure from Sri Lanka in 1990 and his unauthorised departure from India in 2012 and the duration of his residence in Australia I accept that the Sri Lankan authorities may assume that the applicant sought protection in Australia. However the country information does not support a finding that failed asylum seekers returning from a western country are imputed with an anti-government political opinion or are suspected of criminal or security-related crimes and have sought asylum. DFAT has reported that there have been thousands of asylum seekers returned to Sri Lanka since 2009, including from Australia, the US, Canada, the UK and other European countries, with relatively few allegations of torture or mistreatment. Although DFAT does not routinely monitor the situation of returnees, DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low, including those suspected of offences under the Immigrants and Emigrants Act.<sup>27</sup>
31. I note that the applicant has documentation which evidences his birthplace in Sri Lanka, his status as a refugee in Tamil Nadu, India and the length of time he lived as a refugee in Tamil Nadu, India, and that he was [age] when he left Sri Lanka. I note the applicant's concern that he knows nobody in Sri Lanka and has no home in Sri Lanka. However at the TPV interview he clarified that his mother's [relative] lives in Sri Lanka. I find it reasonable to assume the applicant would be able to obtain this relative's name and some indication as to their whereabouts and that the applicant's mother, who left Sri Lanka as an adult, would be able to provide the applicant with information about the family's former residence in [City 1]. I am satisfied that the applicant's identity and former place of residence in Sri Lanka will be able to be confirmed by the Sri Lankan authorities without undue difficulty or delay.
32. According to DFAT returnees are treated according to the standard procedures outlined above, regardless of their ethnicity and religion.<sup>28</sup> I find that the applicant may be charged and convicted for his illegal departure and if so may be fined an amount between 5,000 and 200,000 Sri Lankan rupees. I find it reasonable to assume that the circumstances of his departure may be taken into consideration in determining whether he will be charged and/or fined. In any event, I find this treatment does not amount to serious harm.
33. I find the procedures under which the applicant as a returnee would be dealt with, and any penalties to which he may be subjected, will be applied in a non-discriminatory basis under a law of general application, and as such do not constitute persecution for the purpose of the Act.
34. I have considered the applicant's claims individually and cumulatively. I find that the applicant's circumstances are such that his fears of persecution in Sri Lanka are not well-founded.

#### **Refugee: conclusion**

35. 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).

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<sup>27</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017

<sup>28</sup> Ibid

## Complementary protection assessment

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36. 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

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

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

### Is there a real risk that the applicant will suffer significant harm?

38. I have considered the applicant's claims individually and cumulatively. As outlined in the preceding pages I have found that the applicant does not face a real chance of serious harm in Sri Lanka in relation to his claims when considered individually and cumulatively.

39. I note that the "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear".<sup>29</sup>As I have found that the applicant does not face a real chance of serious harm in relation to his claims I find also that he does not face a real risk.

40. I am satisfied that the applicant does not face a real risk of being arbitrarily deprived of his life; of the death penalty; of being subjected to torture or cruel or inhuman treatment or punishment; or degrading treatment or punishment for any of the claims raised by the applicant and assessed in the preceding pages. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is not a real risk that he will suffer significant harm now or in the foreseeable future.

### Complementary protection: conclusion

41. 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.

42. The applicant does not meet s.36(2)(aa).

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<sup>29</sup> *MIAC v SZQRB (2013) 210 FCR 505* per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

## **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**

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***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.