



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02567

Date and time of decision: 20 November 2017 08:56:00
Matthew Currie, Reviewer

Decision

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

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

Background to the review

Visa application

1. The applicant is an ethnically Tamil adherent of the Hindu faith who arrived in Australia in 2013. He submitted an application for a Safe Haven Enterprise Visa (SHEV) in December 2016. In April 2017 a delegate of the Minister for Immigration and Border Protection refused the visa, on the grounds that Australia did not owe protection obligations to the applicant

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. A migration law firm acting on behalf of the applicant sent an unsolicited submission to the IAA on 18 May 2017. This submission contained three elements. Firstly an email which addressed the findings of the delegate's primary decision and may be regarded as argument rather than 'information'. I have had regard to this section of the submission. The submission contained two attached documents of country information. The first document was already before the delegate (Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 24 January 2017). The second document (UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016) was not before the delegate. The applicant has not satisfied me that his document could not have been provided to the Minister prior to the delegate's decision, nor that the information is credible personal information. Furthermore, I am not satisfied that there are exceptional circumstances to consider the information. As such I am prevented from considering the information.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - The applicant was born [in date] in Jaffa District, Northern Province, Sri Lanka. He is an ethnically Tamil adherent of the Hindu faith.
 - Between 2002 and 2005, the applicant provided limited support to the LTTE and attended a number of LTTE memorial events.
 - Between 2004 and 2008 the applicant worked in [a] shop in Jaffna district. During his employment introduced three friends to the owner of the shop who subsequently employed them.
 - During June 2008 he was twice questioned by the Sri Lankan Police Criminal Investigation Division (CID) about his knowledge of his three friends. The CID believed them to be members of the LTTE.
 - The applicant was unable to assist the CID with their inquiries, and he was threatened by the CID that he would be killed unless he provided information about his three friends (now colleagues).
 - Following these events, the applicant fled Sri Lanka to [Country 1] as he was afraid for his life. He lived in [Country 1] between 2008 and 2013.
 - In 2013 the applicant departed [Country 1] and came to Australia via [Country 2].

- He fears that if returned to Sri Lanka he will be subjected to discrimination, torture and possibly death at the hands of Sri Lankan authorities because of his Tamil ethnicity, his previous connections to the LTTE, his illegal departure and his failed attempt to seek asylum in Australia.

Refugee assessment

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.
7. Since his arrival in Australia the applicant has provided Australian authorities with consistent narrative outlining his claims for identity and protection. He has also provided a number of identity documents in order to support his claims. There are several discrepancies in these documents regarding the correct spelling of the applicant’s name and he himself has provided multiple spellings of his name in various submissions. Having considered these issues, I am satisfied that the explanation provided by the applicant for these inconsistencies is reasonable and that these issues arise chiefly from transliteration errors and his fears that would be denied refugee status in Australia (and [Country 1]) if he contradicted any of the information contained in the documents. I accept the applicant’s claims to identity. I further accept that he was born, lived and worked in the Jaffna district of Northern Province, Sri Lanka from his birth until 2008 when he departed for [Country 1]. I am satisfied that the applicant is a Sri Lankan citizen, and, notwithstanding his period of residence in [Country 1], find that Sri Lanka is his receiving country for the purposes of this assessment.

Imputed membership of the LTTE & ongoing police interest, Tamil ethnicity

8. During the period of peace between 2002 and 2005, the applicant, a resident of Jaffna district, claims to have attended a number of LTTE remembrance ceremonies and memorial services.

At some of these events, the applicant played a minor role in the preparation of these services; for example he hung banners and helped to raise tents before memorial services and performed other minor tasks of a similar nature. The applicant states that he performed these tasks willingly, but only after his assistance was requested by the LTTE. He implies that any request from the LTTE contained an element of coercion; refusal could be interpreted by the LTTE as a rejection of the organisation's goals and any person who refused might suffer consequences arising from this refusal. The applicant has stated that he did not provide any support to the LTTE, beyond these minor administrative tasks. He claims that during this period the LTTE attempted to recruit him, however he declined to become a member of the organisation. Other than the incidents outlined above the applicant claims he had no links to the LTTE. During this period the applicant became friendly with three other young men who he met attending the memorial services.

9. The applicant has indicated that during this period he was also subjected to minor instances of coercion from members of the Sri Lankan Army (SLA) who were stationed in the area. As an example he stated that he might be forced to attend local shops and purchase cigarettes on behalf of the SLA, or from time to time, he might have to let SLA personnel use his motorbike. Failure to assist the SLA could result in a beating.
10. Between 2004 and 2008 the applicant worked [at] a [shop] which produced and repaired [goods]. From time to time, known LTTE members would come to the workshop in order to have some routine work performed and that as part of his regular duties he completed this work. Rather than evidence of support the LTTE, the applicant insists these instances were just routine business interactions which he engaged in as a consequence of his employment. However, he suggests that this type of activity might be interpreted by Sri Lankan authorities as evidence of his support for the LTTE should he be returned to Sri Lanka.
11. In January 2008 his employer asked him if he knew of any other persons who might wish to [work] at the shop. The applicant brought his three friends to the workshop and introduced them to his employer. On the applicant's recommendation they were employed at the workshop.
12. In early June 2008 his three friends (now colleagues) stopped attending the workshop. The applicant was unclear why this had occurred and he claims that initially he thought they may have been sent away on some other task by his employer. Approximately three days after his colleagues stopped attending work, CID officers approached the applicant while he was alone at the workshop. They questioned him about his three missing colleagues. He advised the CID that he could not provide them with any information as he was unaware of his friends/colleagues circumstances, or their current whereabouts. The CID officers told him that the three young men had some link to the LTTE and that he should find out where they were currently located. The applicant was not mistreated during this incident, but he was intimidated by the police interest in his friends.
13. Approximately one week later, the CID officers came back to the shop to question him for a second time about his three missing colleagues. When the applicant informed the CID officers that he had been unable to find out any information that would be of assistance to the CID inquiries, he claims they became angry with him and held firearms to his head and threatened to kill him if he failed to supply them with information. The applicant became very scared after this second interaction with the CID. He reported this incident to his employer who was unsympathetic and made statements to the effect that the applicant was entirely responsible for the employment of the three [men], now suspected to be LTTE members and that he (the

employer) had informed the CID of the applicants relationship with them. After these events, the applicant feared for his life and decided that he had to flee Sri Lanka for his own safety.

14. The applicant claims that immediately following these events he quit his job and went into hiding in Colombo, since he believed he would be unsafe in Jaffna district. He stayed in hiding for approximately one month and during this time he approached an agent to assist him in obtaining a Passport and a [visa] for [Country 1]. He claims that having secured these, he flew on a commercial flight to [Country 1] [in] August 2008.
15. The applicant claims [the] Visa expired three months after his arrival in [Country 1]. Having no legal reason to stay in that country, in 2009 he approached the office of the United Nations High Commissioner for Refugees (UNHCR) in [Country 1] and registered with that organisation. He also registered with the [another organisation] in 2012. The applicant has provided several identity documents from these organisation which demonstrate that he was resident in [Country 1] for during period and I accept that the applicant lived in that country between 2008 and 2013, [working].
16. The applicant claims that during 2009, whilst he was in [Country 1], CID officers visited his mother's home on a single occasion in order to question him. He cites this event as evidence that the SLP never lost interest in him, despite his departure from Sri Lanka the previous year. He believes that the Sri Lankan authorities would still maintain an interest in him, despite the passage of time and that if returned to Sri Lanka he would be detained, likely tortured and possibly killed by the authorities because of his connection to the LTTE.
17. The applicant has outlined some difficulties he faced whilst in [Country 1], but has not made any claims to protection based upon these issues as part of his SHEV application. The applicant reports that he departed [Country 1] in 2013 in order to make his way to Australia. Whilst en route to Australia, the applicant stayed for a period of approximately one month in [Country 2], whilst further travel arrangements were made on his behalf. He departed [Country 2] on or about [June] 2013.
18. Some aspects of the applicant's claims are problematic. He has stated that he became friendly with the three young men whom he came to know during the period of 2002 to 2005 whilst attending LTTE memorial activities. During interview in 2017 the applicant described them as very close friends. He subsequently worked alongside them at the same workshop between January and June of 2008 prior to their disappearance. He has stated he was surprised when they all failed to attend work in early June 2008 that he didn't know where they were, or what they were doing. He asserts that he only become aware of their links to the LTTE after the CID questioned him.
19. These claims are unconvincing; the three young men were, by the applicants own explanation, his close friends and they worked in the same workshop as him on a daily basis for close to six months, having secured employment upon his recommendation. I conclude that the applicant knows more about his three colleagues/friends than he was willing to tell the CID officers in 2008 or Australian authorities since his arrival in this country. Nevertheless, I accept that the applicant's three colleagues were thought to have links to the LTTE by the SLP and that he was questioned on this basis.
20. There are other difficulties with the applicant's narrative. He has claimed that he decided to depart Sri Lanka after the events of June 2008 and that only then did he attempt to obtain a passport and a visa. The applicant has not provided an original passport to Australian authorities, but he has provided a scanned copy of the front page from his passport which

contains basic biographical details about the passport owner (the applicant), and administrative particulars about the document itself. This copy records that the applicant's passport was issued by Sri Lankan Government in [2008], [months] prior to the events of June 2008. At his 2017 protection visa interview, when challenged by the delegate about the discrepancy between the date he claimed he acquired his passport (post June 2008) and the date his passport was actually [issued], the applicant was unable to provide a reasonable explanation. He stated that he was unsure if his passport was genuine, and suggests the agent he used to obtain the passport may have given him a fake. In support of this assertion, he notes that his name is spelt incorrectly in the passport.

21. I am unconvinced by this explanation. I note that the applicant has provided a different reason for the mistaken spelling of his name in the documentation he has presented in support of his claims (transliteration error) which I find more credible. I have also taken into consideration that the applicant was able to use his passport to obtain a [Country 1] [visa], and to depart Sri Lanka on a routine commercial flight in 2008. He also used the passport to legally enter [Country 1] and later provided the passport to the UNHCR as evidence of his Sri Lankan citizenship in 2009. I am not satisfied by the applicant's claim that he thinks the passport is a fake, and I conclude that he has made this claim in order to explain the discrepancy between the date the passport was issued, and the narrative explanation he has provided for his departure from Sri Lanka. I infer from this information that the applicant had decided to obtain his passport, and had considered departing Sri Lanka prior to any interactions he may have had with the CID.
22. The Sri Lankan Army (SLA) controlled the Jaffna district of Northern Province from 1995 and garrisoned units there. The applicant's claims that he was coerced by members of the SLA are credible and consistent with country information before me. Recent information suggests that there are still military units stationed throughout the former conflict areas in Northern Province with a high proportion stationed around Jaffna, though the total number of troops has declined since the end of the war. Military checkpoints on major roads leading to the north and east were removed in 2015 and there are no restrictions on travelling to the north and east¹. The security situation in the north and east has improved dramatically since the end of the conflict, with greater freedom of movement and a reduction in the military's involvement in civilian life². The Sri Lankan police (SLP) are now responsible for civil affairs across Sri Lanka³.
23. Credible country information before me suggests that the SLP is a trained and active police force. However, the majority of SLP members were recruited and gained their experience during wartime and significant institutional changes are required during its transition to a community policing framework⁴. The applicant's claims of mistreatment as in June 2008 while being questioned by CID officers are consistent with country information before me⁵. This mistreatment of the applicant is indicative of standard interrogation techniques used by Sri Lankan security agencies during the period of conflict⁶. Moreover, during the conflict the SLP actively played a partisan, pro-Government role and that members of the Tamil minority were particularly vulnerable to this type of mistreatment⁷.

¹ Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 2.39.

² Ibid.

³ Ibid, 3.9.

⁴ Ibid, 5.5.

⁵ Ibid, 4.14.

⁶ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p 18.

⁷ UK Home Office, "Sri Lanka - Bulletin: Treatment of Returns", UK Home Office, 01 December 2012, CIS28615

24. Information before me indicates that Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of those individuals that have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals that the Sri Lankan security services consider to be of interest, including due to separatist or criminal activities⁸. While the Sri Lankan authorities maintain an interest in former real or imputed LTTE members and a large number were previously detained, only a small number continue to be held by the Government. Those persons who may remain of security interest to the Sri Lankan Government are persons who were high profile former LTTE members (i.e. leaders of the organisation or those suspected to have committed terrorist or serious criminal acts during the conflict or to have provided weapon), or low profile former members (i.e. former combatants, administrative staff or other persons who provided non-military support) who have not undergone rehabilitation⁹.
25. DFAT's most recent assessment of the situation in Sri Lanka is that the monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities¹⁰. Since 2015, genuine attempts have been made at reconciliation between the Sinhalese community and the Tamil minority. DFAT reports that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since 2015¹¹. The Sirisena Government has prioritised human rights and reconciliation and has made significant progress, including: replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict-era back to its former owners; releasing some individuals detained under the Prevention of Terrorism Act (PTA) and committing to reform the PTA; and engaging constructively with the United Nations. The Government also established an Office of National Unity and Reconciliation (ONUR) to develop a national policy on reconciliation¹².
26. Notwithstanding my concerns about the applicant's truthfulness regarding his knowledge of his three colleagues, I do accept that twice during June 2008, the applicant was questioned by officers of the CID about the whereabouts of his three colleagues who were thought to have links to the LTTE. I also accept that during the second period of questioning CID officers threatened to kill him unless he cooperated with them and pointed weapons at him in order to emphasize seriousness of this threat.
27. Nonetheless, I note that the applicant has not claimed that he was imputed to be a member of the LTTE by the CID officers during these events. Furthermore, he was not detained by the CID on either occasion, nor was he ever charged, arrested or otherwise inferred to be involved in the Tamil separatist movement. At interview in 2017 the applicant stated that there were no outstanding Sri Lankan arrest warrants for his arrest. I also note that after these events occurred, the applicant was able to depart Sri Lanka legally, on a routine commercial flight from the Colombo airport. I also observe that the applicant has not had any contact with his three former colleagues since their disappearance in June 2008. Given the passage of time, I am unconvinced that his previous links with these persons would raise his profile to a level that would be of interest to the SLP if he was returned to Sri Lanka.

⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017. CISED50AD105, 3.29.

⁹ Ibid, 3.38 – 3.42

¹⁰ Ibid, 3.9.

¹¹ Ibid, 3.6.

¹² Ibid, 2.29.

28. Credible information before me indicates that Tamils living in Sri Lanka can experience some societal discrimination on the basis of ethnicity, but there are no laws which discriminate on this basis and this discrimination does not result from government policy¹³. I also note the evidence before me which indicates that the treatment of Tamils by the Sri Lankan Government has improved considerably since the end of the conflict in 2009.
29. I am not satisfied that the applicant was imputed to be a member of the LTTE when questioned by the CID in 2008. Having considered the evidence before me, I am not satisfied that his profile would be of ongoing interest to any Sri Lankan authorities almost 10 years later due to his limited support for the organisation's activities between 2002 and 2005, or for his links to three persons who were alleged to be members of the LTTE in 2008. I do not accept that the applicant would be imputed to be a member of the LTTE if returned to Sri Lanka. I am not satisfied that the applicant would face a real chance of harm arising from his ethnicity, his limited support for the LTTE, his association with persons suspected of being involved with the LTTE or his previous interactions with the CID, or the SLA should he be returned to Sri Lanka.

Failed asylum seeker, illegal departure.

30. The applicant claims that if returned to Sri Lanka he would be persecuted by the authorities due to his illegal departure, his failed attempt to seek asylum in Australia. He infers that these factors would be compounded by his previous mistreatment by the CID and the implied disloyalty of seeking asylum in a foreign country and his illegal departure and would result in persecution by the Sri Lankan Government.
31. Current DFAT reporting indicates that thousands of asylum seekers have 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 mistreatment¹⁴. Since 2008 over 1500 failed asylum seekers have returned from Australia alone¹⁵. The Country information before me does not suggest that being a Tamil asylum seeker of itself gives rise to a risk of harm.
32. Upon arrival in Sri Lanka, all returnees can expect to be met at the airport by the Sri Lankan authorities in order to establish their identity and undergo routine immigration processing. These procedures can take several hours, primarily due to the administrative processes, interview lengths, and staffing constraints at the airport. Returnees are also processed en masse, and individuals cannot exit the airport until all returnees have been processed¹⁶. 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 airport¹⁷.
33. I accept that the applicant, like all returnees, will be subjected to these procedures. I note though, that the applicant has in his possession a Sri Lankan National Identity card, a Sri Lankan birth certificate and a photocopy indicating he is the bearer of a current Sri Lankan passport. Notwithstanding the minor transliteration errors contained in these documents, I am not satisfied that the applicant would face undue difficulties in establishing his identity if returned to Sri Lanka. I also note that despite the claims put forward by his representative at interview, the applicant did not depart Sri Lanka illegally. I have found that he departed in August 2008 on

¹³ Ibid, 3.4.

¹⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 4.22.

¹⁵ Ibid, 5.27.

¹⁶ Ibid, 5.19.

¹⁷ Ibid, 5.20.

a valid Sri Lankan passport, and as such there is not a real chance he will be subjected to any penalties under Sri Lankan law for illegal departure.

34. I have found that at the time of his departure the applicant was not of any adverse interest to the Sri Lankan authorities despite his two episodes of questioning by the CID in June 2008. Notwithstanding these events and others claimed by the applicant, his former association with the LTTE and suspected LTTE members, and given the passage of time, I am not satisfied that the Sri Lankan government would maintain an ongoing interest in him, nor that he is likely to be imputed to be a member of the LTTE. I am also not satisfied by the applicant's claims that he would face Government sponsored discrimination, because of his Tamil ethnicity, or his claims for asylum in Australia. I have previously found that his claim to have departed Sri Lanka illegally is false. I do not accept that the applicant faces a real chance of harm if returned to Sri Lanka from any combination of these claims.

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)

Complementary protection assessment

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.

38. Above, I have accepted that if returned to Sri Lanka the applicant will be subjected to several hours routine immigration processing. This may include interviews, and some delays as other returnees are processed. On the evidence before me, this process will not result in the applicant facing the death penalty, the arbitrary deprivation of life, or torture. I am not satisfied that there is any intention to inflict pain or suffering, severe pain or suffering or to cause extreme humiliation through the application of these procedures. I am also not satisfied that any of these administrative processes would result in treatment amounting to cruel or inhuman or degrading treatment or punishment.

39. I have otherwise not accepted that the applicant faces a real chance of harm arising from his Tamil ethnicity, his LTTE associations, his failed attempt to claim asylum in Australia, , his

previous interactions with the SLA or the SLP, or that he will be imputed to be a member of the LTTE. Since real risk and real chance have been found to meet the same standard I also conclude that the applicant does not face any real risk of significant harm arising from these claims.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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