



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09231

Date and time of decision: 28 June 2021 11:07:00
M Wei, 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 referred applicant (the applicant) claims to be a national of Sri Lanka. He arrived in Australia in October 2012 and lodged an application for a Safe Haven Enterprise visa (SHVE), Subclass 790 in July 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 31 May 2021. The delegate found that the applicant did not have a well-founded fear of persecution and that there was not a real risk of significant harm upon his return to Sri Lanka.

Information before the IAA

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

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He is a Tamil and of the Hindu faith, born in [year], from Kilinochchi, Northern Province.
 - Between 1997-2001, when he and his family displaced to another village, they faced harassment from the Sri Lankan army because they were from an area occupied by the Liberation Tigers of Tamil Eelam (LTTE).
 - From 2002 until 2008, He worked for his family business. He owned a business that rented [products]. He provided [products] for the LTTE for free for [their purposes]. He was not a supporter of the LTTE but did this because his family and village expected him to do.
 - The Criminal Investigation Department (CID) physically abused his father on many occasions as the authorities believed that his father had strong connections with the LTTE. His father fled to India in 2007.
 - In 2008, the Sri Lankan army captured his village and directed his family to a refugee camp run by the UNHCR and the Red Cross. The camp however was under the army control.
 - The CID questioned him twice while he was living in the camp about if he was a member of the LTTE or having supported the LTTE through his business and he was beaten.
 - He was released from the refugee camp in 2010 and went to Jaffna where he commenced doing the same kind of business again, providing [products]. The Eelam People's Democratic Party (EPDP) asked him to provide his services for free. When he refused, the EPDP told the CID that the applicant was an LTTE member. In 2010, a white van with three officers from the CID came to his house and enquired about his connections with the LTTE. Out of fear, he returned to Kilinochchi with his family in 2011.
 - In Kilinochchi, the CID often came to his home questioning him about his LTTE connections. From November 2011, he experienced a series of attacks where he was questioned and beaten.
 - In September 2012, three unidentified masked individuals visited the applicant's home. They questioned him about his connections to the LTTE. He was badly assaulted. He believed they were from the EPDP and the CID.

- He lodged a complaint with the police the next day. The same night, the same masked individuals came to his house and assaulted him again. They told him that they were from the CID and he must not complain to the police. He was asked to report to the CID camp the next day and was threatened. He did not report as instructed.
- He did not want to withdraw his police complaint but felt he had no choice. About two weeks later, he left Kilinochchi and went to [Town 1] without his family, where he stayed in hiding as he was recovering from his wounds. The CID continued to make enquires about him through his family in Kilinochchi.
- His brother 'K' was employed by the LTTE in their camp working voluntarily in their [premises]. The CID believed that K to be a stronger LTTE supporter. K experienced physical abuse and threats from the CID. K also had some involvement in the family business before the applicant joined the business.
- He and K came to Australia on the same boat.
- His cousin(s) were shot dead. One cousin worked in a LTTE camp in Kilinochchi.
- The CID continued to inquiry about his whereabouts through his wife after he left Sri Lanka.
- He fears that he would be targeted by the EPDP, who are known for abductions, extortion and killing people. He feared from the unidentified people who had attacked him.
- He fears harm because of his brother's involvement in the LTTE.
- He suffered mentally after he was attacked. He has seen a psychologist in Australia. He continues to suffer from physical pain because of his injuries.
- He would be detained and imprisoned by the Sri Lankan authorities including the CID. He would be a specific target because he had issues with the CID before who believed that he is supporter of the LTTE. He fears harm from the Sri Lankan authorities who would target him believing that he had complained about the Sri Lankan authorities to the Australian government and Tamils who have resided in Western countries are perceived to be involved in political activities.

Factual findings

4. The applicant stated in the visa application that he continued to suffer mentally after he was 'attacked', such as having nightmares and having difficulty to sleep. He also stated that he continued to suffer from some physical pain due to his injuries. He further stated that he had seen a psychologist in Australia who had treated him for the mental trauma he experienced in Sri Lanka. No independent evidence was provided as to when the applicant saw a psychologist in Australia or any mental health assessment or diagnosis made in respect of his mental health condition, or any treatment he has received or any ongoing treatment he requires in regard to his mental health or physical injury. Neither has the applicant expressed any concern in regard to his access to mental and health care on returning to Sri Lanka. I note this was nevertheless considered by the delegate.
5. I also note during the SHEV interview, when the delegate asked the applicant to explain the differing dates he had given about his time involving in his family business, he said that he could not recollect the dates because he was under pressure. Later on during the interview the delegate asked the applicant about his wife and children. At this point, the applicant raised that his father and family in India were affected by the coronavirus in the refugee camp. He said that because of this, he was not feeling very well and could not remember things. The delegate

offered the applicant a break, though the applicant did not take it. The applicant also did not take the offer for another break towards the end of the SHEV interview.

6. I understand that SHEV interview can be a stressful situation. I understand that his family's situation in India would likely to have put added stress on the applicant. I accept that the applicant might have some difficulty in recalling a completely accurate account of past events and timeframes due to stress and the lapse of time. I have taken this into account in my findings below. Nevertheless, I note at the SHEV interview the applicant was generally responsive and was able to address the issues raised and advance his claimed fears.
7. Although the applicant did not have a representative, his visa application was provided with the assistance of migration agent and attached a number of supporting documents. While he raised issues at the SHEV interview that he was under stress, he did not say that he was receiving any mental health treatment or counselling. I accept that the experience and harassment (to which I have accepted) because of the conflict might have impacted on his mental health to some extent and that applicant might have received some psychological counselling in Australia at some stage. I also note that the applicant was also able to gain employment in Australia. In the absence of any independent medical evidence and diagnosis, I am not satisfied that the applicant is currently suffering from any significant mental or physical health condition that requires ongoing medical treatment. On the evidence before me overall, I consider that the applicant was given a meaningful opportunity to present his case before the department including during the SHEV interview.
8. The applicant has consistently claimed that he is a Sri Lankan Tamil, born in Kilinochchi district in the Northern Province of Sri Lanka in [year]. Documentary evidence provided to prove his identity includes his Sri Lankan birth certificate and his national ID Card. I am satisfied that the applicant is [an age] year old Tamil originating from Kilinochchi district. I am satisfied that he is citizen of Sri Lanka and that Sri Lanka is the receiving country.
9. The applicant's evidence was that his brother K came to Australia with him and is currently in Australia on a bridging visa, having also applied for asylum in Australia. His wife and [children] are living in Kilinochchi. His father, step-mother and other siblings are living in India. I accept this evidence.
10. The applicant has claimed that he and his family had lived in Kilinochchi which was under the control of the LTTE prior to his displacement to a [Town 2] refugee camp in 2008, apart from another period of displacement between 1997 to 2001. Based on the evidence provided, including documentary evidence regarding his displacement, I accepted that the applicant and his family were displaced in 1997 and returned to Kilinochchi in 2001 and later again displaced shortly before the war ended. They were living in a refugee camp in [Town 2] from June 2008 when the army captured his village until February 2010. The applicant stated that the camp was run by the UNHCR and the Red Cross but was under the control of the army. I accept this was likely the case.
11. The applicant has claimed that he and his family members faced constant problems during the war and after the war on suspected LTTE connections for reasons of being Tamil from an LTTE controlled area and/or having provided free hire to the LTTE through his family business that rented out and set up [products] for [their purposes]. He also claims that he faced harassment from the EPDP who sought free hire from his business after the war.
12. The applicant stated in the visa application that he worked in his family business he owned from 2002 to 2008 in Kilinochchi. During this period, he provided free hires to LTTE for their

[purposes]. His father fled to India in 2007 because his father was physically abused by the CID and authorities on many occasions as the authorities believed his father had strong connections with the LTTE. At the SHEV interview, the applicant provided varying dates as to the period of his involvement in the family business. He initially stated that he conducted the business from 2007 to 2009. After being further questioned by the delegate, he then said it was between 2002/2003 to 2008. He also said that his brother was involved in the family business before his brother got married and before he himself got involved. He also said that he worked with his father before his father left for India in 2007 and after that he himself carried on the business.

13. Despite there was some inconsistency, I am willing to accept that the applicant was involved in the family business in Kilinochchi from about 2002 until 2008 after they returned from the first displacement and before he was displaced for the second time. His evidence was also that his father was the one who was doing the business and that he continued the business after his father left. Given his father left Sri Lanka in 2007, I consider the applicant's role in the family business was more of an assisting role to his father prior to his father's departure and that he only carried out the business on his own from 2007 until he was displaced in June 2008, which may also explain why he initially stated in the SHEV interview that he worked in the business from 2007. I also accept that his brother K might have been involved in the family business for a period in the early days, noting the family were displaced between 1997 and 2001.
14. The applicant also claimed that his brother K was employed by the LTTE in their camp which was [near] their home, working as a [occupation 1] in the [premises]. He claimed that his brother chose to work for the LTTE voluntarily and CID believed K was a strong supporter of the LTTE. He claimed that for this reason, his brother was experiencing physical abuse and threats from the CID. At the SHEV interview, the applicant reiterated that his brother worked in the LTTE camp as [an occupation 1] from 2002 until 2008. When the delegate sought clarification if his brother was just running his [occupation 1] business or that he was a member of the LTTE, the applicant replied that his brother was doing [an occupation 1] business. He also said that he was working for them after having been trained by them.
15. While not being mentioned in his visa application, I note the applicant had stated in the arrival interview that he received one month self-defence training from the LTTE in 2005 that was given to 'all of us' and no weapons were involved.
16. Country information indicates that that the majority Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course. The LTTE also targeted middle- and upper-class Tamils within Sri Lanka for extortion. The LTTE was known not to tolerate dissent within areas under its control. At its peak in 2004, the LTTE had an armed force of approximately 18,000 combatants. The LTTE had an intelligence wing, a political wing and an extensive administrative structure based in its de-facto capital of Kilinochchi. Country information also indicates that ordinary Tamils in the north and east during the conflict period, were subject to monitoring, harassment, arrest, detention or mistreatment by security forces as security forces often imputed LTTE support based on ethnicity. Country information further indicates that there were serious human rights violations against Tamils from the government side and also the LTTE side during the war.¹
17. Given the applicant and his family had lived and conducted the business in the LTTE controlled area, on the country information before me, it is plausible and I accept that he received one month self-defence training from the LTTE. I also accept that his family provided free hire to the

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report -Sri Lanka", 4 November 2019, 20191104135244.

LTTE. In this respect, I am willing to accept that his father was 'physically abused' by the CID due to his role in the family business and their support to the LTTE. On the limited evidence provided, noting the country information the LTTE had an extensive administrative structure in Kilinochchi, I am also prepared to accept that his brother did [occupation 1] work for the LTTE in the LTTE camp and had experienced some 'physical abuse and threats' from the CID due to his employment with the LTTE as [an occupation 1] and possibly his association with the family business. The applicant's evidence does not indicate and there is no convincing evidence before me to support that his father or his brother was detained for any lengthy period, charged or jailed for suspected LTTE connection or that his brother was a member of the LTTE or that his brother was sent to rehabilitation after the war. I find so accordingly.

18. In his visa application, the applicant also claimed that his cousin 'T' was shot dead (he did not say when he was shot or by whom) and after this incident his remaining family all feared that they would be harmed in the same way, which was one of the reasons he left Sri Lanka. This evidence would suggest that his cousin T was killed before he left Sri Lanka. He also stated in the visa application that he heard from his cousin who used to work in the LTTE camp in Kilinochchi about a boat going to Australia. He stated that his cousin experienced threats from members of the CID who believed he was a member of the LTTE. He further stated that his cousin was shot dead in June 2015 by the CID in Jaffna and there was a news story about his cousin that he saw on Facebook, though no news article about this was provided. This evidence would suggest that this was a different cousin and not T. In light of the country information referred to above that the majority Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course, particularly in Kilinochchi, I am willing to accept that he had a cousin who had worked in a LTTE camp in Kilinochchi before the war ended. However, there is no suggestion, nor is there probative evidence to support, and I am also not satisfied that his cousin or cousins were LTTE combatants or had any significant role in the LTTE. The applicant's evidence also provides little insight why his cousin or cousins were met with such fate given they did not have a significant role in the LTTE. I am doubtful that one or two of his cousins were shot dead by the authorities. Even I were to accept that one or two cousins of his were killed by the authorities for actual or suspected LTTE involvement, beyond they were his cousins, the applicant's evidence does not indicate he had any direct association with his cousin's LTTE involvement or he was suspected of such or that the authorities had questioned him about his cousin's LTTE involvement.

19. In respect of the treatment the applicant claimed that he had faced, he stated that, while living in the refugee camp from 2008 to 2010, he was questioned twice by the CID about his connections with the LTTE and was asked if he had supported the LTTE through his business. He stated that the CID told him that some people in his village had said that he belonged to the LTTE and that an LTTE camp was [near] his family home. He further claimed that on one occasion he was physically assaulted. Country information before me indicates that towards the end of the war, government security forces arrested and detained a large number of LTTE members. Most were sent to government-run rehabilitation centres. A smaller number were prosecuted through Sri Lanka's court system. Those targeted for rehabilitation included not just former combatants, but also those who performed non-combat functions for the LTTE as part of its civilian administration in Tamil-populated areas. Security forces also questioned or monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment.² I accept that the applicant was questioned about his LTTE involvement such as whether he was a member or supporter during his approximate 18 months stay in the refugee camp. I am also willing to accept that he was physically assaulted on one occasion. However, despite the questioning he was being subjected to, despite the CID was told that the applicant belonged to the LTTE and

² Ibid.

that an LTTE camp was [near] his family home, and despite his familial links to his father, brother or cousin, the applicant was released from the camp after the war in 2010 and was not sent to rehabilitation or otherwise arrested or detained. The applicant's release from the refugee camp in February 2010 indicates that the authorities including the CID did not consider he was a person of interest despite his low-level support of the LTTE through his business and his family members' support or involvement in the LTTE.

20. The applicant has claimed that after he was released from the refugee camp he went to Jaffna and started doing a same line of business as he did in Kilinochchi and he faced trouble from the EPDP who wanted to use his services without paying. He claimed that because he refused the EPDP's requests, the EPDP told the CID that the applicant was an LTTE member. After this, the applicant was visited at home and interrogated about his LTTE connections by three CID officers in a white van in Jaffna in 2010. This interrogation made him fearful that that he would be abducted and tortured, so he left Jaffna with his family and returned to Kilinochchi in 2011. The applicant further claimed that there was a big CID camp close to his house in Kilinochchi. The CID officers often came to his home to enquire about his LTTE connections. From about 'the beginning of November 2011', he experienced a serious of attacks where he was questioned and beaten. In September 2012, three masked unidentified individuals came on motorbikes to his home badly assaulted him and questioned him about his connections to the LTTE. The attack only stopped because his attackers thought he was dead. The applicant claimed that he lodged a police complaint the next day. The same night, the same masked individuals came to his house again and dragged him outside and beat him on the road. After this attack, he went in hiding in [Town 1] and from there he left Sri Lanka for Australia in October 2012.
21. Although his business in Jaffna was said to be the reason that have led him to problems from the EPDP and the CID, I find it is concerning that also in his visa application under the section about his employment history, the applicant stated that from June 2008 to October 2012, he was 'unemployed due to displacement and hiding'. While he did not have a representative, his visa application was provided with the assistance of migration agent and an interpreter and his statement of claims was relatively detailed. This inconsistency raises some doubt in my mind that he was running a business in Jaffna at all and he faced harassment from the EPDP and the CID.
22. Country information indicates that former Tamil paramilitary groups who were aligned with the previous government during the war, like the Tamil Makkal Viduthalai Pulikal (TMVP, formerly the Karuna Group) and the EPDP, have been accused of committing serious human rights violations both during and after the war. Both groups were found to have committed unlawful killings and enforced disappearances of suspected LTTE members, attacked and kidnapped civilians, and recruited children during the war. The US Department of State's 2014 Sri Lanka report noted that there were persistent reports that the EPDP increasingly took on the characteristics of criminal gangs post war as they sought to solidify their territory and revenue sources. The EPDP were reported to have engaged in intimidation, extortion, corruption, and violence against civilians in the Jaffna in 2014.³
23. Even accepting he had conducted his business in Jaffna and that the EPDP harassed him for free hire and told the CID he was a member of the LTTE, on his evidence, apart from being questioned by the CID at his house, he was not taken away by the CID, detained or otherwise harmed on this occasion. Despite he claimed that the incident occurred in 2010, the applicant did not return

³ US Department of State, "Human Rights Report 2014 Sri Lanka", US Department of State, 25 June 2015, OG2B06FAF8

to Kilinochchi until 2011. I consider his evidence does not support that the CID had a further interest in the applicant after they questioned him in 2010 in Jaffna.

24. Also, despite he claimed to fear harm from the CID and that was why he returned to Kilinochchi in 2011, the applicant returned to Kilinochchi and lived 'close to' 'a big CID camp'. I consider the applicant's return to Kilinochchi and lived close to a CID camp also undermines his claimed fear of the CID. It is plausible that the applicant might have been questioned shortly after he returned to Kilinochchi. However, in light of that the applicant was previously questioned by the CID while he was in the refugee camp and also in Jaffna, I have serious doubt that the CID would have repeatedly questioned him and beaten him as he claimed after he returned to Kilinochchi in 2011 and prior to the claimed attacks from masked persons in September 2012. Yet, despite claiming that he had experienced a series of attacks where he was questioned and badly beaten, the applicant was not arrested, detained or sent to rehabilitation. Despite having faced a series of attacks from November 2011, the applicant remained in Kilinochchi until September 2012, shortly before he left Sri Lanka.
25. With respect to the claimed two brutal attacks on him in September 2012, the applicant stated in the visa application that he believed the people who attacked him on the first occasion were from the EPDP and the CID. He stated on the second occasion, the same three people told him 'they were from the CID' and that they told him to 'report to the CID camp the next day and threatened that if I did not go they would find me, shoot me and kill me'. Despite that he did not report the next day and he remained in Kilinochchi for another two weeks after the second incident before he went to [Town 1], the CID or masked persons did not come after him in that two weeks. I do not find it is plausible that the CID or these masked people would have not come back to him if he were of such an interest to them or that they would have not taken him away in the first place, considering how soon they came back to attack him on the second occasion as he claimed. Also during the SHEV interview, the applicant repeatedly claimed that he was fearful for returning to Sri Lanka because he did not know who attacked him, which departed considerably from his evidence in the visa application that the masked individuals told him on the second occasion that they were from the CID and he was asked to report to the CID camp the next day.
26. During the SHEV interview, the applicant was asked to talk about the interrogations he was subjected to from the CID. The applicant said that 'they' came 'often' and 'they normally' took him to the camp and assaulted/tortured him there. When asked why they would let him go, the applicant said that because he explained to them that he was not a member of the LTTE so they finally released him but after one or two months they came back and took him and questioned him again. When he was asked why he was let go the second time, he replied that after he explained, he cried and begged for his release and that his wife and children also cried and so they finally released him. In this respect, I note, of the three incidents he detailed in the visa application (three officers from the CID in a white van came to his house in Jaffna in 2010 and the three masked persons came to his house in Kilinochchi twice in September 2012 on motorbikes), the applicant's evidence in the visa application was that he was beaten at his home or on the road outside his home and he did not claim that he was taken to the camp. While allowing that the applicant might have difficulty to recall the exact details about the claimed incidents, the two incidents in September were the catalyst that led to his leaving Kilinochchi and went in hiding in [Town 1] leaving his wife and children behind. I consider the discrepancies are not insignificant.
27. When the applicant was asked at the SHEV interview how long he was in hiding in [Town 1], he told the delegate it might be three months. This does not sit well with his evidence that the two attacks on him occurred in September 2012 and two weeks later he went to [Town 1], also from

[Town 1] he left Sri Lanka on [a day in] October 2012. I note the applicant also stated in the visa application that he was in Jaffna from [a day in] September 2012 to [a day in] October 2012, a matter of 10 days only. Although the difference between 10 days and three months may not be significant in some circumstances, here, this was the period that the applicant claimed that he was in hiding leaving his family behind and also the period immediately before he left Sri Lanka. As such, the period of time he was in hiding in [Town 1] would be quite significant to him. Other evidence in this respect is of concern. At the SHEV interview, he initially said that some people were coming and searching and questioning 'them', so he realised that they were searching for him and became very fearful and for that reason he decided to leave. When he was asked further, he then said that they did not really make any enquiries and they were just on motorbikes coming around the area of his friend's house and his friend commented that the presence of the motorbikes in the area was new and that was why he left. These matters raise doubts that the applicant was speaking from his personal experience.

28. Copy of a photograph was provided with his visa application as evidence of his injuries caused by his attackers. The photo depicts the back of a man showing some kind of scarring. It does not show the date when the photo was taken. I consider it has very little probative value in supporting his claims that any injuries on his back were the result from the beating he received from the CID or the authorities or that was the result of the attacks he faced in 2011 or 2012.
29. I have regard to country information that indicates that Tamil population in the north and the east in general and persons with low level LTTE involvement could be subject to harassment from the authorities or armed paramilitary groups during the war and in a period after the war and that some have been subjected to arbitrary arrest, detention or even forced disappearance or extrajudicial killings.⁴ As such, I accept that the applicant might have been subject to questioning and about his LTTE connection and was possibly beaten while he was living in Kilinochchi during the war, during the time he was in the refugee camp in [Town 2]. I am also willing to accept that he received further questioning from the CID in Jaffna after having encountered problems with the EPDP. I am also prepared to accept that he might have been questioned shortly after he returned to Kilinochchi from Jaffna in 2011 as a new returnee. However, having considered the applicant's evidence overall and in light of the various concerns raised above, I am not satisfied that the CID 'often came to his home' to enquire about his LTTE connections and that he experienced a series of attacks in Kilinochchi after returning from Jaffna from November 2011. I am not satisfied the claimed two brutal attacks on him in September 2012 by masked persons or the CID or EPDP occurred. I am not satisfied he was in hiding in [Town 1]. I am not satisfied that the applicant was of any adverse interest to the CID, the authorities or anyone else including the EPDP when he departed Sri Lanka in 2012.
30. The applicant stated in the visa application that the CID continued to inquire about him and his whereabouts through his wife after he left the country. The last time he knew of was in February or March 2015. At the SHEV interview, the applicant said that he worried about his wife and children in Sri Lanka because his wife cried a lot and feared walking on the road. I note that his wife and [children] remained living in Kilinochchi since he left. The applicant provided no convincing or credible evidence that he or his family would be still of interest to the authorities or anyone in Sri Lanka. I am not satisfied that the authorities or anyone else enquired the applicant or seek to harm him or his family after he left Sri Lanka.

⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

Refugee assessment

31. 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

32. 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.
33. Tamils constitute the largest ethnic minority in Sri Lanka. Tamils are mainly Hindu, with a relatively large Christian minority. They are the majority in Northern Province, comprising about 93.8% of the population.⁵
34. Tamils maintained they suffered longstanding, systematic discrimination in university education, government employment, housing, health services, and that in the north and east in particular, Tamils reported security forces regularly monitored and harassed members of their community, especially activists and former or suspected former LTTE members.⁶ However, the country information overall indicates that the situation for Tamils in Sri Lanka has improved considerably since the end of the conflict and particularly in recent years. Tamils, in particular Tamils from the former LTTE controlled areas in the north and east are no longer specifically targeted or mistreated because of their Tamil ethnicity and past low-level involvement and connection with the LTTE.
35. DFAT assessed that non-Muslim Sri Lankans, including Tamils, faced a ‘low risk’ of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing. DFAT reported that there was no official discrimination on the basis of ethnicity in public sector employment. Rather, Tamil’s under representation was largely the

⁵ DFAT, “DFAT Country Information Report - Sri Lanka”, 4 November 2019, 20191104135244.

⁶ DFAT, “DFAT Country Information Report - Sri Lanka”, 4 November 2019, 20191104135244; US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 11 March 2020, 20200312151418; US Department of State, “Country Reports on Human Rights Practices for 2020 - Sri Lanka”, 30 March 2021, 20210401122412

result of language constraints and disrupted education because of the war.⁷ Sources interviewed by the UK Fact-Finding Team (FFT) such as the Tamil National Alliance, a Journalist and representatives from the Attorney General Department, all stated that Tamils were not specifically targeted and did not suffer persecution just for being a Tamil. While one source (UNHCR) told the UK FFT that there had been historical discrimination against Tamils which did not disappear overnight and that there could still be individuals who would be subjected to surveillance and discrimination, it did not suggest that the majority Tamils with no profile of concern were subject to official or societal discrimination.⁸

36. Country information indicates that the focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009, though it remains sensitive to the potential revive of separatism. Previous membership of the LTTE would not be enough to make someone of interest and that police interest, if any, would relate to whether the person had committed any criminal act. Former prominent members of the LTTE, or those who are suspected of raising funds during the war may be of more interest to the authorities, although this will not always mean that they will be detained but they are likely to be monitored on return. DFAT indicated that while the authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their risk profile, returnees who were likely draw adverse interest from the authorities on return including at the airport were those who are on the watchlist, those found to have committed or have outstanding criminal offences, Tamil activists, in particular prominent activist or former LTTE members, or whose holding leadership positions in Tamil diaspora groups, particularly groups deemed by the Sri Lankan Government to hold radical views. DFAT also stated that most returnees, including failed asylum seekers, were not actively monitored on an ongoing basis. Rather, the government's objective has shifted to identify those activists who promote Tamil separatism. Persons who are active in a proscribed group is likely to be of interest. Very recently, the government issued a gazette announcing the proscription of hundreds of Tamils and several diaspora organisations.⁹
37. Since the 2019 and 2020 presidential and parliamentary elections and the change in government, political observers and human rights bodies have expressed concerns about a possible reversal of past commitments by the previous government towards reconciliation (of which the previous government was also slow in addressing this issue) and a return to a centralised, authoritarian and possibly abusive rule. In particular, concerns have been raised concerning the government's suppressing dissent and activism, such as human rights defenders, victims of past abusers, lawyers and journalists, obstructing accountability for crimes and human rights violations. Concern was raised that the 2020 constitution amendment reverses the gains introduced with the previous government's constitution amendment in 2015 in devolving some of the President's executive powers. Concerns have also been raised concerning the government's transferring responsibilities for large areas of civil administration to the Ministry of Defence, including the government's response to the Covid-19 pandemic.¹⁰

⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

⁸ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", May 2020, 20200527172009.

⁹ DFAT, "Country Information Report - Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", May 2020, 20200527172009; Tamil organisations speak out against Sri Lanka's ban, Tamil Guardian, 04 April 2021, 20210406172318.

¹⁰ Human Rights Watch (HRW), "World Report 2021. Events of 2020", 13 January 2021, 20210114072851; Sri Lanka Campaign for Peace and Justice, "Abandoned Promises? Preserving Human Rights and Pursuing Accountability in Gota's Sri Lanka", February 2020, 20200330123213; OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the Office of the High Commissioner for Human Rights", 27 January 2021, 20210203162131; OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; UK Home

38. I note that the government has promulgated new regulations in March 2021 to set up rehabilitation centres for the de-radicalisation of those holding extremist ideologies. The information before me does not suggest that Tamil or persons with previous LTTE links are being specifically targeted through this.¹¹ The Prevention of Terrorism Act, which was used during the conflict and its aftermath mainly to target those suspected of involvement with the LTTE, has not been abolished although its use has been very limited in the last few years and most arrests made under it were relating to the East Sunday attack in 2019.¹²
39. The law provides for freedom of internal movement, foreign travel, emigration, and repatriation, and the government generally respected these rights. Human rights organizations described an increase in military presence, including numerous military checkpoints, in the Tamil north, as a measure of the government's COVID-19 response. The government-imposed island wide curfews in 2020 restricting free movement of persons citing COVID-19 concerns. Although many events proceeded peacefully, there were reports that in some cases, Tamils were barred from commemorating war victims on May 18. According to civil society and political leaders, authorities used COVID-19 health guidelines in some instances to prevent opposition political rallies, while progovernment rallies proceeded unhindered. Similarly, police, often acting on interim orders from magistrates, repeatedly tried to obstruct protests organized by the families of the disappeared, political parties and civil society actors, citing COVID-19 regulations.¹³
40. Despite these concerns and issues, the various ministries and bodies set up in addressing the needs of the Tamil minority do not appear to have been taken away. It has been also noted that some progress has been made in promoting reconciliation, such as in the area of returning military occupied land. The OHCHR notes it has continued to provide technical assistances to the Human Right Commission of Sri Lanka (HRCSL) and the Office of Missing persons in the past year.¹⁴ The HRCSL, who have jurisdiction to investigate human rights violations, continued to have wide powers and resources and generally operated independent of and with lack of interference from the current government. The HRCSL consists of five commissioners and has divisions for investigations, education, monitoring and review, and administration and finance. The HRCSL accepts complaints from the public and may also self-initiate investigations. After an allegation is proven to the satisfaction of the commission, the HRCSL may recommend financial compensation for victims, refer the case for administrative disciplinary action or to the attorney general for prosecution, or both. If the government does not follow an HRCSL request for evidence, the HRCSL may summon witnesses from the government to explain its action. If the HRCSL finds the government has not complied with its request, the HRCSL may refer the case to the High Court for prosecution for contempt by the Attorney General's Department, an offense punishable by imprisonment or fine.¹⁵
41. I am not satisfied, on the information before me regarding the situation post 2019 election that the since the return of Rajapaksa government, the situation for Tamils and Tamil returnees in general has materially changed or deteriorated or will change in the reasonably foreseeable

Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", May 2020, 20200527172009; Aljazeera, "Sri Lanka: Economy, human rights key challenges facing Rajapaksas", 18 August 2020, 20200819205836; INFORM Human Rights Documentation Centre, "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", 29 June 2020, 20200702160949

¹¹ Eurasia Review, "Sri Lanka To Set Up Rehabilitation Centers For Extremists – Analysis", 15 March 2021, 20210316115940

¹² DFAT, "Country Information Report –Sri Lanka", 4 November 2019, 20191104135244

¹³ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

¹⁴ OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the Office of the High Commissioner for Human Rights", 27 January 2021, 20210203162131

¹⁵ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

future. The weight of the recent country information does not support that Tamils who do not have a particular profile are specifically targeted or face mistreatment under the current government. The country information overall indicates that under the current government, persons of Tamil ethnicity and those with past membership or connection to the LTTE do not face a real chance of harm, with the exception of only very limited groups of persons, who may continue to be of adverse interest to the Sri Lanka authorities. They include those who have, or are perceived to have had, a significant role in the LTTE in the past or are considered to have engaged in post conflict separatist activities or those who are otherwise viewed as activists, dissidents or critics. While the applicant has sought asylum in Australia, there is no probative evidence to support that the authorities would become to know his protection claims or perceive asylum seekers as government critics. There is an overall lack of recent reporting that Tamil returnees in general who have sought asylum abroad and have lived abroad for an extended period and who otherwise do not have a profile of concern are imputed with an adverse profile.

42. The applicant, his father and brother were not members of the LTTE. He and his father were very low-level supporter of the LTTE through their family business. His brother also did not have a significant role in the LTTE. Neither did his dead cousin(s) have any role of note with respect to their involvement in the LTTE. Having had regard to the accepted history about the applicant and his family members, I am not satisfied that the applicant has a profile of concern to the authorities.
43. Country information is that entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). All returnees to Sri Lanka are processed at the airport on arrival by various governmental agencies, who check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT has reported that detainees are not subject to mistreatment during processing at the airport.¹⁶ The UK FFT report also indicated there was no mistreatment of returnees during arrivals process, regardless their ethnicity or religion.¹⁷
44. Country information is also that if returnees are suspected of illegal departure from Sri Lanka, they can be charged under the I&E Act. DFAT reported that the Police Airport Criminal Investigations Unit at Bandaranaike International Airport makes most arrests. In the process, police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are suspected to be former LTTE members. At the earliest available opportunity after investigations are completed, police transport individuals charged with departing Sri Lanka illegally to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. The magistrate then makes a determination on next steps for each individual; facilitators or organisers of people smuggling ventures, including the captain and crew of the boat, are usually held in custody. Apprehended individuals can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time (for example, because of a weekend or public holiday), those charged may be detained for up to two days in an airport holding cell. DFAT was not aware of mistreatment of returnees during this process.¹⁸

¹⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹⁷ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

45. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine. Sri Lankan authorities differentiate between fare-paying passengers and the facilitators or organisers of irregular migration. Unlike facilitators or organisers, fare-paying passengers are usually released on bail and generally receive only a fine for breaking the I&E Act, as a way of deterring future illegal departures. Bail conditions are discretionary. The Attorney-General's Department claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Fines vary from LKR 3,000 (approximately AUD 25) to LKR 200,000 (approximately AUD 1,633). Well-placed sources told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163). Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court.¹⁹
46. The applicant left Sri Lanka by boat 2012. I accept he may be charged with an offence under the I&E Act for departing Sri Lanka illegally. Unlike facilitators or organisers, fare-paying passengers are usually released on bail and generally receive only a fine for breaking the I&E Act, as a way of deterring future illegal departures. The country information is that the applicant would be free to go if he pleads guilty subject to a fine imposed in the range noted as above which can be paid by instalment. The information before me is also that the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member if a person pleads not guilty. On the evidence provided and the country information before me, I am not satisfied there is a real chance the applicant would not be able to secure bail. I am not satisfied that he would be subject to a custodial sentence for departing Sri Lanka illegally. I am not satisfied that the penalties and processes that he may subject to, including the possible short-term detention at the airport, questioning and fine amounts to serious harm for the applicant.
47. In any event, the country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I am not satisfied that the questioning, temporary detention, imposition of a fine and possible associated costs and treatment the applicant may experience as a result of his illegal departure would constitute persecution.
48. I recognise that the applicant may possibly face some practical challenges as a returnee in light of his long absence from the country upon return. On the other hand, I note that the applicant had worked in Sri Lanka and Australia. The evidence does not indicate that there is a real chance he would be prevented from obtaining employment, accommodation and integrating into society more broadly. I am not satisfied that there is a real chance that the applicant's capacity to subsist will be threatened or that he will otherwise face harm in this context. I am not satisfied that the applicant faces a real chance of serious harm due to any difficulties or treatment or practical challenges of settling in Sri Lanka.
49. DAFT reported in 2019 that Sri Lanka inherited a well-developed health care system at independence. Its health care system has a long record strong performance. The public health system offers universal free health care, though regional disparities exist in quality of care and facilities and health outcome are worse in the north and east, partly because of the delay in rebuilding destroyed infrastructure and diminution of human capital during the war. In respect of mental health care, mental health services are considered inadequate, though improving access to mental health services including at the community level, is a government priority. As part of this effort, Sri Lanka has deployed cadres of mental health workers to the district level

¹⁹ Ibid.

and rolled-out a Training of Trainers in Mental Health and Psycho-Social Wellbeing Programme in the Northern Province. District-level hospitals have mental health facilities and some NGOs also provide psychosocial support services, including in Tamil-populated areas.²⁰

50. As noted above, I am not satisfied on the evidence provided that the applicant is currently receiving or requires ongoing mental health or medical treatment. Neither the applicant has claimed that his health needs could not be met in Sri Lanka. In any event, on the country information before me, I am not satisfied there is a real chance that the applicant would be denied access to basic health care including mental health care in Sri Lanka or that he would face a real chance of harm on this basis. I am not satisfied that any stigma around mental health would amount serious harm for the applicant. Additionally, I am not satisfied that any limitations due to lack of services on access to mental health care is persecution as they do not involve systematic and discriminatory conduct.
51. In respect of his claimed fear of harm from the EPDP, the applicant conducted his business in Jaffna for less than one year before he returned to Kilinochchi. While he might have been harassed by the EPDP while he was in Jaffna, I have not accepted that he faced any harassment from the EPDP after he left Jaffna. DFAT reported in 2019 that the influence of the EPDP has waned considerably since 2015, and they no longer maintain armed wings. The EPDP has been disarmed and is now engaged in politics. Local sources reported that that the EPDP were no longer pose a major concern.²¹ Although the US Department of State reported in 2015 that the EPDP were still engaging in criminal activities including intimidation, extortion and violence against civilians in Jaffna in 2014, there is no indication it remains the case in its more recent reporting.²² Overall, there is an absence of recent reporting that the EPDP continue to post a threat to Tamils, including engaging in human rights abuse and criminal activities against Tamils. I am not satisfied the applicant faces a real chance of harm from the EPDP if he were to return to Sri Lanka.
52. In light of my consideration of the above, I am not satisfied the applicant has a well-founded fear of persecution for any of the reasons claimed, now or in the reasonably foreseeable future, if he were to return to Sri Lanka.

Refugee: conclusion

53. 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

54. 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.

²⁰ Ibid.

²¹ Ibid.

²² US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418; US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

Real risk of significant harm

55. 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.

56. 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.

57. I am not satisfied on the evidence provided that the applicant is currently receiving or requires ongoing mental health or medical treatment. In any event, I am not satisfied there is a real risk that the applicant would be denied health care or mental health care or that he would face significant harm in his case. I am not satisfied the applicant faces a real risk of the death penalty, arbitrary deprivation of life or torture. I am not satisfied any difficulties or treatment the applicant may face involve an intention to inflict severe pain or suffering, pain or suffering that could be reasonably regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation for the purposes of the definition of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.

58. I accept that the applicant, may face some practical challenges in resettling. I am however not satisfied that the treatment or challenge would amount to or lead to significant harm. I am not satisfied that it amounts to death penalty, arbitrary deprivation of life or torture. I am also not satisfied that it amounts to pain or suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purpose of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment.

59. I am also not satisfied the treatment and penalties the applicant may face as someone who left Sri Lanka unlawfully amounts to significant harm as defined. I am not satisfied the applicant faces a real risk of the death penalty, arbitrary deprivation of life or torture as defined in the Act. I am also not satisfied, having regard to the country information that such treatment would involve an intention to inflict severe pain or suffering, pain or suffering that could be reasonably regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation for the purposes of the definition of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. Nor am I satisfied that this treatment, when combined with the treatment that he may otherwise face amounts to significant harm.

60. I have otherwise concluded that there is a not real chance the applicant would face any harm. As real chance and real risk involve the same threshold, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Sri Lanka, there is a real risk that the applicant will suffer harm, including significant harm.

Complementary protection: conclusion

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

Decision

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

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.