



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/03602

Date and time of decision: 30 April 2018 14:26:00  
Anne-Maree Harrison, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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

## Background to the review

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### Visa application

1. On 9 September 2016, the referred applicant (the applicant) applied for a Safe Haven Enterprise (subclass 790) Visa (SHEV). The applicant claimed to fear persecution from the Sri Lankan authorities, including the Sri Lankan Army (SLA) and the Criminal Investigations Department (CID) because of his Tamil ethnicity, imputed political opinion due to perceived membership of the Liberation Tigers of Tamil Eelam (LTTE), as a victim and witness to gross human rights violations, his status as a person formerly charged under the Prevention of Terrorism Act (PTA), and as a returned asylum seeker.
2. On 13 September 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the applicant a SHEV because she found he would be no longer of any interest to the Sri Lankan authorities.

### 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).
4. On 17 October 2017 and 20 November 2017, the IAA received submissions from the applicant, which mostly address the delegate's decision and findings. As such, it may be regarded as argument rather than 'information' and I have had regard to those elements of it.
5. The submissions contain five references to country information which I consider to be new information. The following three sources were given as excerpts, the first two pre-date the delegate's decision, the last one post-dates the decision:
  - a. The Guardian, "Torture by Sri Lankan police routine, says human rights lawyer", 14 July 2017
  - b. International Truth and Justice Project – Sri Lanka (ITJP), "Unstopped: 2016/17 Torture in Sri Lanka", July 2017
  - c. The Indian Express, "Sri Lankan Tamils to protest over political prisoners", 14 October 2017.
6. I am not satisfied that exceptional circumstances exist to justify considering this new information because there is similar relevant country information before me dated January 2017, July 2017 and August 2017, and this information is available in full as opposed to the brief excerpts included in the applicant's submissions.
7. The following two sources of country information post-date the delegate's decision:
  - a. The Guardian, "'I want the world to know': Tamil men accuse Sri Lanka of rape and torture", 9 November 2017
  - b. Associated Press, "Dozens of men say Sri Lankan forces raped and tortured them", 8 November 2017.

8. The full reports were provided. Given the date they were published and that they report on incidents of alleged torture shortly before that time, I am satisfied s.473DD(b)(i) is met and that there are exceptional circumstances exist to justify considering this new information.

### **Applicant's claims for protection**

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9. The applicant's claims can be summarised as follows:

- He is a Sri Lankan Tamil Hindu from [Town 1], Northern Province. He is married and has [children].
- As a child his family fled to India to avoid the conflict. Again in 1990 he went to India due to tensions and violence between the LTTE and the SLA.
- In 1993, he returned to Sri Lanka and worked as a fisherman and tended vegetables.
- In 1996, he was arrested, charged, convicted by a court for assisting the LTTE transport goods and petrol, and imprisoned for about a year in [Town 2]. After going to the High Court they were able to leave [Town 2]. They were required to accept the charges and had to sign at the police station every 15 days.
- He again worked as a fisherman and he assisted the LTTE, when requested by them. He gave them fuel, cooked food, and delivered it to them. He did this from the time he was released from prison up until the end of the war.
- [In] December 2010, the CID arrested him on suspicion of assisting the LTTE and giving them oil. He was detained on the 4<sup>th</sup> floor of the CID office in Colombo and then in [Town 3] camp for around a year. He suffered severe torture in [Town 3].
- After he was released he had to report to the army camp in [Town 1] every fortnight and sign, and after three months it became a monthly requirement, which continued up until he left Sri Lanka. Each time he reported he received death threats.
- In November 2011, when he reported he was detained, beaten and tortured by the navy and the CID. The International Committee of the Red Cross (ICRC) intervened to secure his release after a few hours. He was treated for head injuries. He has suffered memory loss as a result of this treatment and injuries.
- In October 2012, he went to India, then travelled by boat to Australia and arrived in November 2012.
- Since leaving Sri Lanka, his family has been harassed on several occasions. His son was abducted by the CID, taken to an army camp (the one he used to report to), kept for two days, and his wife was forced to give the CID his Australian phone number. The CID from [Town 1] called him and asked for a ransom for his son's release. Upon learning he was in Australia they released his son.
- The CID have attempted to call him again but he does not answer their calls.
- Since being in Australia he sought a letter from ICRC to confirm they assisted him while in prison in [Town 2] and in [Town 3] camp. Somehow this got back to the CID, and they threatened his wife.
- If returned to Sri Lanka he will be subjected to physical attacks, torture, and arbitrary detention, from the SLA and authorities, including the CID because they believe he was involved in and has knowledge of the LTTE activities that occurred during the war. He cannot return until his problems have subsided. He has been charged under the PTA

and has suffered torture while detained, and he fears this will happen again if forced to return. He could also be abducted and disappear. Given his past conviction and time in [Town 2] and internment at [Town 3] camp, the authorities think he was either in, or closely assisted the LTTE. Even though there is a new government, things have not substantially changed.

## **Factual findings**

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10. I accept the applicant is a Sri Lankan Tamil Hindu from [Town 1], Northern Province, and that he is married and has [children] based on the identity documents he has provided.
11. I accept that as a child the applicant and his family fled to India in about 1983-84 when the war started. I also accept that again in 1990, the applicant went to India, with his wife and children, due to tensions and violence between the LTTE and the SLA. The applicant has consistently made these claims and country information supports that thousands of Tamils sought refuge in India during the internal conflict.<sup>1</sup>
12. I accept that in 1993, the applicant returned to Sri Lanka, and worked as a fisherman and tended vegetables. The applicant said in his SHEV interview that he lived in an ICRC camp in [Location 1] in [Town 1] under military control rather than returning home [because] the LTTE was in control of that area.
13. I accept that in 1996, the applicant was arrested, charged, convicted by a court for assisting the LTTE transport goods and petrol, and imprisoned for about a year in [Town 2], his case was heard in the High Court, he accepted the charges, was convicted, and released on the condition that he sign at the police station every 15 days. I accept these claims based on the applicant's documentary evidence, which includes: a letter dated [in] January 1997 from the Home for Human Rights (HHR); a letter dated [in] July 1997 addressed to the applicant at the refugee camp in [Location 1] from an Attorney from HHR in Colombo about his High Court case and need to obtain permission to travel from the Defence Authorities; a letter dated [in] August 1997 from the HHR about the applicant's case to be heard in the High Court of Colombo [in] October 1997; and a document from the ICRC dated [in] January 2016 attesting to the applicant's periods of detention in Sri Lanka in which the ICRC visited him, including the time he spent in [Town 4] Police station, Puttalam District, where the ICRC visited him three times before he was sent to [Town 2] prison and released [in] May 1997; and an English translation of a High Court charge sheet dated [in] February 1997 detailing the charges laid against the applicant for having made arrangements to transport fuels [in 1996] for the LTTE, an armed terrorist movement fighting the government of Sri Lanka, and having committed a crime under Acts 10 and 22, to be read in conjunction with the Prevention of Terrorism Act (PTA).
14. In his SHEV interview, the applicant explained why he was arrested in 1996. He said he had to travel by boat so he could sell vegetables at the market in [Town 1], and he was staying at a lodge in [Town 1], and he got caught because he and three other people there had 50 litres of oil and the four of them were arrested because the law prohibited people from holding 50 litres of oil. The police thought they were supplying the LTTE. The delegate asked if he was supplying oil to the LTTE, and he said, if you do not give it to them, it is hard to live there so he did help them. The applicant stated that the conditions in prison were terrible and inhumane, and I accept that this was the case. In his SHEV interview the applicant said that he was mistreated while at the police station before being sent to [Town 2] prison. He said he was

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<sup>1</sup> UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

beaten and taken to hospital for his injuries. I accept the applicant was mistreated while in custody at the police station in [Town 4] in 1996.

15. I accept that after the applicant was released from [Town 2] prison he again worked as a fisherman and he again assisted the LTTE, when requested by them, which included giving them fuel, and delivering food to the LTTE. I also accept the applicant did this from the time he was released from prison up until the end of the war. In his SHEV interview the applicant said that he did this because it was hard to live there, if anyone came with a weapon, whether it be police or army or LTTE, you had to do it. He said his wife did the cooking and he took the meals to the LTTE.
16. I accept that [In] December 2010, the CID arrested him on suspicion of assisting the LTTE and giving them oil, and that he was detained on the 4<sup>th</sup> floor of the CID office in Colombo and then in [Town 3] Detention Centre for around a year. I accept these claims based on the documentary evidence given by the applicant, which includes: a copy of a receipt of arrest from the Ministry of Defence, Public Security, Law & Order, which states the applicant was arrested [in] December 2010 at [time] on suspicion in relation to terrorist activities connected to the LTTE (I note the document is dated [in] December 2015); a copy of a Sri Lankan police message form, dated [in] May 2011, from the officer-in-charge at the TID station in Colombo to the officer-in-charge at the station in [a named town] seeking to obtain a statement from a close relative of the applicant in relation to an investigation recommended by TID Colombo; and three documents dated [in] March 2011, [in] June 2011, and [in] September 2011 from the Ministry of Defence, to extend the applicant's period of detention for [number of months] each time under the PTA in connection with assisting the LTTE to commit unlawful activities, and the applicant was to be detained at [Town 3]; an ICRC card for use while in detention; and the ICRC document attesting to the applicant's periods of detention and its visits to him, which includes that he was re-arrested and re-visited by ICRC delegates from [January to October] 2011 while the applicant was detained at [Town 3] (Galle District), and that he was released [In] November 2011. I find the applicant was detained under the PTA for about a year at [Town 3] Detention Centre on charges related to assisting the LTTE commit unlawful activities, and he was severely mistreated while in [Town 3]. There is no evidence the applicant went to court and was found innocent or guilty of any charges. I find the applicant was released on the condition that he continue to regularly report to the Sri Lankan authorities in [Town 1].
17. The applicant claimed to have suffered severe torture in [Town 3]. In his SHEV interview, the applicant said that one of the ex-LTTE members informed on him, and they came to his home at 3am in the morning and arrested him. He said he spent a year in [Town 3] jail where he was kept in a small cell with only a bottle to pass urine, beaten, and hung upside down with a plastic bag with petrol in it tied to his head. The report dated [in] February 2017 from the applicant's [counsellor] provides an opinion on the consistency between the applicant's psychological functioning and the events he has reported. The country information before me includes reports of allegations of torture committed at [Town 3] camp.<sup>2</sup> I accept the applicant was severely mistreated while detained for about a year at [Town 3] camp from December 2010 [until] November 2011, and that he suffers from trauma based symptoms.
18. I accept that after the applicant was released he had to report to the camp at [Town 1] every fortnight and sign, and after three months it became a monthly requirement, which continued up until he left Sri Lanka. In his SHEV interview the applicant said that after he was released and back home for about 10 days, they came back and said they had not finished the inquiry and they asked him to come to the camp every 15 days on a Sunday to sign at the navy camp.

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<sup>2</sup> [Source deleted].

When he went to sign they would threaten him, they were verbally abusive and they said one day, we will just get rid of you. When asked if he was harmed while going to report, he said yes. I accept that when the applicant claimed to have received death threats when he reported, he meant the occasions when they said to him that one day we will get rid of him.

19. I accept that one time when the applicant went to report he was detained, beaten and mistreated by the navy and the CID. In his statement he said it was November 2011, and in his SHEV interview he said it was the third time he went to report, which suggests it was most likely late December 2011 or early January 2012. Either way, I accept that on one occasion in late 2011 / early 2012 when he went to report he has detained, beaten and mistreated. Further, I accept the ICRC intervened to secure his release after a few hours and that he went to hospital and was treated for head injuries. I am willing to accept the applicant's claim that he has suffered memory loss as a result of this treatment and injuries. During the SHEV interview the applicant said that after that incident they started to harass him a lot and would come to his house at night time or they would come early in the morning to check up on him to see if he was at home and that is when he decided to leave Sri Lanka.
20. I accept that in October 2012, the applicant went unlawfully by boat to India where his [siblings] were still living, and then travelled unlawfully by boat to Australia, and arrived in early November 2012.
21. I accept that since the applicant left Sri Lanka his family has been harassed on several occasions by the CID dating back to May 2013, including his son being taken by the CID on three occasions, one time they beat him, and one time they had to pay a bribe for his release. I also accept the applicant has received phone calls from the CID since he has been in Australia, and threats have been made to his wife by the CID after the applicant sought supporting documentation from the ICRC in Sri Lanka to evidence his claims. The applicant provided an account of events at his SHEV interview and to a [counsellor] as set out in a report of [in] February 2017. The counsellor reports on his [number of] contacts with the applicant from December 2013 until December 2014. The applicant did not give dates for when his son was taken by the CID. However, based on the letter from [the counselling agency] about these incidents, the applicant raised with his counsellor his concerns about his son being taken by the CID in relation to three separate incidents in 2013, March 2014, and September 2014. In the SHEV interview the applicant spoke convincingly about the incidents involving his son and the CID, the CID calls to him, and the CID visiting his wife again in February 2017. He said in relation to the February 2017 incident that they asked his son to go to the police station, which his son and wife did and there was a new officer-in-charge at the police station who said he was checking the files and wanted to see who was there, and that was why he had asked them to attend the police station. I also accept the CID know the applicant is in Australia because the applicant stated that his son and wife have told them this, and I accept the CID has attempted to call the applicant again but he does not answer their calls.
22. I find the applicant has twice been charged under the PTA for crimes in relation to providing assistance to the LTTE, the first time in 1996 and the second time in 2010. The first time he was convicted and spent a year in prison. The second time he was not convicted, but released after a year in [Town 3], and required to report regularly to the Sri Lankan authorities in [Town 1]. I find the applicant unlawfully departed Sri Lanka while he was of interest to the Sri Lankan authorities in connection with charges under the PTA for having assisted the LTTE to commit unlawful activities, even though he had been released from [Town 3] about a year before he departed. I am satisfied that since the applicant has been in Australia, and most recently in 2017, his family has been harassed on several occasions, including that his adult son has been detained on several occasions and mistreated on one occasion by the CID.

## Refugee assessment

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23. 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

24. 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.

25. In January 2017, DFAT reported that the Sirisena Government had made significant progress towards reconciliation in a number of areas, including by releasing some individuals detained under the PTA, which is still in place but under review. Under the PTA suspects can be held without charge for three-month periods, not exceeding a total of 18 months. DFAT noted that fewer individuals are detained under the PTA than there were during the conflict. For offences under the PTA, the onus is on the accused to prove their innocence, and a panel of judges generally hears cases brought under the PTA. The PTA allows certain kinds of confessions that would not be admitted in other criminal cases. DFAT does not have information on overall conviction rates for LTTE members, but stated that the lower standards required for cases brought under the PTA would suggest the potential for a higher rate of conviction.<sup>3</sup> In August 2017, DFAT also reported on the ethnicity of those arrested under the PTA, mostly Tamil but more recently Sinhalese as well, and numbers of arrests between 2005 and 2016.<sup>4</sup>

26. DFAT also referenced a number of reputable organisations (the ITJP, Freedom from Torture, Amnesty International), who have, over the last couple of years, published allegations of torture perpetrated by Sri Lankan military and intelligence forces, mostly related to cases from the period immediately following the civil conflict and involving people with imputed links to the LTTE (but not solely). DFAT noted the work of the UN’s Office of the High Commissioner for Human Rights investigation into Sri Lanka, the UN Special Rapporteur on torture and other

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<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka”, 24 January 2017, CISEDB50AD105.

<sup>4</sup> DFAT, “UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka”, 14 August 2017, CISEDB50AD5239.

cruel, inhuman or degrading treatment or punishment, and the HRC of Sri Lanka which combined provide credible reports of torture carried out by Sri Lankan military and intelligence forces during police detentions and regular criminal investigations. According to DFAT however, the incidence of torture has reduced in recent years, and allegations of torture pertain to a relatively small number of cases compared to the total population.<sup>5</sup>

27. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, visited Sri Lanka in July 2017 and reported on his findings. The Special Rapporteur commented that during his interviews with current and former PTA detainees, he heard distressing stories of extremely brutal methods of torture. In a number of cases these allegations had either been accepted by independent medical evidence, or accepted by the judiciary as the basis for excluding a confession at trial. While the Special Rapporteur noted that steps are underway to avoid new arrests under the PTA, he reported that the PTA remains fully on the statute book, pending review.<sup>6</sup>
28. The November 2017 country information provided by the applicant, from the Guardian and Associated Press, reports on allegations of torture by Sri Lankan authorities in July 2017, with some victims accused of trying to revise a 'rebel group on the losing side of the war'. Most victims said they were not members of the LTTE, although one victim admitted to being a member.<sup>7</sup>
29. I have found the applicant departed Sri Lanka illegally in October 2012 when he was still under suspicion for crimes committed in connection with assistance given to the LTTE during the war, and subject to regular reporting requirements. I have accepted that since the applicant has been in Australia, as recently as February 2017, the applicant's family has been harassed by the CID about the applicant. I am satisfied this ongoing harassment has taken place because the applicant is still of interest to the Sri Lankan authorities in connection with charges laid under the PTA relating to support given to the LTTE during the war, even though he was released after a year in [Town 3] Detention Centre. I am satisfied the interest the CID has in the applicant goes beyond some members using his background as leverage for extortion, as per the attempt in March 2014 when his son was abducted by the CID. The applicant said he could not afford to pay and his son was released upon learning he was in Australia. The CID's interest in the applicant has continued since that time, and the applicant has not claimed to have been asked for money again.
30. Based on country information, there continue to be reports of abductions, torture complaints, arbitrary arrest and detention, and excessive use of force by police against Tamils perceived to support or sympathise with the LTTE. Sources indicate that security personnel and police have been responsible for detention of civilians accused of LTTE connections, and that interrogation sometimes included mistreatment, torture and sexual abuse to extract confessions or information from suspected LTTE members or supporters. Some reports are that these practices, in which the police have been implicated, can be based on loose ties to the LTTE.<sup>8</sup>

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<sup>5</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

<sup>6</sup> UNHCR, "Human rights and counter-terrorism UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka preliminary report", 14 July 2017, CXC90406610453.

<sup>7</sup> The Guardian, "'I want the world to know': Tamil men accuse Sri Lanka of rape and torture", 9 November 2017; Associated Press, "Dozens of men say Sri Lankan forces raped and tortured them", 8 November 2017.

<sup>8</sup> UK Home Office, "Country Information and Guidance Sri Lanka: Tamil Separatism. Version 2.0", 19 May 2016, OGD7C848D17.

31. I am satisfied that if returned to Sri Lanka the suspicions involving the applicant and any assistance he provided to the LTTE during the war remain and will be heightened because he departed Sri Lanka while he was still of interest. I am satisfied the Sri Lankan police will be alerted to the applicant's return to Sri Lanka when he arrives at the airport, given the immigration and law enforcement procedures at the airport for people returning on temporary travel documents who illegally departed Sri Lanka.<sup>9</sup> Given the applicant has twice been charged under the PTA for crimes in relation to providing assistance to the LTTE, the first time in 1996 and the second time in 2010, and given the CID's interest in the applicant when he departed and its ongoing interest in the applicant, I am satisfied that on return, or soon after, the applicant will be taken in for questioning by the Sri Lankan police, and there is more than a remote chance he will suffer significant physical ill-treatment in the course of an investigation, because investigation processes can involve detention and questioning, and the use of torture to extract confessions from suspected LTTE members and supporters. Based on the country information before me, I am satisfied there is a real chance the applicant will be targeted for serious harm if returned to Sri Lanka and the conduct of the authorities in inflicting this harm is systematic and discriminatory, and that it would be inflicted on the applicant for the essential and significant reason of real and / or an imputed political opinion in connection with the LTTE.
32. According to DFAT, Sri Lankan security forces maintain effective control throughout Sri Lanka and it is unlikely that individuals would be able to relocate internally with any degree of anonymity. In particular, the Sri Lankan military, intelligence and police continue to maintain a high level of awareness of returned Internally Displaced Persons (IDPs) to the north and east. The level of monitoring has reduced under the Sirisena Government but some individuals have reported that their movements continue to be recorded.<sup>10</sup> As the harm would be inflicted by the Sri Lankan authorities, who control the entirety of the country, I find that effective protection measures are not available to the applicant. I am satisfied the real chance of persecution relates to all areas of the receiving country.
33. As the harm arises as a result of the applicant's past history assisting the LTTE and ongoing suspicions involving his role in connection with the LTTE, I find there are no reasonable steps available to the applicant to modify his behaviour to avoid a real chance of harm. The applicant has a well-founded fear of persecution within the meaning of s.5J and I am satisfied that he is outside the country of his nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself of the protection of that country.

#### **Refugee: conclusion**

34. The applicant meets the requirements of the definition of refugee in s.5H(1).

#### **Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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<sup>9</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

#### **5H Meaning of refugee**

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

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

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

...

### 5J Meaning of well-founded fear of persecution

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

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

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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