



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09950

SRI LANKA  
IAA reference: IAA21/09948

SRI LANKA  
IAA reference: IAA21/09949

INDIA  
IAA reference: IAA21/09947

Date and time of decision: 9 November 2021 17:52:00  
M Anderton, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

*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. The applicants are a family group of four, parents and their young children. Applicants 1 and 2 arrived in Australia by boat from India in April 2013. The children were born in Australia.
2. On 8 September 2017 applicants 1, 2 and 3 applied for safe haven enterprise visas. Since applicant 4 was born afterwards he was joined later to the application.
3. On 21 September 2021 the visas were refused. The delegate did not accept that any of the applicants faced a real chance persecution or that complementary protection obligations were owed.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. No further information has been obtained or received.

### Applicants' claims for protection

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6. Applicant 1 and 2 are defacto partners. Applicants 3 and 4 are their children born in Australia. Applicant 1 was born in Sri Lanka and applicant 2 was born in India. Applicants 1 and 2 made their own claims. The children did not make any claims of their own and relied on being members of the family unit of applicants 1 and 2.
7. Applicant 1's claims can be summarised as follows:
  - He was born in [Town 1], Northern Province and is a Tamil Hindu.
  - The ethnic conflict and repression of Tamils dominated his life since birth. Due to the conflict and for safety his parents decided to move the family to Vavuniya district in 2006.
  - He underwent hardship at the hands of security forces because of his age and the army thinking he would be supporting the Liberation Tigers of Tamil Eelam (LTTE). It was a nightmare every time he was detained or cordoned for checking.
  - His father transported goods between LTTE and government areas with permits. Later applicant 1 became aware that his father was transporting goods for the LTTE and willingly working for them.
  - In July 2008 at the request of the LTTE his father with two others took contraband essentials to them. His father passed through the checkpoints but the third one was detected, and driver detained. The details of the others involved was extracted. So his father stayed in the LTTE controlled area.
  - CID visited their home looking for applicant 1's father. They took applicant 1 to the CID office to question him about the family background connection to the LTTE. He denied

that his father had LTTE connections but would carry anything unknown to him. They assaulted applicant 1 and accused him of being an LTTE member but released him on condition he come whenever he was called by them. From then applicant 1 was subject to regular questioning to check on information they had gathered about drivers and their vehicles.

- CID identified that “T”, who was shot and killed by forces in October 2006, was applicant 1’s uncle and he was an LTTE cadre. CID maintained the LTTE accusations against applicant 1 but allowed him to go home on condition he brought them information about LTTE members who filtered into Vavuniya for attacks or escape. CID openly told him his father was in the LTTE, was in contact with them and to get information about LTTE movements. Applicant 1 agreed and provided some names he had heard so he could escape CID treatment.
- In February 2009 applicant 1’s father escaped the LTTE controlled area disguised as [an occupation 1] and he went to Eastern province and then Vavuniya.
- With the war ending in May 2009 and many escaping and being detained, applicant 1’s father arranged to surrender himself to CID to avoid trouble for the family. He was taken to the army camp and then to an IDP camp. It was arranged by middle men that he would be released after statements were obtained and he would not be kept in an army camp. The middle men were concerned about applicant 1 due to his father’s confession regarding his LTTE association.
- Due to applicant 1’s father situation, CID ongoing interest and LTTE suspicion in applicant 1 and heightened security forces focus on young men in Vavuniya, his family arranged to send him with one of his uncles out of Sri Lanka. The broker moved applicant 1 to Colombo for a few days, obtained a passport, visa to India through his contacts.
- While in India, applicant 1 learned his father was made to confess that applicant 1 was assisting the LTTE and it was at applicant 1’s request and arrangement the goods were transported by to the LTTE. With the father’s statement, the middle men managed to have the father released on condition he reported regularly and appeared in court when charges were made and that he informed of applicant 1’s movements.
- Applicant 1 had a valid visa for India but could not register as a refugee or live in one of the refugee camps there. He was told the war was over and registration procedures had changed and could not get any accommodation in the camps. He managed to register as a refugee but without any accommodation in the camps. He lived on the outskirts of the camp on his own.
- He was afraid to return to Sri Lanka as his family was suspected to be involved with the LTTE and under attention to this day. He had no future in India in obtaining permanent employment, studies or refugee status to gain citizenship.
- He developed a relationship with applicant 2, a refugee girl in Tamil Nadu. Her parents wanted to send her to a safe place. Applicant 1 decided to go with her as if he remained the Q branch officers would take revenge on him over the departure of applicant 2 as they had eyes on her and were aware that she was friendly with him.

8. Applicant 2’s can be summarised as follows:

- She was born in Tamil Nadu, India in a refugee camp. Her parents were refugees from Sri Lanka who had been living there since December 1989.

- She grew up in a refugee camp and their movements outside the camp were minimum other going to school and permitted activities controlled by the camp.
- She completed [grade]. She did not find work due to the conditions of their refugee situation and entering university was very difficult unless you had exceptional scores and were supported by political groups or charities. She was ambitious to study and achieve employment, but their situation frustrated and curtailed her ambitions.
- She learned from her father that his village was targeted to be colonised by Sinhalese people to outnumber Tamils which led to continuing altercations between the population. A lot of atrocities were committed during 1977 communal riots. In those her grandfather and uncle were murdered by Sinhalese hoodlums. Due to this and loss of their lands the family left the village and moved around as displaced person until they went to Vavuniya.
- Due to anger of this loss, applicant 2's father joined the LTTE and worked to support them. He met applicant 2's mother as a fellow LTTE member while in Vavuniya. Due to security operations which threatened the life of her parents as they were identified as LTTE members, they left for India by boat in December 1989. Her parents and extended family still remain in India, fearful of returning because of the support they provided to the LTTE, which is known to Sri Lankan forces.
- Her parents continued to support political groups and parties within India which advanced the political struggle of the Sri Lankan Tamils.
- There were several tense occasions within the camp, but she was told she need not know about and to concentrate on her studies. Applicant 2 did gather they were largely due to Q branch officers making enquiries at the camp with the families or taking away suspected LTTE activists; or militant group members visiting camps for their own purposes which created rivalry amongst occupants.
- As a female, she and many girls met peculiar personal problems from some camp officers and Q branch officers. When officers did ration inspections or roll calls, they would visit and at that time she and siblings at home were indecently assaulted. Officers would make rude comments, do body searches as though they were hiding something. Q branch officers were suspicious of their families, 'but for applicant 2' they would speak to them if she did not resist them. At times without any alternative, she would have to be submissive.
- Q branch officers would visit and call her to their post pretending to make enquiries about people visiting and accuse the family of encouraging Tamil militant activists, if she did not allow liberties with her. They would scold her in bad language, assault her, which was disgusting. Due to growing attention on her as a young girl and not wanting to bear it anymore, her parents made arrangements for her leave.
- She developed an interest in applicant 1. The camp administrators were not happy and jealous about their affairs and they warned her she should not entertain him at the camp. Her parents decided she should leave before something inevitable happened, which was

### Well-founded fear of persecution

9. 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.

#### *Receiving country*

10. Based on applicant 1's identity documents and birth in Sri Lanka to Sri Lankan parents, I accept that applicant 1 is a Sri Lankan citizen and find that his receiving country is Sri Lanka.
11. Applicant 2 was born in India to Sri Lankan parents. Although her former agent submitted her parents were also stateless, the evidence before me does not support that. Applicant 2 told the delegate both her parents were Sri Lankan citizens. Country information indicates that applicant 2 would have Sri Lankan citizenship by descent. However, applicant 2 claims that her parents did not register her citizenship with authorities while in India. I note DFAT country information that those who did not register their citizenship run the risk of statelessness. While applicant 2 has an entitlement to Sri Lankan citizenship, as she is not yet registered as a citizen and in light of the requirements of the Sri Lankan nationality law, I accept that applicant 2 is currently stateless. There is no evidence that she is an Indian citizen. Given she was born and lived in India until her departure in 2013, I find her country of former habitual residence is India and therefore her 'receiving country'. This is despite the fact that she may not have a right to return there ( s.5 of the Act).
12. Applicants 3 and 4 were born in Australia. There is no evidence that they are Australian or Indian citizens. Their parents claim they are stateless. Their father was a Sri Lankan citizen, and under the Sri Lankan Citizenship Act, the children are entitled to Sri Lankan citizenship by descent. According to country information their father would need to register their birth with Sri Lankan embassy in Australia, but applicant 1 claims not to have done that. Therefore, the children are currently stateless also. Unlike applicant 1, they have never resided in any place apart from Australia.
13. The applicants, through their former representative, have claimed that as Applicant 1 (and by equivalence, applicants 3 and 4) are stateless, they cannot return to India, and any assessment should be against Sri Lanka. The Act requires stateless applicants to be assessed against their country of former habitual residence. In the case of Applicants 3 and 4, that concept does not sit easily with persons born in Australia. As noted above, the country information indicates

that they, along with their mother are entitled to Sri Lankan citizenship, and they may well avail themselves of that entitlement. Further,, given the children are young and part of a family unit, I consider it is very likely that they will return with their father to Sri Lanka, rather than India because of the family inherent connection to Sri Lanka and as none of the family have a right to enter India. I note also that applicant 2 is also entitled to Sri Lankan citizenship, so consider it is more likely that all four applicants would be returned to Sri Lanka. I consider it very likely the family will return to Sri Lanka, but for completeness have assessed applicants 3 and 4 both against Sri Lanka and India.

14. I note given the receiving country legislation that applicant 2, as a stateless person must be assessed against India as her former habitual residence. However, presuming any facilitated entry to India would need to be on a lawful basis and noting applicant 2 (and none of the other applicants) does not have a present right of entry to India, I have also assessed her against Sri Lanka.
15. In summary, I have assessed applicants 2, 3 and 4 against Sri Lanka and India. Noting applicant 1 is a Sri Lankan citizen, I have assessed applicant 1 against Sri Lanka only.

*Applicant 1*

16. I accept applicant 1 is a Tamil Hindu from the Northern province.
17. The applicant claimed his father provided and transported goods for the LTTE between government and LTTE areas. He claimed in 2009, on one of his father's contraband runs, one of the other drivers was caught, who told the army about his father. His father, as a result, remained in an LTTE area until the war ended. Applicant 1's father then escaped disguised as [an occupation 1] to the Eastern province and then Vavuniya. Then so that he did not cause trouble for his family, applicant 1's father decided to surrender with the help of middle men. The arrangement was he would provide a statement and not be held in an army camp and released. Due to torture, applicant 1's father was forced to confess that he assisted the LTTE at the request, and by arrangement of, applicant 1. As a result, and because of his age and being harassed and suspected LTTE, applicant 1 was fearful and left for India with a passport and valid visa.
18. Having considered the applicant's claims and evidence, I consider the applicant's account was inconsistent and lacked credibility in a number of respects.
19. For instance, in his arrival interviews, applicant 1 made no mention of his father providing assistance to the LTTE or that his father told authorities that applicant 1 was LTTE. I note however applicant 1 mentioned that his uncle was in the movement (LTTE) and killed.
20. Further, while in his protection interview applicant 1 stated he was arrested once and questioned three times, he made no mention of that in his arrival interviews. I note he was specifically asked if he had ever been arrested at the September 2013 interview and replied no. While applicant 1 later denied he said that at the arrival interview, that is not the case. Further, when asked if police, security or intelligence organisations impacted on his life, he also said no.
21. I am mindful of the observations in *MZZJO v MIBP* [2014] FCAFC 80 about reliance on omissions in arrival interviews and their purpose. I note also the submissions that the applicants were traumatised and did not have knowledge of the legal process, that the initial screening interview was for identity purposes and they were advised it was not time to detail to their

claims, but they could do so later when they lodged their application. I note the agent submissions that applicant 2 was fearful of return if she disclosed her parents LTTE activities.

22. The September 2013 interviews were conducted 5 months after they had arrived. The interviews were over an hour long. Further, the September 2013 interviews were not a screening interview. Further, according to the record, they were warned to tell the truth and that if the information given was different to any future interview it could raise doubts about the reliability of what they have said. They were asked about the reasons they left Sri Lanka and India and what they thought might happen if they returned there. At the end of the interview, they were asked if there was anything else, they wanted to say as well, to which they replied no.
23. Even if they were told to be brief and there would be another opportunity, I find it difficult to believe that applicant 1 would not mention his main claims, about his father's detention and the LTTE accusation against himself and three arrests or questioning incidents, all which were the trigger for his departure from Sri Lanka. Further, I do not accept that the applicants needed to know the legal process to respond to the questions. They were asked to explain their personal circumstances and reasons they left Sri Lanka and India. I find it difficult to believe that they would not mention their main claims and claimed trigger for departure. Further, if the applicant's father provided LTTE assistance and was detained because of that and applicant 1 was accused of being an LTTE member, I find it difficult to believe that applicant 1 would not mention that, particularly given he had no difficulty in mentioning his uncle had been an LTTE member who was killed. It is not credible that he would omit such crucial information, if true.
24. Further, having listened to the interviews and noting the earlier interview records notations that the applicant's understood the interpreter, I do not accept there were any interpreting issues or interpretation explains the problems discussed. Further, while I acknowledge that applicants may be nervous or anxious, I am not satisfied that this explains the problems discussed. Further, I consider they had plenty of opportunity to present their claims and had meaningful opportunity to do so.
25. Further, applicant 1's application statement and protection visa interview accounts also varied.
26. For instance, his account of when and how often he was arrested or questioned varied, as did the circumstances or reasons those events.
27. In his statement applicant 1 said he was questioned after his LTTE uncle's death in October 2006 and required to inform on LTTE movements; and then detained and questioned at the CID office after his father avoided detection on the contraband run in 2008 (early or mid).
28. However, his account at his protection interview was different as he referred to three occasions of arrest/ questioning. Further, his protection interview account did not make sense in the timelines and descriptions given. For instance, initially the applicant claimed he was first arrested in June (or July) 2008 because his father had taken contraband to the LTTE. Then he said the second time he was stopped in the street and taken for questioning ten days later. At this point the applicant said he found out about his father transporting contraband.
29. Applicant 1 said the third time he was questioned at home but not taken away. Initially the applicant could not recall when he was questioned the third time. However, some time later in the interview, with prompting of departure timelines from the delegate, he indicated the third time was one and half months before departing Sri Lanka. (He said he departed Sri Lanka [in] August 2009, and therefore third time would be early July 2009).

30. I consider his account of arrests and being questioned varied significantly from two occasions to three occasions. In his statement, he said he was detained/ questioned twice. In the protection interview it was three times. I find it difficult to believe that he would provide such different accounts, particularly given the referencing to the circumstances or reasons for the questioning. Further, it is particularly difficult to believe that he would not mention in his application that he was questioned by CID at his home one and a half months before departing Sri Lanka. That would have been a crucial event.
31. Further, even taking into account the possibility that the October 2006 (in statement) questioning may have been a typographical error (which was not claimed) and should be 2008, the circumstances/reasons for the arrest do not match up with his protection interview account either. Nor does October 2008 match up with one half months prior to departure or 10 days after his initial arrest in early or mid-2008.
32. I consider applicant 1's account of his arrest/ questioning varied throughout the application process and as discussed above, I do not accept the explanations for that. The variations were significant, were more than just related to differences in his arrival interview and related to his main claims and apparent trigger for his departure.
33. Further, his account of when he knew the reasons for his arrest (to do with his father and his father's contraband trip) varied. The applicant claimed he was first arrested as a result of his father's contraband transport. In his protection interview initially, the applicant said CID did not give him a reason for his arrest and beating, but it was only after a few days that he came to know the reason for his arrest. Applicant 1 said CID asked whether he (applicant 1) was an LTTE supporter/member, carrying goods for them. Later in the protection interview the applicant said when he was taken and questioned a second time 10 days later, he found out about his father's contraband run.
34. However, the applicant's statement suggested that the reason for the arrest was known or at least related to LTTE accusations against his father. For instance, applicant 1 said CID had come looking for his father but the father was not there, so CID they took applicant 1 and questioned him about the family's LTTE connection (paragraph 10 statement). Applicant 1 stated he denied that his father was LTTE or that he would have carried anything unknown to him. Further, I note there was no mention in his statement of another questioning 10 days after applicant 1's initial arrest, where he found out about his father's contraband run (as claimed in his protection interview).
35. There were other variances in his account also. For instance, in applicant 1's statement there were three vehicles who tried to transport contraband for the LTTE in July 2008. Two of them got through, but one was caught. But in his protection interview he said there were two vehicles; his father's vehicle got through, but the other was caught. In his statement the contraband event occurred in July 2008, but at the protection interview he said (twice) it was at the beginning of 2008, then later in the interview said specifically, it was in June 2008.
36. I found the applicant's account of the circumstances, timing of his claimed arrests lacking in credibility and inconsistent.
37. Further his account of when he learned that his father confessed that applicant 1 was LTTE varied. In his statement he said he learned of this when he was India. But in the protection interview he said he learned of it when CID came to his house and they asked him to come the next day or later.



38. Further, I have serious doubts about the applicant's claims that his father transported contraband to the LTTE area. Despite it being a key part of his claim, when asked what the items were the applicant did not know. Further, I note according to applicant 1's statement his father was checked in and out of the areas and had a permit. If he had permits for both LTTE and army controlled areas and was checked in and out, I find it difficult to believe that he was able to transport contraband to the LTTE, particularly when, according to the applicant's statement, the government was pushing ahead with its final stages of the war against the LTTE and prohibiting goods.
39. Further, the applicant's account that due to torture suffered by his father, the father told CID that applicant 1 was an LTTE member and arranged the contraband transport lacked credibility. Firstly, the applicant was young and still in [school] at the time of the claimed contraband trip. Applicant 1 indicated authorities would believe it because young people were suspected LTTE. However, the applicant's father was the adult and the lorry driver.
40. Further, on the applicant's account another lorry driver had doxxed in his father in 2008 for the contraband run, his father had remained in an LTTE area, did not have registration papers for Vavuniya and surrendered to authorities, so it is difficult to believe the father would not have been considered the culprit rather than applicant 1. Further, if authorities believed his father was involved also, it is not credible that they would have released him. Country information is that suspected LTTE towards the end of the war and thereafter were rounded up and sent to rehabilitation camps. That his father was not suggests he was not suspected LTTE. Further, I do not accept that 'middle men' arranged his father's surrender and planned release (or detention only in an IDP camp, rather than an army camp) with payment of a bribe. It is just not plausible. It may be that his father surrendered to an IDP camp and was questioned about LTTE connections, as many thousands were. But if he were suspected or LTTE he would have sent to a rehabilitation camp.
41. Likewise, if the authorities had been told applicant 1 was an LTTE member or involved in taking contraband to them, he would have very likely been sent to a rehabilitation camp. If such an accusation had been made it is not credible that authorities would go to his house question him and tell him to come back the next day or later.
42. Further, I note the applicant obtained a passport and valid Indian visa and managed to fly to India in August 2009, only a few months after the end of the conflict. If he had been of interest to authorities as claimed, I find it difficult to believe that he could have done so without detection. The applicant claimed an agent arranged it for him. He initially said the passport was in his name and genuine with a valid three months visa to India. It was only later in the interview that he tried to suggest that he did not know as the agent obtained it for him. I consider the applicant was shifting his account to enhance his claims. I find the applicant departed Sri Lanka lawfully. I do not accept that the agent facilitated anything fraudulent or untoward.
43. I consider it is not credible that CID were looking for the applicant or that he was of interest to authorities.
44. Like the delegate, I do not accept the applicant's claims that his father was arrested and detained in an army camp or that his father confessed, under duress, that his son was LTTE and responsible for organising the contraband trip. It is just not credible.
45. However, I am prepared to accept that applicant 1 and his father may have been questioned and harassed by authorities as Tamils during the conflict period as this was not uncommon for

Tamil males, in particular. I accept his father transported goods between the areas, including into LTTE areas, with a permit. However, I do not accept that the applicant's father worked for or transported contraband for the LTTE or that he was arrested or wanted by authorities. Further, I do not accept that applicant 1 was accused of being an LTTE member, arrested or wanted by authorities. Further I am prepared to accept that applicant 1's uncle may have been killed in 2007 in the war, as this was not uncommon, and I note the applicant claimed this in early interviews. However, I do not accept that his uncle was LTTE or that as a result the uncle's death, applicant was accused of LTTE and required to report to authorities or provide information about the LTTE. The applicant was young, still at school and I note he did not refer to this in his protection interview despite being given many opportunities to add or mention anything further not discussed. Further, it is not credible that he was asked to provide such intelligence, given he was a school boy with no knowledge of such information.

46. I do not accept that applicant 1 was of any interest to anyone when he departed Sri Lanka. Further, I do not accept the applicant's family in Sri Lanka were of any interest to authorities since then. I note applicant 1 said at any early interview that his mother and sister visited him in India when he had an accident in India and his father remained in Sri Lanka. That they were able to do this further reinforces my view that the applicant and family were not of interest.
47. I have considered applicant 1's return to Sri Lanka as well as the possibility of the children returning with him, noting the children are stateless but could obtain Sri Lankan citizenship if registered. The children have not made any claims of their own. I note DFAT country information that children born overseas to a Sri Lankan citizen must register at a Sri Lankan diplomatic mission in their country of birth or at the office of the responsible government minister in Sri Lanka to receive Sri Lankan citizenship. I note the child and parent birth certificate (which the applicants have) are required and affidavit relating to paternity would be required, since the parents were not married. The cost of doing so in Australia was \$145 and if not registered in the first year of birth, a further fee of \$12 a year is payable. Given this, I do not consider there would be any difficulty in applying for and obtaining citizenship or that having do so amounts to harm. I note Sri Lankan citizens residing overseas can apply for identity documents such as citizenship and passports from any Sri Lankan overseas mission also.
48. I have considered the country information and submissions. I accept that during the conflict and shortly thereafter Tamils were disproportionately harmed and affected, including being detained and tortured and killed.
49. Since the conflict ended, and particularly since 2015, the situation in Sri Lanka has improved significantly. Country information (DFAT, UK Home office) indicated that Tamils per se no longer faced persecution. The Sri Lanka authorities have sophisticated intelligence and do take an interest in those who advocate for Tamil separatism and threaten the integrity of the Tamil state. However, I do not accept any of the applicants have such profile, interest or will be perceived as such. Further, I do not accept that applicant 1 will be perceived as LTTE or LTTE links because of the father transporting goods, uncle's death or as a Tamil having lived in a formerly LTTE controlled area or due to his departure from Sri Lanka and residence abroad or for any reason. Further, I note applicant 1's family continue to live in [Town 1], Sri Lanka and there no claims that they feared or were suffering harm.
50. I note the recent country information and submissions about the return of Gotabaya Rajapaksa in November 2019 to government and the concern this has brought to Tamils, in particular. I note that reconciliation and accountability efforts under the former Sirisena government have regressed since Rajapaksa has come to power, and the anti-Tamil sentiment.

51. Even in the current political situation in Sri Lanka, I do not accept any of the applicants face a real chance of harm on the basis of ethnicity, place of origin, past experiences, familial connections, absence from Sri Lanka, and residence in India or Australia.
52. I note DFAT information that bureaucratic inefficiencies rather than official discrimination present the biggest challenge to reintegration for returnees. Refugee returnees, particularly those who returned without UNHCR facilitation, can experience delays in obtaining necessary identification documents and citizenship. Lack of documentation inhibits access to social welfare schemes and the ability to open bank accounts, find employment or enrol in educational institutions. Limited job availability in the north and east further contributes to difficulties in securing employment and housing. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they were able to reintegrate into their communities and find employment and had not experienced societal discrimination.
53. However, I note applicant 1 was educated to the level of [grade] completion and he has worked in India and Australia as [in] [specified industries]. Further, his family continues to reside in [Town 1], with whom he has been in contact since 2012 (having lost contact between 2009 and 2012). I am not satisfied that applicant 1 faces a real chance of discrimination or difficulties with documentation, employment or reintegration. I note he is a Sri Lankan citizen and has evidence of that. Further, I note country information that Sri Lankan citizens residing overseas can apply for identity documents such as citizenship and passports from any Sri Lankan overseas mission also.
54. I have considered the children's return also to Sri Lanka as stateless persons. As discussed above, the children are eligible for Sri Lankan citizenship as well and just need to be registered. I note the submissions that there have been administrative barriers for refugees approaching overseas missions to register children born overseas, and applicant 2 was such a victim and stateless because of these issues. However, this country information was in relation to UNHCR returns from Tamil Nadu to Sri Lanka and difficulties getting exit permits from Tamil Nadu in India. The applicants are in Australia and the children were born in Australia. They could be registered at the High commission in Australia. Further, applicant 1 has a Sri Lanka birth certificate and the children have birth certificates. Further, given their facilitated return to Sri Lanka, there is no evidence to suggest any such return would be other than on a lawful basis. They have not claimed to fear harm on the basis of their citizenship status. I am not satisfied that the children face a real chance of harm as stateless returnees.
55. While I acknowledge the children were not born in Sri Lanka, they are still young, and will return as a family group with their father (and possibly also with their mother, if she does not return to India) and have the support of each other. I do not accept that the children or of the applicants face a real chance of harm on the basis of their ethnicity, background, familial connections, experiences or for any reason upon return to Sri Lanka.
56. The present government has been in power now for nearly 2 years and the evidence before me does not support a return to civil conflict or a real chance of harm to someone with the applicants' profiles.
57. I do not accept applicant 1 was or will be of any interest to Sri Lanka authorities upon return or that he was or will be perceived as pro-LTTE, anti-government, separatist or of adverse interest. I do not accept applicant 1's family were or are of ongoing interest to authorities.

58. Even considering the present the situation, I do not accept any of the applicants face a real chance of harm as Tamils, because of their origins, being away for a long period in the Tamil diaspora in Australia and India or due to their past experiences or family links.
59. I accept the applicants will return as failed asylum seekers. Applicants 1 and 2 were subject to the Department of Immigration 2014 data breach. The children were not born at that stage, so would not have been subject to the data breach. The data breach did not disclose their claims to protection. At most, it may be inferred from the information available that they were seeking asylum. In any event, as the applicants will very likely return on temporary travel documents, I accept that they may be recognised as failed asylum seekers. I am not satisfied that they otherwise face a real chance of any harm as a result of the data breach.
60. According to the country information there are many thousands of failed asylum seekers who are returned to Sri Lanka, including from Australia and India, without harm. I have considered the country information reports about some failed asylum seekers being detained. However, other than LTTE or criminal suspects, the overwhelming credible evidence is that failed asylum seekers and returnees return without harm.
61. I accept there are some reports of monitoring in the north upon return. However, I note DFAT country information that Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits. In any event, I do not accept that any of the applicants will be of adverse interest or perceived to have LTTE connections that would lead to monitoring of them. As discussed above, applicant 1's father's transport of goods in the area was many years ago, was limited and with permits. I do not accept the death of applicant 1's uncle in 2007 raised or will raise his profile. I have not accepted he transported contraband, worked the LTTE or was arrested or wanted by authorities. Further, I have found that applicant 1 was not of adverse interest when he departed Sri Lanka and I am not satisfied that he or any of the applicants they will be upon return. Many thousands have also returned from Tamil Nadu to Sri Lanka without harm. I do not accept they face a real chance of any monitoring or any harm upon return as failed asylum seekers, returnees, their residence in India or Australia.
62. Applicant 1 departed Sri Lanka lawfully and none of the other applicants have been in Sri Lanka. There will be no penalties for illegal departure therefore. However, I accept that upon return of the applicants to Sri Lanka with a temporary travel document that they will very likely be subject to an investigative process to confirm identity. According to DFAT this would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants and often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. I note processing at the airport may take several hours and returnees are processed in groups, though free to talk to each other and go to the bathroom. Further, I have not accepted that applicant 1 has a criminal or terrorist background or was of adverse interest to authorities or will be perceived as such. Further, applicant 1's family continue to reside in [Town 1]. Further, I do not accept that applicant 2 has or will be perceived to have any such criminal or terrorist background or of adverse interest or that any of the applicants face a real chance of harm due to connection to her either. I do not accept that applicant 1 or any of the applicants (including applicant 2, if she returns to Sri Lanka) face a real chance of harm during such process.
63. I have had regard to all the evidence before me and the totality of the personal circumstances of applicants 1, 3 and 4 and the recent political landscape. I am not satisfied any of them has a

well-founded fear of persecution from anyone for any reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, upon return to Sri Lanka.

*Applicant 2*

64. In her statement Applicant 2 claimed during the 1977 communal riots in Kantalai her grandfather and uncle were murdered by Sinhalese hoodlums and because of that her father joined the LTTE. Applicant 2 claimed both her parents were LTTE and known to authorities, so they fled to India in 1989. She also claimed that Q branch officers made rude comments and body searches and assaulted her. The officers were suspicious of their families and accused the family of encouraging Tamil militant activists and if they did not allow liberties to be taken with her, something serious would happen.
65. At the protection interview applicant 2 said she feared return to Sri Lanka because her parents were involved in the LTTE and she would be questioned about her family background and bound to disclose it and she would be tortured. She claimed her father transported goods for the LTTE and provided information about the safe places. Her mother fought in battles. Applicant 2 claimed that while in India, her parents attended meetings supporting the LTTE outside the camp and they also attended protests in the camp. Applicant 2 claimed whether she was inside or outside the camp in India Q branch officer touched her inappropriately and used bad language.
66. However, I note applicant 2 had not mentioned any of these claims in her October 2013 interview. Further, she had stated that neither she nor her family were involved in any activities or protests and the police, security or intelligence organisations did not impact on her daily life. The delegate sent a s.57 letter to the applicant noting this and indicating that as a result, she might doubt applicant 2's credibility.
67. Post interview submissions responded that the applicants were traumatised, did not have knowledge of the legal process and initial screening interview was for identity purposes and they were advised it was not time to detail to their claims, but they could do so later when they lodged their application. It was submitted that applicant 2 did not disclose her parents' activities as she feared she may have been forced to return as she had heard this in the detention centre. It was submitted that applicant 2 did not have a perception of particular social groups or understanding of the purpose of the question about impacts of security organisations on her daily life.
68. As discussed above and for similar reasons, I do not accept the explanations. The interview was many months after their arrival, lengthy and they were asked about the reasons why they departed and what they believed would happen if they were returned. Further, this was not just a case of the applicant not mentioning an important facet of her claims but also of providing statements to the contrary. I do not accept that they needed knowledge of the legal process to outline their experiences or fears. Further, applicant 2 was educated having completed [school grade] and I find it difficult to believe she would not understand the questions about interactions with police or security. If she or her family had been subject to such frequent harassment and accusations and supported political groups or attended demonstrations, I find it difficult to believe that she would respond in the negative. I do not accept her explanations that she was fearful or being returned if she disclosed her parents' activities. They were warned of the confidentiality of the information and need to provide truthful information. Further, given these were her key and only claims, I find it difficult to believe that she would not have mentioned them.

69. Further, applicant 2's account at the protection interview was unconvincing. Initially, she said her father assisted the LTTE. I note it appeared that she did not understand the word for member of the LTTE and when this was explained, applicant 2 said her father was an LTTE member. The delegate asked for more details of her father's activities. Applicant 2 reiterated he assisted the LTTE going out with them. When asked again for details about his activities and what that meant, applicant 2 said when there were problems her father would stand with them and support them. Eventually, applicant 2 said her father transported things for the LTTE. Then she said he was not a driver, but gave information about where the safe areas were. Further, when asked about her mother's LTTE history, applicant 2 initially said her mother assisted the LTTE. Again, the delegate had to ask the applicant for more details and what she meant by that. Applicant 2 then stated her mother had gone to battle.
70. I acknowledge that applicant 2's knowledge of her parents' activities in Sri Lanka would be based on information the parents provided to her. However, I found applicant 2's description of the parents LTTE involvement unconvincing and very superficial. For instance, her initial description was that her mother assisted the LTTE, then it was she was working the LTTE, rather than immediately saying her mother fought for the LTTE in battle. Further, applicant 2 had to be asked a number of times for more information about her father's LTTE activities. Further, I note applicant 2's statement did not describe her father's LTTE activities either, but rather stated that he "worked in support of them".
71. I note applicant 2 also said that her parents attended LTTE meetings outside the camp. They also attended demonstrations, which lots of Tamil refugee camps had and were attended. When asked whether her parents organised the demonstrations in India, applicant 2 initially said it was not one person but took many people to organise this. The delegate asked applicant 2 again if her parents organised the demonstrations; applicant 2 said they did. The delegate found applicant 2's description vague and general and did not accept that the parents organised demonstrations. Similarly, I do not accept that applicant 2's parents organised demonstration or protests.
72. Further, I find it difficult to believe that her parents were able to leave the camp and attend LTTE meetings, given on her own evidence, one had to sign in and out of the camp, explain and have a good reason for leaving the camp. Further, according to her statement people were taken away from the camp who were suspected LTTE activists. I note applicant 2's statement that Q branch would accuse the family of encouraging Tamil militant activists if applicant 2 did not allow the officers some liberties. However, even if that were case, if her parents were LTTE members, including had fought with the LTTE and attended LTTE meetings and protests, I find it difficult to believe that they would have been allowed to remain in the camp. On the applicant's own evidence, Q branch officers took away suspected LTTE members or activists from the camp. Further, DFAT notes that there were "special" camps in Tamil Nadu managed by the prisons inhabited by former LTTE members or those we with criminal convictions who were not permitted to leave, work or receive benefits. Given applicant 2's parents were not taken away and still remain in the normal refugee camp, this further reinforces my view that applicant 2's parents did not attend LTTE meetings or that were LTTE members.
73. I am prepared to accept that two of applicant 2's family were killed in communal riots in 1977 and the family was displaced and went to India in 1989 as according to the country information this was not uncommon during the conflict. However, given applicant 2's failure to mention key LTTE claims, lack of details in her application statement and her unconvincing protection interview account I do not accept that her parents were LTTE, attended LTTE meetings or protested against the government. That her parents continue to live and remain in the camp without harm further reinforces my view. I do not accept that applicant 2's family were of

adverse interest to Sri Lankan authorities or Q branch or anyone. If applicant 2 were to return to Sri Lanka I do not accept that she faces a real chance of harm.

74. However, I am prepared to accept that officers may have used bad or sexually provocative language to her as a young girl in India. I accept she may have been sexually harassed and subject to searches and inappropriate touching. However, I do not accept applicant 2 was questioned about her parents' activities or protests, as I do not accept that her parents were involved in LTTE meetings or protests or accused of being Tamil activists.
75. Noting that applicant 2 is not presently a Sri Lankan citizen, I have considered applicant 2's return to India, her country of former habitual residence. I acknowledge also that her husband is a Sri Lankan citizen, so if she were to return to India, it would in all likelihood not be with him.
76. I note the children are presently stateless, but could obtain Sri Lankan citizenship by descent and given this, may well return to Sri Lanka with their father. I have considered their return to Sri Lanka above. However, I have also considered them as if they might return with their mother to India.
77. I note neither the children nor applicant 2 have a present right to return to India and are stateless. Despite this, under the Act, India is applicant 2's receiving country. According to DFAT the Australian immigration department is required to notify Indian authorities prior to the arrival of escorted removals from Australia and the Indian High Commission has previously advised of the requirement that a travel document application should be signed by the applicant and accompanied by a letter stating the applicant consented to the issuance of the document and is willing to return to India. There is no evidence before me to suggest that any return to India, if it were to occur, would be otherwise than a lawful basis. I have considered their circumstances in India upon return.
78. According to DFAT, in October 2019 it was estimated that there were around 62,000 Sri Lankan Tamils in 107 camps dispersed throughout Tamil Nadu. They receive monthly cash and in-kind assistance from the Indian and Tamil Nadu governments. Just under 37,000 Tamil refugees live outside the camps as 'non-camp refugees'. Approximately 210,000 refugees and asylum seekers of various origins reside in India, according to UNHCR; 60,800 were in Tamil Nadu in various/unknown locations in planned or managed camps. Anecdotal evidence suggests the actual number of refugees and asylum seekers resident in India is likely to be higher.
79. While applicant 2 claimed her education and employment ambition was curtailed due to her refugee situation in Tamil Nadu, I note that she completed [grade] in Chennai and departed India shortly thereafter ([grade] education certificate issued in [year]). I note her claims that she was called 'refugee' at school and was subject to camp restrictions, having to sign in and out of the camp and provide reasons. However, I do not consider applicant 2 faced harm, much less serious harm, in that regard or that she faces a real chance of such upon return.
80. Further, there is no claim or credible evidence before me that the children face a real chance of harm in India and I am not satisfied that they will.
81. I note applicant 2's experiences of sexual harassment in India from officers and the country information about treatment of women in India. DFAT assesses women across society, but particularly in rural areas and from lower castes, face a moderate risk of societal discrimination and violence. This can include sexual, domestic and dowry-related violence. I note applicant 2's parents and siblings still reside in India. I note that the delegate concluded that the applicant

would have adequate familial protection in India and applicant 2 provided no information to the IAA contesting this. Further, like the delegate I consider applicant 2 is older, married (albeit her husband may not be with her, if he is returned to Sri Lanka) and would have the protection of her father and own family. Similarly, the children would have family protection. Further, there was no claim or credible evidence of any domestic violence.

82. Further, like the delegate and for the same reasons, I do not accept that applicant 2 faces a real chance of harm or punishment for illegal departure from India.
83. On the evidence, I am not satisfied that applicant 2 (or the children) face a real chance of not being able to subsist or be educated. I note country information that those in the camps are provided government assistance and those outside the camps who have not registered are generally better off than those in the camps as they run successful businesses. In any event, I note her parents are still there and her father was a [specified occupation]. While they may face some societal discrimination as they are not Indian citizens but refugees or restrictions on movement if in the refugee camp, I am not satisfied it amounts to serious harm.
84. While I accept that applicant 2 faced sexual harassment in India in the past, I consider the chance of that occurring again is lessened, given she is older, married, has children and has the protection of her family. On the evidence and based on her circumstances, I am not satisfied that she faces a real chance of sexual assault, violence or serious harm. Further, even if she faces some harassment or discrimination based on gender such as inappropriate comments or provocative language, while objectionable, I am not satisfied that it rises to the level of serious harm. I am not satisfied that the female child applicant faces a real chance of sexual harassment or harm in the foreseeable future as she is a young toddler and has the protection of her family.
85. I have had regard to all the evidence before me and the totality of the personal circumstances of applicants 2, 3 and 4. I am not satisfied any of them has a well-founded fear of persecution from anyone as stateless Tamil refugees in India or for any reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, in India.

*Return to Sri Lanka*

86. In the event that applicant 2 is returned to Sri Lanka, like applicant 1 above, I am not satisfied that she faces a real chance of harm upon return to Sri Lanka. I have not accepted that her parents were LTTE, attended LTTE meetings or demonstrations or of adverse interest to Sri Lankan authorities or anyone. I do not accept that applicant 2 upon return will be of adverse interest to authorities either or that she faces a real chance of harm from them on account of her ethnicity or her connection to her husband or her family.
87. While she may be questioned about her identity and background, I do not accept that she or her family will be of adverse interest. She has identity documents and if returning with her husband would have his support also. As discussed above, many thousands fled Sri Lanka for India during the conflict, as her parents did, and many children were born in Tamil Nadu, as she was. She has identity documentation that indicates her birth and residence in Tamil Nadu also. Similarly, as discussed above, I do not accept that applicant 2 faces a real chance of harm as a failed asylum seeker subject to the data breach, her residence in Tamil Nadu or as a returnee.
88. Further, even returning as a stateless person, I am not satisfied that she faces a real chance of harm. She has a birth certificate for identity and Indian school and refugee cards to confirm her identity. Further, given her facilitated return to Sri Lanka, there is no evidence to suggest any



such return would be other than on a lawful basis. The evidence before me does not support that applicant 2 faces a real chance of harm as a stateless person.

89. Further, I consider she could obtain Sri Lankan citizenship.
90. I note the country information about administrative barriers in obtaining Sri Lankan citizenship and identity cards and Indian exit permits, but this relates to large scale repatriation from Tamil Nadu to Sri Lanka. Applicant 2 confirmed at the protection interview that both her parents are Sri Lankan citizens. She is therefore eligible for Sri Lankan citizenship and would need to register in Sri Lanka and pay \$205. On the evidence, I am not satisfied that she could not register her citizenship. In any event, she would be required to register her identity (as do all adults in Sri Lanka) under the Registration of Persons Act. Following this she is eligible to apply for a national identity card, which is obtained through the grama niladhari or Department for Registration of Persons. According to DFAT identity cards were issued within a month of granting citizenship.
91. I have also considered her gender and the country information about the prevalence of violence against women. However, if she returns to Sri Lanka, she will have the protection and support of her husband. I am not satisfied that she faces a real chance of sexual violence, discrimination or other harm. Likewise (even though not claimed) I do not accept the female child applicant faces a real chance of harm based on gender as she has the protection of her family and is a young toddler.
92. I have had regard to all the evidence before me and the totality of the personal circumstances of applicants 2, 3 and 4 and the recent political landscape. I am not satisfied any of them has a well-founded fear of persecution from anyone for any reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, upon return to Sri Lanka.

#### **Refugee: conclusion**

93. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

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94. Under s.36(2)(aa) of the Act, 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**

95. 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.
96. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are in turn defined in s.5(1) of the Act.
97. In respect of applicants 1, 2, 3 and 4 I have not accepted that any of them face a real chance of harm upon return to Sri Lanka and likewise I do not accept that any of them faces a real risk of harm upon return to Sri Lanka.
98. In respect of applicants 2, 3 and 4’s return to India, even if they face societal discrimination or restrictions on movement if in a camp, as they are not Indian citizens but refugees upon return, I do not accept that it amounts to severe pain or suffering, pain or suffering that can reasonably be regarded as cruel or inhuman, or extreme humiliation or that there is a real risk of death penalty or arbitrary deprivation of life, torture (or any significant harm as defined).
99. In respect of applicant 2’s return to India, even if she faces sexual harassment such as inappropriate comments or provocative language upon return, I do not accept that it amounts to severe pain or suffering, pain or suffering that can reasonably be regarded as cruel or inhuman, or extreme humiliation or that there is a real risk of death penalty or arbitrary deprivation of life, torture (or any significant harm as defined). I have not accepted that any of the female applicants faces a real risk of sexual violence or violence or significant harm (as defined).
100. I have otherwise not accepted that they face a real chance of harm upon return to India. Likewise, I do not accept that any of them faces a real risk of harm.

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

101. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

#### **Member of same family unit**

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102. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression ‘member of the family unit’ is defined in r.1.12 of the Migration Regulations 1994 to include de facto partners and children.
103. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).
104. The IAA affirms the decision not to grant the referred applicants protection visas.

## 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.