



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02614

Date and time of decision: 8 February 2018 16:23:00
Natalie Becke, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Eastern Province of Sri Lanka. [In] December 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). [In] May 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this 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 22 July 2017 the IAA received a source of new country information sent on behalf of the applicant, being the full statement of the UN Special Rapporteur on human rights and counter-terrorism, at the conclusion of his official visit to Sri Lanka in July 2017. Given the date the Special Rapporteur made this statement I am satisfied it could not have been provided before the delegate's decision.
4. The statement concerns the Special Rapporteur's findings regarding the Sri Lankan government's progress in combating terrorism since the end of the civil war, as measured against international human rights law. I consider this statement provides an update on the post-civil war situation in Sri Lanka, particularly for the Tamil community and those suspected of LTTE links, and I am satisfied exceptional circumstances exist to justify its consideration.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - In 1990 the applicant's grandfather, who was a Liberation Tigers of Tamil Eelam (LTTE) combatant, was killed in battle against the Sri Lankan Army (SLA). After his death, the applicant's father looked after his own [brother] (the applicant's uncle, 'Uncle J')
 - In [a particular year] the applicant was born in [Town 1], Eastern Province.
 - When Uncle J was about [age] he joined the LTTE, and became the [a public official] for Batticaloa District, [undertaking particular duties for] the LTTE
 - Around [2011] the CID came to the applicant's family home looking for Uncle J. The applicant's father told them he didn't know where Uncle J was, and the CID threatened him.
 - In [2012] Uncle J arrived at the family home with [a number of] other people. They spoke with the applicant's father and left [a short time] later. [Some time] later the CID searched the house looking for Uncle J, money and weapons. When the applicant's father said he didn't know anything about these matters, he was assaulted and taken to the SLA camp.
 - The same day the applicant and his mother attempted to lodge a report with the police, who said they would investigate but no action was taken.
 - The next day the CID returned the applicant's father, who had been badly beaten. The CID had interrogated him about Uncle J as well as the money and weapons they thought

Uncle J had, and threatened to kill the applicant and his father next time. The applicant's father went into hiding.

- [Later in] 2012 the CID came again and asked for the applicant's father and left.
- [Later in] 2012 the CID came again, and searched the house. When they found nothing they took the applicant to their camp and interrogated him about the whereabouts of his father, Uncle J, and the weapons and money. The CID physically mistreated the applicant and after several hours released him.
- A friend of the applicant's mother suggested the applicant live with her in Colombo until he could depart for [Country 1]. The applicant spent [a number of] months hiding in Colombo and did not go outdoors.
- [Later in] 2012 the applicant left the house in Colombo for a meeting with a people smuggler. While he was out the CID came to the house and asked for him. The applicant's mother asked him to return immediately to [Town 1] and hide in [a particular location].
- In [October] 2012 the applicant departed Sri Lanka by boat.
- After the applicant's arrival in Australia his mother told him that while he was in Colombo the CID had come looking for him and his father on two occasions. The CID also came once after the applicant had departed Sri Lanka, and the applicant's mother told them he and his father had gone to Australia.
- Since the applicant has been in Australia he has shared pro-Tamil material on his [social media].
- The applicant fears the Sri Lankan authorities will detain, interrogate, torture or kill him because: he is a young Tamil male from the east with scarring; he has familial LTTE links; he and his father are of adverse interest to them; and he departed Sri Lanka illegally by boat.

Refugee assessment

6. 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

7. 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.
8. The applicant has been consistent in stating his identity since his arrival in Australia. In support he has provided a copy of his, and his father's, Sri Lankan birth certificates accompanied by English translations. I am satisfied the applicant's identity is as claimed and that Sri Lanka is the receiving country for the purposes of this assessment.
 9. The applicant was born in [Town 1], Eastern Province, where the LTTE were active during the Sri Lankan civil war (1983-2009). Historically many Tamils, particularly in the north and east of Sri Lanka, reported being monitored, harassed, arrested and detained by security forces under the former Rajapaksa government.¹
 10. The applicant has claimed that in 1990 his paternal grandfather was killed while fighting for the LTTE against Sri Lankan government forces. After his grandfather's death the applicant's father assumed responsibility for Uncle J, who then joined the [LTTE]. I accept that Uncle J then [became a public official of the LTTE] in Batticaloa district, but that the applicant's father did not have any LTTE involvement himself. The applicant's evidence on these matters was consistent between his written SHEV statement and responses at SHEV interview and I accept these claims. The applicant explained that he was very young when Uncle J joined the LTTE, and I accept his evidence that during the war he only saw him once, in 2007, when they went to visit the LTTE camp. I have also had regard to a picture which the applicant claims is of him as a young boy, standing next to Uncle J who is holding a rifle. I also consider it plausible that the applicant's father and Uncle J continued to have some contact during the war although the applicant is not aware of the details.
 11. I accept in [2011] the CID came to the applicant's family home searching for Uncle J, and that when the applicant's father told them he did not know where Uncle J was, the CID threatened him. I accept that in [2012] Uncle J arrived at the family home with [a number of] other people whom the applicant did not know. I accept the applicant's evidence that the situation between his father and Uncle J was very tense, and Uncle J and his companions left shortly afterwards.
 12. I accept that some days later, [in] 2012, the CID arrived at the applicant's home searching for Uncle J and his hidden money and weapons. I am prepared to accept that when the applicant's father said he didn't know where Uncle J was, the CID assaulted him and took him to their camp. I also accept that the applicant and his mother attempted to report his disappearance to the police but that no action was taken. I accept that his father was released the next day and told the applicant the CID had interrogated him about Uncle J and the money and weapons they thought Uncle J possessed. I accept that during the course of his interrogation the applicant's father was seriously mistreated and that the CID made threats to kill him and the applicant.
 13. I have significant concerns with the remainder of the applicant's claims. The applicant has claimed that his father returned to the family home on the night of his release, but that when the family woke up in the morning he had disappeared. The applicant claims that neither he, nor any other member of his immediate family, has had contact with his father since he left

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

but that his departure meant that the applicant, as the eldest son in the family, became the CID's target.

14. In the applicant's arrival interview, which was held [a number of] weeks after his arrival in Australia, the applicant has given a different account of his father's whereabouts. Firstly, when asked for his father's details, the applicant indicated that he currently resided in the family home, for which he gave an address, and that his father is currently working as a fisherman. Secondly, when asked who made the arrangements for his travel to Australia, the applicant responded that his father did, via a smuggler, two days prior to the applicant's departure. During the SHEV interview the delegate put these inconsistencies to the applicant for comment and he responded that during his arrival interview he had been nervous and confused, he had just left his family behind; and in fact it was his mother, not his father, who had arranged his journey to Australia.
15. I have had regard to the applicant's explanation, as well as the fact that the applicant was [a minor] at the time of his arrival interview; however these factors do not alleviate my concerns. I have listened to the audio recording of the arrival interview, during which an independent observer was present throughout because of the applicant's status as a minor, and note that he gave full and accurate responses regarding other aspects of his background, family composition and history in Sri Lanka. I do not consider it credible that the applicant would state that his father was not missing or deceased, provide his father's address, and make several references to his father arranging his journey to Australia, if in fact his father was missing and his mother was the person who had made the arrangements. On the evidence I am not satisfied the applicant's father was in hiding from [2012] onwards.
16. The applicant has claimed that [at multiple times in] 2012 the CID came to his house, asking for his father, and upon finding that he was not there, on the second occasion took the applicant to their camp instead. During the SHEV interview the applicant advised the delegate that at the camp the CID interrogated him about his father, Uncle J, and the money and weapons they believed Uncle J possessed. The applicant also told the delegate that he was physically mistreated and threatened with death. The applicant showed the delegate a scar on his [body] which he stated was the result of being [beaten]. The applicant's evidence to the delegate regarding these events, although largely consistent with his written SHEV statement, lacked detail and was unconvincing. While I am prepared to accept that the applicant has a scar on his [body], I do not accept that he sustained this scar while in the custody of the CID. Given I have found the applicant's father was not in hiding from [2012], I do not accept that the CID were unsuccessfully searching for him [at various points in] 2012, and that they took the applicant in his place.
17. The applicant has claimed [from a certain time in] 2012 he lived with a family friend in Colombo for [a number of] months to avoid the ongoing attention of the CID in [Town 1]. The applicant claimed that during [that time] he did not leave the residence where he was staying, to avoid being detected by the CID. However at the end of the [applicant's stay] the applicant left the house in order to meet a smuggler, who was arranging his trip to [Country 1]. While the applicant was away from the residence the CID arrived searching for him. This prompted the applicant to travel back to [Town 1] and hide in [a particular location] for several weeks until he could depart Sri Lanka by boat in [October] 2012. I do not consider it credible that on the only occasion which the applicant exited the house where he was hiding, the CID came looking for him.
18. The delegate asked the applicant if anything had happened to his family since his departure for Australia and he responded that the CID came on one occasion to question his mother

regarding his and his father's whereabouts but after she told them that they had both gone to Australia, the CID have not returned. The delegate put to the applicant that it was not credible that the CID have not targeted his mother or his [sibling] for the information regarding the location where Uncle J hid his money and weapons, if they were still interested. The applicant responded it is because his mother is a woman and his [sibling], who was [a minor] at the time of the applicant's SHEV interview, is too young. Given the applicant has claimed that the CID were targeting him throughout 2012, while he was only [a minor], I consider his response lacks credibility.

19. Overall, given the significant inconsistencies in the applicant's evidence regarding the events he claims occurred in 2012, I do not accept that his father went into hiding and is still missing, or that in his absence the CID detained, interrogated and physically mistreated the applicant instead. I do not accept that the applicant went to Colombo because he was having issues with the authorities in [Town 1], or that he was in hiding there. I do not accept that while he was in Colombo the CID came looking for him, and that this prompted him to return to [Town 1] and hide until his departure for Australia. I also do not accept that while the applicant was in Colombo the CID came looking for him on two occasions or that after the applicant's departure from Sri Lanka the CID have asked his mother about him.
20. I am prepared to accept that in [2012] the CID detained the applicant's father overnight and threatened to kill him and the applicant; however the applicant's father was released the next day and there is no credible evidence before me that the CID ever approached the family again. I consider any threats that the CID made were for intimidation purposes only. Six years have now elapsed and in the circumstances I do not accept that the applicant or his father are persons of interest to the Sri Lankan authorities.
21. At the end of the SHEV interview the applicant showed the delegate several videos on his mobile phone, regarding what he identified as the ongoing police brutality against Tamils in Sri Lanka. The video audio was not in English, however the interpreter was able to provide a very brief summary of their contents, which included an incident where the police threatened a group of Tamil civilians at gunpoint, and another concerning a protest over land confiscation. The applicant explained that this did not occur in his village, but in a [nearby] village, and that the videos show Tamils are still being discriminated against, and how important it is that the international community help them.
22. The applicant's representative then noted that the applicant had posted these videos to his [social media] page. The applicant then handed the delegate his phone and it appears that she examined his [social media] page. In the delegate's decision, in relation to the applicant's [social media] page, she noted "minimal activity and no posts regarding the situation for Tamils in Sri Lanka since 2015"; however the evidence that she based this on was not contained in the referral materials to the IAA and I have given no weight to this finding. In the representative's post SHEV interview written submission to the delegate, he stated that the applicant cannot afford to have his [social media] page, or the videos, translated. To date the applicant has not provided any screenshots of his [social media] profile or posts to show his pro-Tamil or anti-government sentiments. In any event, the country information before me does not indicate that the Sri Lankan authorities are monitoring the individual [social media] accounts of individual asylum seekers overseas, and I not satisfied the applicant would be targeted on this basis.
23. The 2012 United Nations High Commissioner for Refugees (UNHCR) Guidelines, issued around the time the applicant's departure from Sri Lanka, did not specify individuals of Tamil race as requiring protection at that time, for that reason alone. Furthermore, in the UNHCR's opinion,

individuals originating from an area where the LTTE were previously active, such as the applicant, did not require protection solely on that basis unless there were additional, relevant factors which may have given rise to a profile of risk.²

24. I note the UNHCR identified at that time, amongst other risk profiles, those who with familial LTTE links, or those who provided the LTTE with material support, as potentially in need of protection. Country information before the delegate also indicates that the majority of Tamil civilians in the Eastern Province had some degree of contact with the LTTE in their daily lives. I have accepted that the applicant's grandfather was an LTTE combatant and Uncle J was a [public official] for the LTTE in Batticaloa District. I have also accepted that Uncle J was a person of adverse interest to the Sri Lankan authorities after the war, and that the CID searched for him at the applicant's family home in [2011] and [2012]. I accept that on the second occasion they detained the applicant's father overnight, physically mistreated him, and threatened him and the applicant. However, for the reasons discussed above, I have not accepted that the CID have targeted the applicant because of his familial LTTE connections, or any other reason. In any event, I am satisfied that the Sri Lankan authorities have not approached the applicant's father since [2012].
25. Approximately five years have now passed since then, and since the publication of the UNHCR Guidelines. The country information before me indicates the situation in the north and east of Sri Lanka, although fragile, has continued to improve. The LTTE is a defunct organisation and the Sirisena government has replaced the military governor of the Northern Province with a civilian administration as a confidence-building measure to address the grievances of the Tamil community. The monitoring of individual citizens in the north and east of the country, while still occurring, has reduced.³ There are no restrictions on freedom of movement throughout the entire country, and significant military checkpoints in the north have been dismantled. There has been international criticism however, including from the UN Special Rapporteur on human rights and counter-terrorism, that the pace of progress has been too slow, particularly with regards to bringing the perpetrators of war crimes to justice, and the failure to dismantle the Prevention of Terrorism Act continues to give the Sri Lankan authorities sweeping powers to detain individuals without charge.⁴
26. In 2016 the UK Home Office assessed that: "A person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidences past membership or connection to the LTTE unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport."⁵ The evidence before me does not suggest that being a young Tamil male from the east, with familial LTTE connections, is sufficient.
27. I have not accepted that the scar on the applicant's [body], which the delegate noted during the SHEV interview, was sustained while he was in the custody of the CID. In any case I note that neither the 2015 Department of Foreign Affairs and Trade (DFAT) report, nor the current

²United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

³ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

⁴ Groundviews, "Full Statement by Ben Emmerson, UN Special Rapporteur on human rights and counter-terrorism, at the conclusion of his official visit", 15 July 2017

⁵ UK Home Office, "Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17

DFAT report, which were before the delegate, make any reference to people with scarring now being more likely to be the subject of attention from the Sri Lankan authorities.⁶

28. I am not satisfied that the applicant is, or will be, of interest to the Sri Lankan authorities because of his status as a young Tamil male from the east with scarring, his familial LTTE connections, the CID's previous interactions with his father, or the applicant's pro-Tamil posts on [social media]. Based on the applicant's personal circumstances, and the greatly improved country information, I find the applicant does not face a real chance of harm for any of these reasons, should he return to Sri Lanka.

Returning Asylum Seeker from Australia – Illegal Departure

29. I accept the applicant departed Sri Lanka illegally in October 2012 and sought asylum in Australia.
30. I note DFAT assesses the risk of mistreatment for the majority of returning asylum seekers to be low and the country information before me does not support a finding that the applicant will be imputed with an anti-Sri Lankan government political opinion simply because he, a Tamil, sought asylum in Australia, a western country. I have found the applicant is not of any interest to the authorities, and overall I am not satisfied that the applicant faces a real chance of harm on account of him having sought asylum in Australia.
31. The applicant departed Sri Lanka without a passport and, as noted in the delegate's decision, persons who depart Sri Lanka illegally ('illegal departees') can be penalised under the Immigrants and Emigrants Act (I& E Act) upon return. Country information before the delegate indicates that persons who have departed Sri Lanka illegally may face penalties that can include imprisonment and fines although in practice, penalties are applied to such persons on a discretionary basis and can be paid by instalment, with the accused then free to go.⁷
32. Illegal departees who are charged under the I&E Act can remain in police custody at the airport for a short period after arrival, and should a magistrate not be available before this time – for example, because of a weekend or public holiday – may be held at a nearby prison. Whether such a loss of liberty, such that that the applicant may face under the I&E Act processing, would constitute serious harm is a qualitative judgment, involving the assessment of matters of fact and degree; as well as an evaluation of the nature and gravity of that loss of liberty.⁸
33. With reference to the applicant's particular circumstances, I have found he was not of interest to the authorities at the time of his departure from Sri Lanka, or that he was anything other than an ordinary illegal departee. While I accept the applicant has shared pro-Tamil material on [social media], for the reasons discussed above I am not satisfied that the Sri Lankan authorities would target him for that reason upon arrival in Sri Lanka. Accordingly, while I accept there is a real chance the applicant will be questioned, fined, and held briefly as part of the re-entry process, I do not accept he would face greater scrutiny or penalty upon return than other illegal departees. On the evidence before me I am not satisfied that any routine questioning at the airport upon return, which all illegal departees undergo, amounts to serious harm.

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁸ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610

34. I am also not satisfied that the payment of a fine, or being held in detention for a period of up to 24 hours at the airport, or possibly a nearby prison for a brief period, cumulatively amounts to serious harm. Country information indicates that the applicant may experience poor conditions if imprisoned for this brief period, as the result of ageing prison infrastructure, overcrowding and shortage of sanitary and other basic facilities.⁹ However I am not satisfied that such conditions of themselves, in this case, constitute serious harm as defined by the Act.
35. If the applicant pleads not guilty, he will be released on his own personal surety. I note in some cases a family member is required to collect illegal departees who are released, or to act as a guarantor if personal surety is not granted.¹⁰ There is no evidence before me to suggest a member of the applicant's family would not be available to go to Colombo, or act as guarantor, if this is indeed required.
36. I am not satisfied on the evidence that even if he pleads not guilty, there is a real chance he will be detained any longer than a brief period.
37. Furthermore, the country information before the delegate indicates the I&E Act applies to all Sri Lankan citizens, and is not discriminatory on its face or in its application. A generally applicable law will not ordinarily constitute persecution¹¹ and I am satisfied that the law itself, and application and enforcement of the law, in this case does not amount to systematic and discriminatory conduct.
38. As such I find the treatment the applicant will face as a consequence of the application of the I&E Act is not persecution within the meaning of s.5J(4) of the Act.

Refugee: conclusion

39. 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

40. 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

41. 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

⁹ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

¹¹ *Chen Shi Hai v MIMA* (2001) CLR 293

- the person will be subjected to degrading treatment or punishment.
42. I accept the applicant has familial LTTE connections and that in 2011 and 2012 the CID interrogated his father about these. I also accept that the applicant has shared pro-Tamil material on his [social media]. However I have not accepted that the applicant, an asylum seeker and a young Tamil male from the east with scarring, would face a real chance of harm in relation to these reasons upon return. For the same reasons I also find there is not a real risk he will suffer significant harm.
43. I have accepted the applicant would be returning to Sri Lanka as an asylum seeker who left the country by boat, and will be subject to a process under the I&E Act. Country information cited above indicates if he pleads guilty he will be fined, which he can pay by instalment. If he pleads not guilty he will be granted bail immediately on the basis of personal surety, or with a family member acting as a guarantor, pending a hearing. I accept that in any of these scenarios he may be held in detention for a short period. On the evidence before me I am satisfied the applicant, who was an ordinary passenger on a people smuggling venture, does not face a real risk of a custodial sentence.
44. DFAT has reported that detainees are not subject to mistreatment during processing at the airport. The applicant may be required to spend approximately 24 hours in police custody at the airport, or possibly a nearby jail, to resolve his offences under the I&E Act. Country information before the delegate indicates that Sri Lankan prison conditions do not meet international standards due to old infrastructure, gross overcrowding, and a shortage of sanitary and other basic facilities.¹² I am not satisfied this, or the imposition of a fine, would amount to the arbitrary deprivation of life, the death penalty or torture. I am also not satisfied there is an intention to inflict pain or suffering, severe pain or suffering, whether physical or mental, or cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I find there is not real risk of significant harm on this basis.
45. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.

Complementary protection: conclusion

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

Decision

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

¹² US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

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.