



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/04017

Date and time of decision: 30 August 2018 12:09:00  
P Tyson, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a national of Sri Lanka. On 24 February 2017 he lodged an application for a Safe Haven Enterprise visa (protection visa).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa in a decision dated 1 December 2017. The delegate accepted the applicant's claims to have been attacked while working for the Tamil National Alliance (TNA) during provincial elections held in 2012 but found there is no real chance of him being pursued and seriously harmed in the future on account of his association with the TNA. The delegate found there is not a real chance of the applicant facing treatment that would amount to serious harm as a failed Tamil asylum seeker who departed Sri Lanka illegally. The delegate also concluded there is not a real risk of the applicant suffering significant harm.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been received from the applicant.
4. I have obtained new information relating to the treatment of Tamils who support the TNA and returnees to Sri Lanka who have departed that country illegally and claimed asylum in Australia. The information is from a 2018 report of the Department of Foreign Affairs and Trade (DFAT) that updates an earlier report relied upon by the delegate. The information is directly relevant to the applicant's circumstances, is considerably more recent than much of the information relied on by the delegate and has been prepared by an Australian government agency specifically for the purpose of protection status determination. I am satisfied there are exceptional circumstances to justify considering it in this case.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - The applicant is from [City 1], in Sri Lanka's Eastern Province. He is of Tamil ethnicity and Hindu religion.
  - From around the time of elections in 2010, the applicant was employed as [Occupation 1] for the TNA. He also supported this party.
  - The applicant received phone calls threatening he would be shot if he did not stop working for the TNA. At one point he stopped working, but he needed the money and supported the work of the TNA, so returned after being assured by the TNA that they would look after him. The applicant believes the threats were made by an armed group connected with the government, possibly the TMVP. There were others working for the TNA at the applicant's level who were shot.
  - In one incident around the time of the September 2012 provincial elections, the applicant was in the TNA van when it was approached threateningly by another van. He managed to drive away. In another incident, the applicant and passengers of his van were physically assaulted by people from the armed group. The applicant was beaten but managed to run away. His [body] was injured, requiring hospital treatment and

causing ongoing pain. Shots were fired into the air and the applicant believes he would have been shot if he had not managed to run away. After this attack, the TNA notified the police but the applicant never heard anything more about it. He does not believe the police, who are Sinhalese and support the government, would help a Tamil low level employee such as himself. The applicant stopped working immediately, afraid for his safety. He began staying with different friends at night. He was continuing to receive calls from unfamiliar numbers.

- The applicant decided to leave Sri Lanka. For three weeks after he left, people visited his home looking for him.
- The armed group who threatened the applicant are still functioning in Sri Lanka and he fears harm from this and other groups because of his TNA involvement and political opinion. He fears they will come after him if he returns and he would still be wanted by them because of his ongoing involvement with the TNA. They have links to the government and could easily find him no matter where he moved. The applicant would not be protected by anyone. The authorities already failed to protect him even after the attack was reported.
- The applicant also fears harm as an asylum seeker returned from a western country, as he would be regarded as having betrayed Sri Lanka.

## **Refugee assessment**

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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’s identity and nationality are not in issue and are supported by documentary evidence. I accept the applicant’s identity is as claimed and that he is a national of Sri Lanka.

9. Country information confirms that although mostly peaceful, the 2012 Provincial Council elections were marred by some reports of violence and intimidation.<sup>1</sup> The information indicates that following the elections, five of the TNA's newly elected councillors in the Eastern Province were said to have fled to Colombo in fear of their lives.<sup>2</sup> Although these councillors evidently have a much higher profile than the applicant, this information suggests that threats against the TNA occurred in the Eastern Province during and following the elections and lends plausibility to the applicant's claim of violence and threats directed at the TNA, and that persons searched for him after his departure from Sri Lanka.
10. It appears from the recording of an arrival interview conducted in February 2013 that at that time the applicant presented letters from his employer confirming his role as [Occupation 1] for the TNA, and also a newspaper article dated [in] August 2012 which he described as relating to an incident when he was threatened while doing campaign work and lodged an entry with the police. In his written statement submitted with the visa application and during the protection visa interview on 31 August 2017 he also referred to these documents. The documents do not appear in the material given to the IAA by the Secretary and are not referenced in the delegate's decision, but I accept that they have been given to the Department and that they corroborate the applicant's claims.
11. The applicant's claims regarding his experiences in Sri Lanka have been made with broad consistency since his arrival interview. There has been some variation as to the timing of events and the applicant required prompting during the protection visa interview to recount some of the events described in his written statement submitted with the visa application and even then did not appear able to go to the level of detail displayed in the written claims. However, my impression from listening to the recording of the interview was that these matters were more likely due to limited education and the passage of time rather than a deliberate attempt to mislead or fabricate.
- There is an inconsistency in the evidence regarding the length of time the applicant has worked for the TNA. In the written statement submitted with the visa application it is claimed that the applicant was employed by the TNA in 2010 and continued to work for them after that time. However, the applicant's evidence at the protection visa interview was that in 2012 he worked for the TNA for around six months. The employment history provided in his arrival interview also suggests that he worked for the TNA during the 2010 elections and 2012 elections, but performed other work in the interim. The applicant's written statement indicates that is a summary of his claims and that it was prepared over a short period of time and may contain errors or omissions. On this point I prefer the evidence at the interviews over that in the statement.
  - There is also inconsistent information regarding the timing of the incident in which the applicant was beaten which he says triggered his decision to leave Sri Lanka. In his written claims, the applicant indicates that the attack took place prior to the election and he stopped working after the attack and left Sri Lanka not long after. In the protection visa interview, the applicant claimed that he stopped working for the TNA [in] September 2012. He said that the incident in which he was beaten took place 2 or 3 days before the election and after that he did not go to work. The applicant also said in the arrival interview that he had stopped working [in] September 2012. However, as the

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<sup>1</sup> Freedom House, "Freedom in the world 2013 - Sri Lanka", 10 June 2013, CX309121.

<sup>2</sup> SATP, "Sri Lanka Timeline - Year 2012", 31 December 2012, CIS961F9402802.

interviewer put to the applicant, the country information indicates that the Provincial Elections, including in the Eastern Province, took place on 8 September 2018.<sup>3</sup>

- The applicant has not been able to identify with any certainty who was harassing and threatening him although has suggested it was the TMPV (Tamil Makkal Viduthalai Pulikal), a paramilitary group said to have been aligned with the government during the conflict which later formed a political party.<sup>4</sup> The suggestion that this group was responsible appears to be speculation.
12. Considering the evidence as a whole, I accept the applicant's claims to have worked for the TNA, received threatening phone calls, been harassed while out canvassing, including being followed and then chased by a white van on one occasion and beaten by a group of men on another. I accept that whether or not it was the TMVP, these threats were made by a group which opposed the TNA and had an interest in the outcome of the elections. I also accept persons inquired about the applicant's whereabouts in the weeks following his departure. However, I find that that the incident in which the applicant was beaten took place prior to the 2012 election and some weeks prior to his departure from Sri Lanka.
13. The country information<sup>5</sup> before me indicates that there have been changes in Sri Lanka since the applicant's departure, with a new president and government elected in 2015. Under the new Sirisena government, the security situation has greatly improved in the north and east. More recent elections have seen less violence. Elections held in 2015 were generally peaceful and orderly. Although there were violent incidents, incidents of violence were of relatively low scale and intensity in comparison to previous elections. Reports before me indicate that the TNA enjoys significant support, having won 16 seats in the national parliament in 2015 elections. The TNA leader is leader of the National Opposition. DFAT<sup>6</sup> has recently reported that Tamils do not receive unwarranted attention from authorities because of their political involvement, including with the TNA.
14. The applicant's role for the TNA was as [Occupation 1]. The incidents in which he was harassed and beaten while out canvassing appear to have occurred while he was with a group of other TNA workers or supporters rather than being directed specifically at the applicant, although I accept he had also personally been identified, given that he received phone threats and persons looked for him in the weeks after his departure from Sri Lanka. However, despite the person(s) making these threats apparently having the applicant's phone number and home address, and the applicant continuing to work for the TNA for around six months in 2012, he was not harmed other than on one occasion when out canvassing. I am not satisfied on the evidence that any further interest has been shown in the applicant other than visits to his home in the immediate aftermath of the elections and his departure. A significant period of time has passed since these events and I do not accept that the persons who threatened, harassed and attacked the applicant in 2012 continue to retain any interest in harming him now, over five years later.

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<sup>3</sup> Ibid.

<sup>4</sup> UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77.

<sup>5</sup> Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISEDB50AD105; Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508.

<sup>6</sup> DFAT, "Country Information Report Sri Lanka", 23 May 2018, CISEC96CF1164.

15. The applicant has said that he is not involved in politics in Australia and does not intend to get involved with politics if he returns to Sri Lanka. However, even if the applicant were to again work for the TNA as [Occupation 1] or otherwise provide support of the nature he did in the past, having regard to the overall improvement in the situation and reduction of incidents of political violence I consider the chance of the applicant again being threatened or harmed in the future to be no more than remote. I am not satisfied there is anything beyond a remote chance of the applicant being harmed in the reasonably foreseeable future in relation to his past or any future political activity.
16. The applicant has not made an express claim to fear harm on account of his Tamil ethnicity or Hindu religion, although he said in the context of his claims regarding the TNA that he does not believe the police, who are Sinhalese and support the government, would help a Tamil low level employee such as himself. However the attack on the applicant and others previously reported to police was carried out by unknown perpetrators and the applicant left the country soon after. I am not satisfied any police inaction, if that was in fact the case, was for the reasons the applicant suggests. The UK Home Office<sup>7</sup> has assessed that simply being a Tamil does not of itself give rise to a well-founded fear of persecution. DFAT<sup>8</sup> have reported that monolingual Tamil speakers can have difficulty communicating with the police, military and other government authorities, but this is a result of the historical factors and language barriers rather than discrimination. Monitoring and harassment of Tamils by security forces has decreased, and I note the applicant does not claim to have ever been subject to such treatment. The information does not suggest harm to Hindus. I am not satisfied the applicant would face any risk of harm for reasons of his Tamil ethnicity and/or his religion.
17. The applicant has claimed in his statement that he fears harm returning to Sri Lanka as an asylum seeker being returned from a western country as he would be regarded as having betrayed the country. He claims to have heard of people being taken by the government and CID and harmed after returning from Australia.
18. I accept that the applicant's return to Sri Lanka will necessarily bring him into contact with Sri Lankan authorities, who may infer that he has claimed asylum in Australia. Information from DFAT<sup>9</sup> indicates that returnees are checked against immigration, intelligence and criminal databases by Sri Lankan immigration, security and intelligence agencies, and their identity is confirmed through police investigation which can involve an interview, contact with their local police, neighbours and family, and checks on criminal and court records. DFAT has said that all returnees are subject to these procedures regardless of ethnicity and religion and are not subject to mistreatment during this processing. Between 2008 and 2017, over 2400 Sri Lankan nationals have returned to Sri Lanka from Australia, and many more have returned from other western countries, most of whom are Tamil. While there are reports<sup>10</sup> of returning asylum seekers being detained on arrival, the majority appear to have some pre-existing adverse profile, such as involvement with the Liberation Tigers of Tamil Eelam (LTTE). Such allegations of mistreatment are relatively few in the context of the large numbers of returnees. While DFAT<sup>11</sup> has referred to anecdotal evidence of returnees receiving regular visits and phone calls

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<sup>7</sup> UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77.

<sup>8</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017.

<sup>9</sup> Ibid; DFAT, "Country Information Report Sri Lanka", 23 May 2018, CISEC96CF1164.

<sup>10</sup> For example, Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065.

<sup>11</sup> DFAT, "Country Information Report Sri Lanka", 23 May 2018, CISEC96CF1164.

by the CID as recently as 2017, that related to returnees to the north of Sri Lanka whereas the applicant is from the east, and I note that it also reported that it was reported that only 0.3% of returnees interviewed by UNHCR in 2016 indicated they had security concerns following their return.

19. The applicant does not claim to have ever had or been accused of activity such as involvement with the LTTE, and I do not accept the applicant has ever been of adverse interest to authorities or that his involvement with the TNA would be considered of any concern. Considering the applicant's particular circumstances and background I find that any investigation process on the applicant's return will quickly establish that he is not a person of any concern (beyond the unlawful departure offence discussed below) and will not involve any harm. I consider it remote that the applicant would receive any sort of follow-up visits or checks by authorities after his return to his home and remoter still that he would be harmed even if such checks were to occur. On the evidence before me I am not satisfied that there is any prospect of the applicant being perceived as having betrayed the country or harmed because he has claimed asylum in Australia.
20. I have also taken into account information in the most recent DFAT report<sup>12</sup> that returning failed asylum seekers face practical challenges in Sri Lanka, relating to debt they have acquired to pay for their journey, and difficulty finding suitable employment and housing. Returnees have reported social stigma from communities on return which seems linked to resentment of financial support they receive, and there are reported bureaucratic inefficiencies which impact reintegration. In addition to his work for the TNA, which I have found would not attract a real chance of harm in the future, the applicant has said he has also worked for a private [company]. The applicant has skills as [Occupation 1] and has not suggested he is no longer able to perform work of that nature due to his injury. He has not suggested that he has outstanding debts or would not have accommodation on return. I am not satisfied there is more than a remote chance of serious harm to the applicant arising from any practical challenges he may face in resettling in Sri Lanka, including when I take into account the financial cost associated with his illegal departure, discussed below.
21. The evidence before me is that the applicant departed Sri Lanka unlawfully. Information from DFAT<sup>13</sup> indicates that this is an offence under Sri Lankan immigration law. While the law allows for imprisonment, the information indicates this sentence has never been imposed on a person who was passenger on a people smuggling boat, as was the case for the applicant. Returnees are commonly imposed with a fine which can vary from case to case between LKR3000 (AUD 25) for a first offence up to LKR 200,000 Sri Lankan rupees (AUD1670), and is payable by instalment. The information indicates that returnees suspected of unlawful departure undergo investigation at the airport and are then transferred to the Magistrates Court. Some may spend a brief period of time in custody pending their appearance before a magistrate or granting of bail. However, that would only be in the event that a magistrate was not available to hear the case such as due to a weekend or public holiday, or they pleaded not guilty and needed to wait for a relative to come to court to act as guarantor, whereas bail may also be granted on personal surety. The information also indicates that returnees who have pled not guilty to illegal departure may need to attend court or report to police on further occasions, which can involve travel and legal costs.
22. Considering this information, I find that the applicant will be charged with an offence and ultimately fined. The applicant does not have an adverse profile and DFAT has assessed that

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid; DFAT, "Sri Lanka - Country Information Report", 24 January 2017.

the risk of torture or mistreatment for the majority of returnees, including those suspected of offences under the I&E Act, is low. I accept the applicant may spend a period of time in custody pending bail, but I am not satisfied that the chance of him being imposed with a custodial sentence, being detained for more than a few days and/or being subjected to mistreatment in this process, is anything but remote.

23. I find that the treatment the applicant will experience on account of illegal departure arises from a non-discriminatory application of Sri Lankan law, rather than being for one of the reasons in s.5J(1)(a) or involving systematic and discriminatory conduct as required by s.5J(4)(c). Further, I am not satisfied that it amounts to serious harm. As I have said above, the applicant has a history of employment and I am not satisfied that the imposition of a fine which can be paid by instalment or the costs associated with attending court or police would threaten his capacity to subsist or otherwise amount to serious harm. The information before me indicates that conditions in Sri Lankan prisons (if that is where he is detained) can be poor, due to a lack of resources, overcrowding and poor sanitary conditions. However, the detention will be for no more than a matter of days and having regard to its nature and gravity<sup>14</sup> and the applicant's particular circumstances, I am not satisfied that a brief period of detention even in such conditions will amount to serious harm. Nor am I satisfied that the detention, fine, costs associated with attending court or police, and challenges the applicant may face in resettling in Sri Lanka amounts to serious harm when considered cumulatively. I am not satisfied there is a real chance of the applicant suffering harm that would amount to persecution.
24. Considering the applicant's circumstances as a whole, including his past and any future political involvement, his ethnicity and religion and return to Sri Lanka from a western country like Australia as a failed asylum seeker who has departed illegally, I find there is not a real chance of him being persecuted in Sri Lanka in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

25. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

#### **Complementary protection assessment**

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26. 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**

27. 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

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<sup>14</sup> *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610.

- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

28. I have found above there is not a real chance of the applicant being harmed in connection with his past or any future political involvement, his Tamil ethnicity, Hindu religion or as a failed asylum seeker returning from Australia.
29. On the country information I refer to above, I accept that there can be practical challenges for returnees resettling in Sri Lanka, and I also accept that the applicant will be investigated, charged with illegal departure and fined, and that he may spend a brief period of time in custody in this process and have to return to court on future occasions. I have concluded however that there is not a real chance of him being mistreated in this process.
30. Considering the brevity of the detention the applicant will experience, even taking into account the conditions of Sri Lankan prisons, I am not satisfied that in his circumstances spending a number of days detained in such conditions would involve the level of pain, suffering or humiliation described in the definitions of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. Nor am I satisfied that the costs associated with paying a fine and attending court or police, practical challenges the applicant may face on return to Sri Lanka, and this detention, rise to the level of pain or suffering of that nature either individually or cumulatively. I further find that such treatment in respect of illegal departure arises from the enforcement of Sri Lankan law and does not involve the requisite intention to inflict pain or suffering or to cause humiliation as required in those definitions. Nor does any of the treatment or challenges I accept the applicant may experience otherwise amount to significant harm as defined in the Act.
31. For the reasons I have given earlier, I am not satisfied there is otherwise a real chance of the applicant being mistreated, or of suffering any harm in connection with his past or any future political involvement, his Tamil ethnicity, Hindu religion, illegal departure, return as a failed asylum seeker from Australia, or the combination of these matters. Real chance and real risk involve the same standard.<sup>15</sup> Relying on the factual findings and country information I have set out above, I am similarly not satisfied there is a real risk of the applicant suffering significant harm in Sri Lanka.

#### **Complementary protection: conclusion**

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

#### **Decision**

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

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<sup>15</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

## Applicable law

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

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

In this Act, unless the contrary intention appears:

...

***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.