



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05716

Date and time of decision: 10 December 2018 13:35:00
G Deal, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The applicant (the applicant) claims to be a Tamil Hindu from Sri Lanka. [In] November 2012 he arrived by boat in Australia. On 8 April 2016 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now part of the Department of Home Affairs.
2. On 18 September 2018 a delegate of the Minister for Home Affairs (the delegate) refused to grant the visa. The delegate accepted most of the applicant's claims including that his father's cousin (who the applicant calls his uncle) assumed care of him after his family went missing and his grandmother passed away, he spent time in a refugee camp and both he and his uncle were subjected to harassment by authorities after the war. However, ultimately, the delegate found the applicant did not meet the relevant definition of refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia had protection obligations.

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. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a young Tamil male from the north of Sri Lanka, an area controlled by the Liberation Tigers of Tamil Eelam (LTTE) during the conflict.
 - Up until 2006 he lived with his grandmother, who passed away in 2009.
 - At the end of the war he was separated from his immediate family who are still missing, presumed dead.
 - In 2009 he was placed in a refugee camp and released into the care of his uncle in about 2010.
 - In about 2010 or 2011 he was harassed by soldiers and his uncle was harassed by the Criminal Investigation Division (CID) leading the applicant and his uncle to flee Sri Lanka for their safety in 2011.
 - His maternal uncle was a cadre in the LTTE and killed during the war.
 - His information may have been leaked in a Departmental data breach in 2014. He is a failed asylum seeker who would be perceived as having departed unlawfully. He has no support or family in Sri Lanka who would be able to assist with bail.

Factual findings

6. Based on the country information before me and the applicant's evidence, including his documentary evidence, I accept he is a young Tamil male from the north of Sri Lanka, an area controlled by the LTTE during the conflict.¹
7. Based on the consistency of the claim, his ability to spontaneously respond to questions in the SHEV interview, the supporting documentation, including a death certificate for his grandmother, and the country information before me which indicates many thousands of people in the north disappeared in the final stages of the conflict or sent to refugee camps in 2009, I accept the applicant lived with his grandmother in [City 1] who passed away in 2009, visited his parents [in] 2006, could not return to [City 1] due to the war, became displaced, was separated from his family in 2009 and was placed in a refugee camp before being released into the care of his uncle in 2010 because his family were missing, presumed dead.²
8. The applicant claims he will be harmed because of his association with his uncle who was harassed by the CID prior to fleeing Sri Lanka in 2011. The applicant was [age] years of age when he arrived in Australia. He travelled to Australia on a people smuggling boat with his uncle. The applicant's uncle also attended his arrival interview with him. In his arrival interview when asked why he left Sri Lanka the applicant said he did not have anyone in Sri Lanka and that his uncle was also having problems in Sri Lanka and so he left with his uncle. He said they initially flew to [Country 1] from Sri Lanka on their passports but disposed of them in [Country 2]. In the SHEV interview he said the passport had his photo in it and they had no problems at the airport when leaving Sri Lanka although he said he did not know if the passport was genuine as his uncle had obtained it for him.
9. In his SHEV application he said that when he was living with his uncle in about 2010 he came to understand his uncle was having problems with the CID. People would come to their house and talk with his uncle but he would always make the applicant go inside when they came. He did not have much contact with his uncle before going to live with him so he was not sure what problems he had. He also mentioned, for the first time, that at this time, while on his way to his school, soldiers would call him over and talk to him and threaten him and force him to buy them cigarettes which he did as he feared being harmed by them and his uncle had to eventually escort him to school because he was so afraid.
10. In the SHEV interview when the delegate sought further information in relation to his claim his uncle was harassed by the CID the applicant said that people who said they were from the CID came to the house looking for his uncle. When asked how he knew they were from the CID he said his uncle's mother used to say that and his uncle used to tell her to tell them she did not know where he was when they came looking for him. He said at that time his uncle was living in Colombo. When asked what he was doing there, the applicant said he did not know. When asked if he ever learnt what the CID wanted to talk to his uncle about he said he had not. When asked if his uncle was ever arrested or detained the applicant said he was not. The applicant said the CID did not talk to him but that soldiers would harass him while on his way to school and he said, for the first time, that they would ask where his parents were but they never hurt him. He did not know what his uncle did during the war. The delegate asked if there was anything the people did when they came to the house that made him think they wanted to hurt his uncle and the applicant said they came with guns and were very scary to look at and

¹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

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

that they were not like here, they used bad language and slapped people. He also said, for the first time, that his uncle's family did not like him which was another reason why his uncle took him to Australia. When asked what he thought would happen if he returned to Sri Lanka the applicant said he feared the army and the CID who were looking for his uncle. When asked why he thought the authorities would be after him and his uncle he said he did not know. The delegate queried whether the applicant had any contact with his uncle now and the applicant said he lived with him but that his uncle had never told him why the CID were after him and the applicant had never asked him.

11. The country information before me indicates that security forces questioned and monitored thousands of civilians for possible LTTE activity, civil resistance and anti-government sentiment after the end of the war.³ Thousands of individuals suspected of involvement with the LTTE at that time also disappeared, were abducted or sent to government run rehabilitation programs.⁴
12. Given the detail provided in the SHEV interview and the country information before me I am willing to accept the applicant may have been harassed by soldiers while on his way to school, on occasion, after the conflict, as were many others at that time. The applicant has said that he had little contact with the people he claims harassed his uncle. He said that when they came his uncle or his uncle's mother always told him to go inside and he has not said he was ever spoken to or harmed by them. The applicant has said he did not know much about his uncle's harassment because he was very young at that time. However the applicant has subsequently spent considerable time with his uncle. The applicant travelled with his uncle to Australia. His uncle attended the applicant's arrival interview with him and the applicant has lived with his uncle in both Sri Lanka and Australia and currently lives with him. I find it surprising his uncle has never told the applicant about his claimed problems with the CID or that the applicant never asked his uncle about this, particularly given its relevance to his central claim to fear harm because his uncle was suspected of LTTE involvement. The applicant's uncle would have been in his [age] at the time. The applicant said that his uncle was never mistreated, detained or arrested in the time that they lived in [City 1] which I would have expected, based on the country information before me, if he were genuinely suspected of LTTE involvement. Given the consistency of the broader claim that the authorities came to the house to talk to the applicant's uncle I am willing to accept this aspect of the claim. It is also not inconsistent with the country information before me. However given the lack of detail, and that his uncle was never mistreated, detained or arrested, that the applicant was released from the refugee camp into his uncle's care without issue and that they were both able to legally depart Sri Lanka without issue I do not accept the applicant or his uncle were wanted by the authorities in connection with an adverse security profile or otherwise. Given its late raising and only when the delegate indicated he had reservations about the applicant's claim to fear being harmed because of his uncle's profile and the serious lack of detail, while I am willing to accept his uncle's family may not have been inclined to look after the applicant at that time, I consider the claim they disliked him an exaggeration intended to strengthen his claim for protection and do not accept it.
13. The applicant claims he will be harmed because his maternal uncle was an LTTE cadre. In the SHEV interview the applicant mentioned for the first time that another uncle, his mother's brother, had been forcibly recruited by the LTTE and died during the conflict. In a post

³ Department of Foreign Affairs and Trade (DFAT), Country Information Report – Sri Lanka, 23 May 2018.

⁴ United Nations Office High Commissioner for Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka, 23 July 2018, UN Doc. A/HRC/40/XX/Add.3; Amnesty International, 8 May 2017, "Only justice can heal our wounds": listening to the demands of families of the disappeared in Sri Lanka'.

interview submission the applicant's then migration agents submitted that this uncle was a cadre in the LTTE but no further detail was provided. The country information before me indicates that during the conflict the LTTE abducted thousands of Tamil adults and children to serve as fighters, many of whom are still missing today.⁵ I am willing to accept the applicant's maternal uncle was forcibly recruited by the LTTE and that he died some nine years ago during the conflict.

14. I accept the applicant may be identifiable as someone who has attempted to seek asylum in another country. However, given the applicant has said he left on a passport displaying his photo at the airport in Sri Lanka without issue I consider he left Sri Lanka legally and in the absence of further supporting information and I do not accept he left or would be perceived as having left Sri Lanka illegally.

Refugee assessment

15. 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

16. 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.
17. I accept the applicant is a young Tamil male from the north of Sri Lanka, and that his grandmother, parents and siblings have either passed away or are missing, that he was placed in a refugee camp at the end of the war and then lived with an uncle in [City 1]. I also accept both he and his uncle may have been harassed by authorities after the war, as many young Tamil men were at that time, but I do not accept they were wanted by the authorities in connection with an adverse security profile, or anyone else, when they left Sri Lanka. I accept

⁵ Amnesty International, 8 May 2017, "Only justice can heal our wounds": listening to the demands of families of the disappeared in Sri Lanka'.

the applicant's maternal uncle was forcibly recruited by the LTTE and died during the conflict, like thousands of other Tamils at that time.

18. The country information before me indicates that conditions in Sri Lanka have improved since the applicant left in about 2011. In 2015 the current President, Maithripala Sirisena, was elected and the government co-sponsored a resolution of the Human Rights Council committing Sri Lanka to a range of transitional justice and reconciliation reforms.⁶ Since the current government's election Sri Lanka has also seen the return of some land held by the security forces during the conflict, the establishment of the Office of Missing Persons, the removal of military checkpoints on major roads, less military involvement in civilian life and a significant decrease in the day-to-day monitoring of Tamils by authorities, among other things.⁷ While the current government has been more recently criticised for its slow progress in delivering reforms, particularly its failure to repeal the problematic *Prevention of Terrorism Act* (PTA) and the endemic and systemic use of torture when dealing with suspects under the PTA, the government has continued to engage with the international community, in particular the United Nations (UN), and progress promised reforms by, more recently ratifying a number of international conventions, drafting framework legislation to replace the PTA (seeking feedback from the UN on this) and adopting a 'zero tolerance policy' toward torture, among other things.⁸ Further, the country information before me indicates outstanding issues relate to largely historical matters, such as the government's failure to deal with perpetrators of past human rights abuses, the return of land confiscated during the conflict and the on-going detention of Tamils charged under the PTA in the past.⁹
19. While the applicant has submitted that recent political instability and a rise in Mr Rajapaksa's popularity at the local elections in February 2018 are signs that reconciliation efforts have failed and Sri Lanka's human rights record will further deteriorate and in particular, that there will be an increase in the monitoring of Tamils and greater impunity for human rights abuses committed against suspected terrorists, the country information before me does not indicate this to be the case. The articles referred to by the applicant in support of this claim detail the proroguing of Parliament in May 2018 after some apparent tensions and reshuffling within government, tensions between Muslim and Buddhist communities and more broadly the community's growing frustration with the current government's slow progress in delivering promised reform.¹⁰ Further, there is nothing before me to suggest the applicant has a political profile and I have not accepted he was wanted by the authorities in connection with an adverse security profile or otherwise when he left Sri Lanka.
20. DFAT assess that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity. DFAT notes that since the change of government in 2015 the Tamil community has had more involvement in the political landscape. While the Special

⁶ DFAT, Country Information Report – Sri Lanka, 23 May 2018; Human Rights Watch, 'Sri Lanka: 2 Years On, Scant Progress on UN Resolution' 13 September 2017.

⁷ DFAT, Country Information Report – Sri Lanka, 23 May 2018; DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

⁸ Human Rights Watch, Sri Lanka: Anti-Terror Bill Revives Concerns of Abuse (18 May 2017); United Nations Office High Commissioner for Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka, 23 July 2018, UN Doc. A/HRC/40/XX/Add.3; Amnesty International, 8 May 2017, "Only justice can heal our wounds": listening to the demands of families of the disappeared in Sri Lanka'.

⁹ United Nations Office High Commissioner for Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka, 23 July 2018, UN Doc. A/HRC/40/XX/Add.3; DFAT, Country Information Report – Sri Lanka, 23 May 2018; The Indian Express, 'Sri Lankan Tamils to protest over political prisoners' 14 October 2017; Amnesty International, 8 May 2017, "Only justice can heal our wounds": listening to the demands of families of the disappeared in Sri Lanka',

¹⁰ Sydney Morning Herald 'Sri Lankan President suspends Parliament' (13 April 2018); Al Jazeera 'Sri Lanka: Muslims fear more attacks during Friday prayers' (8 March 2018).

Rapporteur noted that Tamils were disproportionately affected by the operation of the PTA, it also noted that there had been a very recent steep decline in its use, with its use reportedly only sporadic.¹¹ In 2016, young and middle-aged Tamil men, particularly in the north, reported being regularly harassed by security forces although I note this is now somewhat dated and the government has implemented a number of measures in an effort to repair relations and address grievances and DFAT has indicated that monitoring largely concerns those involved in sensitive political matters.¹² Broadly consistent with the above, in 2017 the UK Home Office stated that being of Tamil ethnicity, in itself, did not warrant international protection.¹³

21. The applicant claims to fear harm because his maternal uncle was forcibly recruited by the LTTE and killed during the conflict. There is no credible evidence before me to indicate the applicant came to the authorities' attention because of his maternal uncle's role in the LTTE. When his maternal uncle died the applicant would have been [age] years of age, at most. DFAT relevantly indicates close relatives of high profile former LTTE members wanted by the authorities may be subject to monitoring, however, I have not accepted that the applicant's maternal uncle was a high profile LTTE member.
22. Thousands of Tamils in the north had some association with the LTTE and many travelled overseas as economic migrants, accordingly, post-conflict, the authorities are only interested in a person's past to the extent it indicates a present risk to the unitary Sri Lankan state.¹⁴ Consistent with this, DFAT reports that the government remains sensitive to the potential re-emergence of the LTTE and that the authorities maintain 'stop' and 'watch' electronic databases, to alert security forces to those of particular interest, such as former LTTE cadres, those who have engaged in separatist or criminal activities or those with an extant court order, arrest warrant or order to impound their passport.¹⁵ If detained in these circumstances an individual may be severely mistreated by the authorities.¹⁶ A report by Amnesty International indicates that former LTTE members, journalists and human rights defenders were typically the victims of forced disappearances thought to have been perpetrated by the security forces in the years following the end of the conflict.¹⁷
23. The country information before me indicates that while the conditions in Sri Lanka have greatly improved for Tamils in recent years, issues remain. In particular close relatives of high profile former LTTE members, former LTTE members, those engaged in sensitive political issues, separatist or criminal activity or who have an extant court order, arrest warrant or order to impound their passport may be at risk of being monitored, harassed, detained or mistreated by authorities. Based on the evidence before me the applicant's profile does not meet any of these descriptions. I am not satisfied the applicant faces a real chance of harm by reason of his origin, ethnicity, age or past experiences in Sri Lanka, including the death of family members in

¹¹ United Nations Office High Commissioner for Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka, 23 July 2018, UN Doc. A/HRC/40/XX/Add.3.

¹² US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka", 3 March 2017, OGD95BE926876.

¹³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁴ Amnesty International, 8 May 2017, "'Only justice can heal our wounds': listening to the demands of families of the disappeared in Sri Lanka"; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, Country Information Report – Sri Lanka, 23 May 2018; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁷ Amnesty International, 8 May 2017, "'Only justice can heal our wounds': listening to the demands of families of the disappeared in Sri Lanka"; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

the conflict, his maternal uncle's role in the LTTE, the applicant's time in a refugee camp and his and his uncle's harassment by authorities after the conflict.

24. In his post interview submission the applicant claimed to fear harm as a consequence of a Departmental data breach in 2014. In his decision the delegate noted that only the applicant's name, date of birth, nationality, arrival and detention status may have been briefly accessible as a consequence of the breach. Given the applicant's profile, including that I do not accept he was wanted by the authorities or any other groups when he left Sri Lanka, and the limited nature of the breach I do not accept there is a real chance he would face harm as a consequence of this breach.
25. The applicant claims to fear harm as someone who has attempted to seek asylum in Australia and who has no family or support in Sri Lanka and no valid passport. DFAT states that processing of returnees at the airport can take several hours. Police check the identity of those returning on temporary travel documentation to ensure they are not attempting to conceal a criminal or terrorist background or avoid court orders or arrest warrants. Returnees are not subject to mistreatment during this process. DFAT states that the biggest problem facing returnees are bureaucratic inefficiencies and social stigma which can affect their ability to secure employment and housing and that they often have to also repay the cost of their boat journey. There are reports, as recently as last year, of returning asylum seekers being monitored by authorities in the north.¹⁸ However, DFAT has noted that evidence of this is only anecdotal.
26. I accept the applicant will have to enter Sri Lanka on a temporary travel document. There is no credible evidence before me to suggest the applicant has a criminal or terrorist background or outstanding court order or arrest warrant and I do not accept there is a real chance he would be detained or arrested on his return. I have not accepted he left or would be perceived as having left Sri Lanka illegally. I have accepted that the applicant will be a returning asylum-seeker and that his grandmother, parents and siblings have either passed away or are missing. He is from the north and has not indicated he would not return there. In the SHEV interview he indicated that while living with his uncle in [City 1], he also lived with his uncle's mother (his father's aunt) and I do not accept the applicant does not have any extended family or contacts in the north. He is currently [age] years of age and while his education was disrupted during the conflict he has undertaken further studies while in Australia. There is no credible evidence before me that indicates he is unable to work. In his arrival interview the applicant said his uncle paid for his trip to Australia and he did not know how much it cost and did not indicate he was required to repay this. While I accept he may experience difficulties reintegrating, including finding employment, and be possibly initially contacted by authorities on his return, given his profile I do not accept these experiences would amount to 'serious harm'.
27. Overall, I am not satisfied the applicant faces a real chance of persecution because he is a young Tamil male from the north of Sri Lanka, because of his experiences in Sri Lanka or the data breach.
28. I am not satisfied the applicant has a well-founded fear of persecution.

¹⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; DFAT, Country Information Report – Sri Lanka, 23 May 2018.

Refugee: conclusion

29. 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

30. 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

31. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
32. For the reasons already discussed, I accept the applicant may experience difficulties reintegrating, including finding employment, and be possibly initially contacted by authorities on his return. However, given his profile I am not satisfied that those circumstances would amount to 'significant harm' as defined. There is not a real risk the applicant would be arbitrarily deprived of his life or subject to the death penalty on his return or be subject to torture. Furthermore, the evidence before me does not support a conclusion that there is an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman in nature or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of significant harm as a consequence of being a returning asylum seeker from Australia without a valid passport.
33. In considering the applicant's refugee status, I have otherwise concluded that there was no 'real chance' the applicant would suffer harm on his return to Sri Lanka for the other reasons claimed. 'Real chance' and 'real risk' involve the same standard.¹⁹ For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

Complementary protection: conclusion

34. 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).

¹⁹ *MIAC v SZQRB* [2013] 210 FCR 505.

Decision

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

Applicable law

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.