



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09465

Date and time of decision: 18 August 2021 19:59:00
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 June 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 in July 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 5 July 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 of Tamil ethnicity, born in [District 1], Northern Province of Sri Lanka.
 - [Between specified years] his father was an active member of the paramilitary group called the People's Liberation Organisation of Tamil Eelam (PLOTE).
 - His father was arrested by the Criminal investigation Department (CID) and detained for three days for suspected involvement in the Liberation Tigers of Tamil Eelam (LTTE).
 - A few months later, the army took his father away for four months. His father was only able to escape during a fight that broke out between the LTTE and the army.
 - Immediately after this incident, his family fled Sri Lanka by boat to India.
 - In India, the Q branch took his father for questioning in 1992. His father has been taken for questioning by the Q branch for about five times and is still being watched by them.
 - In 2009, he and other [Tamils] organised a protest condemning the Sri Lankan government's abuse of Tamils. He and his friends led the protest. They notified the media about the protest. The media videoed the event, which was telecasted on [TV news in India].
 - After the event, the Q branch raided his home and found LTTE materials in his home. Two days later the Q branch called him to report to their office. He was severely beaten and released with a warning not to be involved in such activities again or he would be sent to in a special camp. He was marked as a person of interest and was required to report to them every day.
 - In [2012], he was caught by the Q branch on his way to board a boat and was being kept for 4 days. He was accused of being involved in people smuggling. They took pictures of him and took his fingerprints and made him sign on a piece of paper.
 - In November 2012, he and his friends organised a remembrance day event in the camp. The police, CID and Q branch came to the camp and beat him up. He was warned again. After this, he was frequently called by the Q branch to attend their office and was under

surveillance. He continued to face problems from the Q branch until he left India for Australia in 2013.

- The Q branch would have definitely provided his details to the Sri Lankan authorities.
- He faced discrimination and harassment as a Sri Lankan refugee in India living in a refugee camp. There were no job opportunities for him. There was lack of freedom. He had to sign for exiting and entering his refugee camp.
- He participated pro Tamil activities in Australia.
- He fears harm from the Sri Lankan authorities because: his father's involvement with the paramilitary group PLOTE; he has been suspected of being involved in people smuggling in India; his pro Tamil /pro Sri Lankan paramilitary group activities in India and Australia.
- He will be jailed as a failed asylum seeker and would not be released as he has no family members in Sri Lanka to pay bail money for him.
- His right to subsist will be threatened.

Factual findings

4. The applicant arrived in Australia [in] June 2013. He took part in an Enhanced Screening (ES) interview [in] June 2013. He provided further claims for protection ('supplementary claims') to the Department on 17 February 2014. The applicant participated in an Arrival and Induction interview (arrival interview) on 15 May 2014. He lodged the SHEV application in July 2017 with the assistance of a registered migration agent. The applicant took part in the SHEV interview on 18 May 2021 and his migration agent participated the interview by phone. As considered below, I am satisfied that the applicant had a meaning opportunity in presenting his claims, evidence and arguments at the SHEV interview.
5. The applicant claims that he is Tamil, born in [District 1] in the Northern Province of Sri Lanka in [year] and that he left Sri Lanka for India in 1990 with his family when he was [age range]. He lived with his family in a refugee camp in India before he came to Australia in 2013. His parents and [specified siblings] are still living in the refugee camp in India. He is single. The applicant has provided a number of identity documents, including his Sri Lankan birth certificates, a Sri Lanka Refugees Identity Card issued to his family by the Indian government (indicating they arrived in India [in] August 1990), and his India resident Identity Card. I accept he was living in India as a refugee from 1990 to 2013 before he came to Australia, and that he does not have a right to enter and resident in India. I am satisfied that the applicant is [an age] year old Tamil originating from [District 1], in the Northern Province of Sri Lanka. I am satisfied that he is a citizen of Sri Lanka and that Sri Lanka is the receiving country.
6. The applicant's central claims for protection are centred on his father's adverse profile to Sri Lanka authorities and his own involvement in anti-Sri Lankan government protest activities.
7. The applicant claimed in his visa application that his father was of adverse interest to the Sri Lankan authorities at the time he left Sri Lanka in 1990: his father was a member of the paramilitary group PLOTE [between specified years]; his father was 'arrested by the CID' sometime after he left PLOTE while he was selling [products] and was 'jailed for three days'; a few months after his father was released by the CID, the army took his father away and his father escaped from the army four months later during a transfer of him from one camp to another camp. He also claimed that his father was of adverse interest to the Q branch in India:

Q branch took his father for questioning in 1992 asking him if he had been involved in any unlawful activities; his father has been taken for questioning by the Q branch for about five times; his father is still being watched by the Q branch and will not disclose any more details over the phone to him.

8. In respect of himself, the applicant in the visa application referred to the following incidents: in 2009, he was one of [many] Tamils who organised a protest and he and his friends led the protest, condemning the Sri Lankan government's abuse of Tamils, which was telecasted on the [TV news in India]; the Q branch raided his home and discovered LTTE materials. He was severely beaten after he reported to the Q branch two days later and was released with a warning not to be involved in such activities further. He was told to report every day at his camp as his name was in the person of interest list. Another incident was that he was caught by the Q branch in March 2012 when he tried to board a boat to leave India. He was accused of being involved in people smuggling. He was being kept for four days. The Q branch took pictures of him and his fingerprints and made him sign on a piece of paper. A further incident occurred in November 2012 when he and his friends organised a remembrance day event for the martyrs. They put up posters with the leader of the LTTE Prabhakaran and raised the LTTE flags in the camp. The police, CID and Q branch officers beat him up. Following this incident, he was being frequently harassed by the Q branch who asked him to attend their office, which continued until he left India in May 2013.
9. As discussed below, I note, since his arrival in Australia, the applicant's evidence about the problems he faced in India and his father faced in Sri Lanka and India has evolved quite significantly. The applicant has provided differing and conflicting accounts with regard to many aspects of his claims since his arrival in Australia. I note that applicant stated in the visa application that his response given in the ES interview was brief and did not include all of his reasons for coming to Australia and that he was also aware the information he gave at the arrival interview did not include the real reasons why he had left his country as he was afraid if he disclosed the real reasons it could have 'negative implications'. He stated that with the assistance of his representative he was able provided detailed information pertaining to his claims for protection. In making the relevant findings below, I have taken these explanations into account along with what he has provided at the SHEV application.
10. The applicant attended an ES interview [in] June 2013, [number] days after his arrival in Australia. The applicant was asked about his reasons for coming to Australia. He stated he came to Australia so that he could live here with freedom and to seek citizenship. When he was again asked if he had other reasons for coming to Australia, he replied no. When he was asked why he could not return to Sri Lanka, his answer was that he had been told by his parents and other people in his camp that youngsters could not live there. When he was specifically asked if his parents told him why they had left Sri Lanka in 1990, his answer was that they said that the ongoing war was there.
11. On 17 February 2014, the applicant made supplementary claims. He stated that his father was a [products] seller and was arrested by the CID in 1990. His father was tortured and released. His father was again arrested and did not return for four months. One day, while selling his [products], a gunfight broke out and his father was shot and injured. As a result, his family left Sri Lanka. The applicant also claimed that he participated in a hunger strike in the refugee camp in India in protesting the treatment of Tamils. He was arrested by the CID and beaten and was accused of being a supporter of the LTTE. They fabricated information that he was the organiser of the protest, but he was not. Because of this, his father was very concerned about his situation and sent him to Australia. He also provided three photographs to the Department and identified that he was among a crowd of people sitting in one photo.

12. In the arrival interview in May 2014, approximately only three months after he provided the 2014 supplementary claims, the applicant gave a quite stark differing evidence about his father. This time, he claimed that his father was twice interrogated by the army and was taken by the army, not by the CID as he stated in the supplementary claims. He claimed that his father escaped from the army's custody while his father was being transferred to a different army camp and took the opportunity when a fight broke out between the army and the LTTE. He stated that 'after a week' (not as he claimed in the visa application 'a few months later', his father was taken by the army after being taken the first time. While claiming that he was involved in fasting and protesting against the Sri Lankan government, his evidence was that Q branch got very annoyed and tightened the rules and regulations after that. He stated that he participated in fasting twice in the refugee camp: in 2009, all the refugees fasted requesting a ceasefire in Sri Lanka; and in 2011, all camps in Tamil Nadu fasted against the Sri Lankan government because there were videos released about killings in Sri Lanka by one of the channels. His evidence was also that he could be identified by the Sri Lankan government from those photos on the 'net'.
13. At the SHEV interview, the applicant was asked to talk about his involvement in organising the protest in 2009 against the Sri Lankan government in India and what the protest was about. The applicant said this protest was about the killing of LTTE leader Prabhakaran's son towards the end of the Sri Lankan civil war. The applicant claimed he and his friends among other youngsters in his refugee camp got together with the leader of the camp and organised the protest, and there was a hunger strike the day before. He claimed that the camp leader called the people in the camp to join the protest through a microphone, which was also used for other announcements in the camp. He claimed that 'all the people in the camp' and 'the whole camp' about 500 people were involved. He claimed that he and his friends led the protest by leading a procession and they shouted the slogan 'stop the war', also holding posters with words 'stop the war'. While he stated that he was involved all together in two protests against the Sri Lankan government in India, he said that the first time happened during the war and the second time was when Prabhakaran's son died. I note, on this evidence, both protests he said he was involved were all happened during the war and towards the end of war. I note this evidence again differs from his evidence in the visa application that he organised a protest in 2009 and that he was involved in organising remembrance days for the martyrs in November 2012. As per his visa application, he and his friends put up posters of Prabhakaran and raised the flags of the LTTE in 2012 event. He also claimed in the visa application that he was beaten by the police and Q branch officers because he was one of the persons in charge and that following the November 2012 event, he was frequently called by the Q branch to attend their office. This continued before he left India in 2013. I consider this variation of his evidence is not insignificant.
14. The applicant was also asked at the SHEV interview to comment on the various discrepancies in his evidence he gave to the Australia immigration since his arrival, such as his failure to refer to any of his core claims about his father and himself in the ES interview and his subsequent differing/contradictory evidence since he made the supplementary claims. The applicant explained that he was not in the right state of mind and could not think properly while he was in immigration detention. He was scared and fearful because he was in detention for two years living lonely, so it was hard to explain things properly or to tell things correctly. He was only able to think and coordinate everything properly after coming out of the detention, only then he was able to think clearly and he gave all the information to his lawyer. I note he did not elaborate at the SHEV interview that he was afraid to disclose the real reasons due to concern of having negative implications, as he stated in the visa application.

15. The applicant was asked at the SHEV interview if he had any evidence about his involvement in protests against the Sri Lankan government in India. He initially replied that he did not have evidence. He then added that while he was in detention, he submitted a photograph and he told the Departmental officers at the time that he could not identify himself in the photograph as it depicted a group of people. It was put to the applicant that he submitted three photographs when he gave his supplementary claims and claimed then that he was the person who had one arm raised in one photo. The applicant claimed that he forgot about it at the SHEV interview because he was not in the right state of mind and that his mindset was disturbed as his grandmother passed away 'two days ago' and his family members were affected by COVID-19. He then asserted that he was among the people depicted in the photograph.
16. The applicant stated at the SHEV interview that when he was in detention, 'every two weeks, they called and asked for evidence and I had submitted some photographs but I cannot exactly remember. I forgot'. When the delegate asked how he obtained these photos, he said that he got them from his parents, who obtained the photos from the leader of the refugee camp. The applicant again stated that while he was in detention that 'they' came and asked him for evidence and he gave whatever he had. He further said that was 'disturbed' and could not sleep and eat well when 'the removal officer came'.
17. I note that the applicant did not indicate before this point at the SHEV interview, i.e, during the first over 70 minutes period that he was not in the right state of mind that affected his giving evidence at the SHEV interview. I note he did at one point (about 40 minutes into the interview) saying that he could not remember the names of all his friends he claimed with whom he worked in organising the protest, which I consider it is understandable. However, the applicant did not indicate then he was not in the right state of mind or that his grandmother had just passed away. Also despite he claimed, in response to the concerns that the delegate had raised, that he was not in the right state of mind while he was in detention and that his mind became clear after he left detention, the applicant also did not indicate that he was distressed or not in the right state of mind. While his family in India might have been affected by COVID-19 pandemic, I am sceptical of his claim that his grandmother had just passed away two days earlier. I note that the applicant was represented by a migration agent as well. The overall interview indicates that the applicant otherwise had engaged well throughout the SHEV interview, in responding directly to delegate's questions and presenting his arguments. Apart from the applicant's assertion, there is no probative evidence before me to indicate that the applicant could not effectively participate in the SHEV interview. I am not satisfied this was the case. While I understand that interview can be a stressful situation and the applicant is not expected to remember everything or every detail, hence I draw no adverse inference from the fact he could not remember that he had previously told the Australian immigration about the photographs referred to above. I am otherwise satisfied that the applicant had a meaningful opportunity in putting forward his claims and evidence at the SHEV interview.
18. When the delegate put to the applicant at the SHEV interview the discrepancies in his evidence about his father, the applicant also provided various reasons. He claimed that when he was in the detention camp in Australia, his father did not tell everything properly to him. Only after he came out of the detention, he told his father that his father did not tell him the whole thing correctly and that he asked his father to tell him the 'correct version'. Only then his father told him what happened. He also claimed that his father was scared to disclose all the information because Q branch came and questioned his father 'every month' and Q branch could tap the phone calls and harm his father. He further claimed that his father declined to tell him about what happened in Sri Lanka while he was in India and that he was not close to his father when he was in India. After he came to Australia, the Australian authorities were asking him what

his problem was and what his father's involvement was, he then had to ask his father about it, and only then his father tried to tell him.

19. I note that the applicant was advised at that start of the ES interview that the purpose of the ES interview was to collect information about him and his reasons for coming to Australia, which would be the basis for the Australian government to decide whether the applicant would be allowed to remain in Australia. The applicant was offered a break of 15 minutes to give him the opportunity to consider if he had anything to add towards the end of the ES interview. Based on the information he provided at the ES interview, the applicant was assessed as having not made claims that raise any fear of harm whether for a Refugees Convention reason or otherwise' and the removal of him to Sri Lanka would be consistent with Australia's non refoulment obligations. I note that the applicant explained that he was fearful because he was in detention for two years. However, the ES interview took place not long after he was in detention. I acknowledge that the ES interview took place [number] days after the applicant's arrival in Australia. He might have been stressful at the time as he faced uncertainty in a new environment. While the applicant claimed that he was not in the right state of mind, there is no evidence to indicate that the applicant had any particular vulnerability that had affected his giving evidence at that time. The applicant was about [age] years of age when he arrived at Australia. He had [number] years of education plus having obtained a diploma in [occupation 1] in India. He also had a few years of working experience in India. The applicant was put on notice of the purpose of the ES interview. The applicant was specifically asked the reasons he came to Australia and why he could not return to Sri Lanka. His evidence that he learnt from his parents that they left Sri Lanka in 1990 because of the war and that his parents told him that youngsters could not live in Sri Lanka is also at odds to his evidence at the SHEV interview that his father did not want to tell him of what happened in Sri Lanka despite that he had asked his father when he was in India.
20. I also consider that the applicant might have been stressed after he was assessed, following the ES interview in June 2013, that he had not made claims that engaged Australian protection obligations and that he might have been visited by some removal officers. However, despite he was facing of being removed from Australia, the claims he made in his supplementary claims in February 2014 (while stating that he participated in a hunger strike and that his father was arrested by the CID) was that he was not in fact an organiser of the protest and that the police fabricated this and that that his father was shot and injured while he was selling [products] after he was released from the CID (not as he later claimed that his father was shot when his father made the escape from the army or that his father was a member of the PLOTE).
21. The applicant explained at the SHVE interview that his father did not tell him the correct version at the time and that his father was scared to disclose information to him over the phone worrying his phone calls being taped by the Q branch. However, this does not explain that his parents were able to obtain photographs of his participating of the protests in India from the refugee camp leader and sent them to the applicant in Australia for him to provide them to the immigration in February 2014. The applicant stated in the visa application in 2017 that his father was being questioned by the Q branch in India in 1992 asking whether his father was involved in 'any unlawful activities'. His father had been taken in for questioning for an estimate of five times and was being watched by the Q branch as such his father could not disclose more details to him. He however told the delegate at the SHEV interview that 'every month' the Q branch came and questioned his father. I also note, although he claimed that his family home was raided and the Q branch found printouts of LTTE leader Prabhakaran and LTTE posters in his house following the 2009 protest and he also claimed that the whole camp/all the people in the camp were involved, he did not indicate that his father was in any sort of trouble. The applicant has provided no convincing details why his father would have

been constantly questioned and monitored by the Q branch. Neither am I convinced that his father only told him the correct version of the story after he had left detention.

22. In his visa application, the applicant claimed for the first time that he was caught by the Q branch in [2012] for trying to board a boat to leave India. He claimed that the Q branch kept him in a dark cell for four days accusing him of being involved in people smuggling. They took picture of him and his fingerprints and made him sign on a piece of paper. At the SHEV interview, while the applicant said that he was not a smuggler and that he was released after he was caught for trying to leave India, he also stated after he was being released following three days in their custody, the Q branch came to his home and made his mother sign on a piece of paper. He claimed that they humiliated him in front of the whole camp people. He was beaten a lot. The Q branch told him that 'you are a people smuggler'. He claimed that after this incident, he was so sad that he did not go to work. He was just sitting around worrying all the time. The Q branch started to harass him for all the bad things happened at the camp. He reiterated that he could not go to work as he was 'sad' and 'worried'. He said that 'I left even without telling my parents. I could not take it any longer'. I note this evidence was not consistent with his evidence in his visa application that apart from being held in custody for four days in [2012], he was working for the same employer working on [a specified project] in Chennai and Pondicherry from July 2007 to April 2013. This evidence also undermines his claim that he was involved in organising another protest in November 2012. I also note in his 2014 supplementary claims he stated that his father sent him to Australia because his father was concerned about him.
23. I have considered the three photographs referred to above. The first photograph is of a poster showing several smaller images of dead civilian bodies lying around with some Tamil words on top and bottom. The second photograph depicts a large crowd including young children standing around underneath some marquees in an outdoor ground, with the same poster shown in the first photo standing in the background. The third photograph shows a larger crowd of people, including a group of young children, sitting on the ground underneath marquees, with the same poster in the background, while listening to a man standing up in front of a microphone. In the foreground of the third photo is a man, among a group of people who had their back to camera, with his right hand raised pointing at the right direction. Although he had his head turned a little bit to the right side and a silhouette of part of his right face is visible, it is otherwise difficult to see this person's face. This person whom the applicant claimed to be himself was simply sitting on the ground, as well as the rest of the crowd, apart from the person standing up in front of the microphone. I see no LTTE soldiers or its leader on the posters in the background. I give little weight to these photos as probative evidence that the applicant was an organiser/participant of a protest or that he led a procession in a protest.
24. I am mindful that caution need be exercised in relation to omissions at earlier interviews prior to the visa application. I acknowledge that the applicant did not have legal representation then. However, in light of my consideration above, I am not satisfied that the applicant has provided a convincing or satisfactory explanation with respect to the evolution and variation of his evidence, at times, inconsistent and contradictory.
25. Country information indicates that the PLOTE originated as an LTTE splinter group, but it was never well armed, and its military activities remained low key. In 1986 the LTTE issued notices banning all PLOTE activities. In 1989 the LTTE assassinated the leader of the PLOTE. After 1987, the PLOTE renounced its armed rebellion against the Sri Lankan government but maintained

armed cadres.¹ The applicant's evidence sheds little light about his father's role in the PLOTE and why he was arrested in 1990 if he had left PLOTE in 1986 and the PLOTE had renounced its rebellion against the Sri Lankan government in 1987. Country information before me also indicates that in mid-1987, the signing of the Indo-Sri Lankan Accord provided for an Indian Peacekeeping Force (IPKF) in the north and east of Sri Lanka. However, due to the heavy fighting between the LTTE and the IPKF, India withdrew of its IPKF in March 1990 and that the situation in the north and east deteriorated in June 1990.² Although it is not implausible that his father, a Tamil [products] seller, living in the Northern province during the war, might have been questioned at checkpoints for perceived LTTE connection,³ in light of the applicant's problematic evidence as outlined above, I am not satisfied that his father was ever a member of the PLOTE. I am not satisfied that his father was ever detained by the CID or the army. I am not satisfied that his father escaped from the army's custody or that his father was of any adverse interest to the Sri Lankan authorities when he left Sri Lanka in 1990. I further consider the applicant's evidence that the problems his father has faced from the Q branch in India is not credible. I am not satisfied his father was questioned in 1992 for 'unlawful activities', or that his father has faced ongoing questioning and surveillance from the Q branch or Indian authorities, or otherwise is of adverse interest to the Indian authorities or the Sri Lankan authorities.

26. The 26-year Sri Lankan civil war ended in 2009, which is estimated to have claimed 100,000 lives. Human right organisations have documented serious violations during the final stages of the war, during which up to 40,000 civilians may have been killed.⁴ It is plausible and I am willing to accept that the applicant was a participant in a camp event in 2009 where a hunger strike might have taken place to condemn the innocent killing of civilians towards the end of the war. However, the applicant's evidence about his being an organiser for two protests in his refugee camp in India was utterly unsatisfactory. I am not satisfied that he was involved in organising any protest/hunger strike against the Sri Lankan government or pro-LTTE in 2009 or in 2012 (or in 2011). I am not satisfied the claimed protesting event in 2012 or 2011 occurred, whether it was about remembrance in honour of the martyrs of the war. The applicant has consistently claimed that it was not pleasant living as a refugee in India. I am willing to accept the applicant had faced restriction of his movement living in a refugee camp which required him of signing in and out and he might have faced some discrimination. On the other hand, I note that had not stopped the applicant gaining a diploma in [occupation 1] and working outside the camp. I am not satisfied that the applicant was questioned or beaten by the Q branch or authorities in India relating to any protesting activities or that his home was raided or that he had LTTE materials found in his home. Given my concerns about the applicant's credibility, I am doubtful that he was caught in March 2012 for trying to leave India illegally by boat. Even I accept that he did try to leave on that occasion and that he was caught or that he was being mistreated by the Q branch for this reason, I am not satisfied that he was accused of being a people smuggler. I am not satisfied information about his being a people smuggler or otherwise has been passed on to the Sri Lankan authorities. I am not satisfied that he was beaten and humiliated in front of his whole camp and as such, he could not go to work. I am not satisfied that the applicant was of any adverse interest to the Q branch, the Indian authorities or the Sri Lankan authorities when he left India in 2013.

¹ UK Home Office, "Sri Lanka March 2012, 7 March 2012, 3523; The Sunday Times, "Colonialism To Communalism - The History Of Sri Lanka's Ethnic Politics", 20 August 1995, CX11210; Joanne Richards, Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", 1 November 2014, CISA447F082828

² UK Home Office, "Sri Lanka March 2012, 7 March 2012, 3523

³ Department of Foreign Affairs and Trade (DFAT), "Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁴ Ibid.

27. At the SHEV interview, after discussing his claimed anti-Sri Lankan government activities in India, the delegate asked the applicant if he had been involved in any against Sri Lanka or pro Tamil activities in Australia, the applicant replied that he had been to martyrs remembrance prayers/meetings. He had participated in meetings organised by the Tamil society. The applicant raised no claim in his visa application that he had engaged in any pro-Tamil/against Sri Lankan activities in Australia. When the delegate asked him at the start of the SHEV interview if there was anything in his application that he would like to add or change, he said no. The late raising of this claim only after being prompted by the delegate is concerning, in particular, given that a key claim for his protection was that he organised and participated in anti-Sri Lankan government activities in India. As noted above, while the applicant claimed in the visa application that he was involved in organising remembrance days for the martyrs in November 2012, he did not refer to this event at the SHEV interview. Apart from his bare assertion, the applicant has not provided evidence to substantiate his claimed pro-Tamil activities in Australia, noting he was represented before the Department and evidential issue about his claimed activities in India was subject to considerable discussion at the SHEV interview. Although I am concerned about the credibility of this claim, I am however prepared to accept that the applicant might have participated in some Tamil community social activities in Australia. On this basis, I am willing to accept that he attended (as a mere attendee) martyrs remembrance events organised by Tamil society group in Australia. Like the delegate, I consider that any involvement on his part is minimal, insignificant and occasional. He has not claimed and I am not satisfied on the evidence before me that he is a member of the Tamil society. The applicant has not claimed that he was involving in organising any such event or otherwise involved in any other anti-Sri Lanka activities in Australia. I am not satisfied he has done so. The applicant has not claimed or provided evidence that the Tamil society that had organised martyrs remembrance events is a proscribed group by the Sri Lankan government. I am not satisfied this is the case.
28. The information before me indicates that the applicant was included in the list of persons whose details were inadvertently published by the Department on its website in February 2014. The applicant was advised of this by letter on 12 March 2014. I note that the applicant has not raised any claims of harm arising from this incident. The information potentially disclosed does not reveal the applicant's protection claims or that he has applied for a protection visa. Even accepting that the Sri Lankan authorities may have accessed the leaked information, I consider, at most, the authorities may suspect the applicant has sought asylum in Australia and that authorities would not know his claims for protection. Similarly, I consider that the authorities may in any event likely to infer that the applicant has applied for asylum in Australia if he were to return to Sri Lanka involuntarily, which I have considered below.
29. I also note that the applicant, while indicating that he is of Roman Catholic, has not raised that he fears harm because of his religion. This is also not considered by the delegate.

Refugee assessment

30. 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

31. 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.

32. Country information indicates that many Tamil returnees chose to return to the north, either because it is their place of origin and they have existing family links, or because of the relatively lower cost of living compared to the south.⁵ I accept that the applicant’s family members are all in India. The applicant was born in [District 1]. I consider, the applicant on returning to Sri Lanka, is very likely to return to the Northern Province.

33. It is reported that Tamils maintained they suffered longstanding, systematic discrimination in university education, government employment, housing, health services, access to justice 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 in recent years. Tamils, including 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.

34. 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 result of language constraints and disrupted education because of the war.⁷ Multiple credible 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 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

⁵ 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; Freedom House, “Freedom in the World 2021 - Sri Lanka”, 3 March 2021, 20210304102827.

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

the majority Tamils with no profile of concern were subject to official or societal discrimination.⁸

35. Country information indicates that the focus of the Sri Lankan government's concern has changed as the civil war has long 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. 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. DFAT noted that some returnees, including returnees in the north and east with suspected LTTE links, had been the subject of monitoring by the authorities, but it also stated that most returnees, including failed asylum seekers, were not actively monitored on an ongoing basis, and that, some Tamil returnees in the north had told DFAT they had not experienced harassment by the authorities or received monitoring visits. Credible sources were also not aware of returnees from Tamil Nadu being subjected to monitoring or harassment by the authorities. DFAT also indicated that while the authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their risk profile, returnees who likely draw adverse interest from the authorities on return including at the airport are 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. Some returnees, including returnees in the north and east with suspected LTTE links, had been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the Criminal Investigation Department. It however considered that most returnees, including failed asylum seekers, were not actively monitored on an ongoing basis. Sources interviewed by the UK FFT indicates that seeking asylum is not considered as an offence, though returning asylum seekers may be subject to a further check at home after leaving the airport or be monitored although the length of time may vary. It does not however indicate that returning asylum seekers are subject to mistreatment if being monitored. A UK Upper Tribunal's recent decision, which focussed on sur place claims made by the Tamil diaspora in the UK, notes that while Sri Lankan government views the Tamil diaspora with a generally adverse mindset, it does not regard the entire cohort as either holding separatist views or being politically active any meaningful way. The information before me also does not indicate that returnees who do not have a profile of adverse interest to the authorities are otherwise subject to arrest, prosecution or mistreatment just because they have sought asylum.⁹

36. Since the 2019 and 2020 presidential and parliamentary elections and the change in government, concerns have been raised 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.

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; Upper Tribunal (Immigration and Asylum Chamber), *KK RS (ANONYMITY DIRECTION MADE) AND SECRETARY OF STATE FOR THE HOME DEPARTMENT*, 27 May 2021, 20210601113225; Tamil Guardian, "Tamil organisations speak out against Sri Lanka's ban", 4 April 2021, 20210406172318.

For example, issues 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, appointing former military personnel to senior government positions. The government was also reported to have dropped the singing of the national anthem in Tamil during the Sri Lankan Independence Day celebrations in February 2020, moving away from the previous government who sang the national anthem in both Tamil and Sinhalese as a significant gesture towards reconciliation.¹⁰

37. 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 recent arrests made under it were relating to the East Sunday attack in 2019, for example, the arrest of a prominent Muslim lawyer Hejaaz Hizbullah in April 2020.¹² Various increased security and intelligence since the Easter Sunday attack appears to be in response to the deadly Easter Attack.¹³ Some international NGOs continued to have access to suspects of the attack that remained in custody.¹⁴

38. The law provides for freedom of internal movement, foreign travel, emigration, and repatriation, and the government generally respected these rights. 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. 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, public commemorations, citing COVID-19 regulations.¹⁵

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 Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", May 2020, 20200527172009; INFORM Human Rights Documentation Centre, "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", 29 June 2020, 20200702160949; US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

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; 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

¹³ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹⁴ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

¹⁵ Ibid.

39. I note that 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.¹⁶ 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.¹⁷
40. I acknowledge that issues of human rights abuse remain of significant concern in Sri Lanka. Human rights organizations also described an increase in military presence, including numerous military checkpoints, in the Tamil north, as a measure of the government's COVID-19 response in 2020.¹⁸ However, I consider the bulk of the more recent country information does not support that Tamils and Tamil returnees who have sought asylum abroad in Australia or having an extend period time in Australia or India, who do not have a particular adverse profile otherwise, 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 at a low level 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. The country information before me does not support and I am not satisfied that the applicant's profile, including his participation in a hunger strike in India in 2009 among many participants in his refugee camp, his occasional and minimal attendance of martyrs remembrance events in Australia, his residence in India and Australia and his seeking asylum in Australia would make him to be viewed as a government critics or a Tamil separatist.
41. 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 understands detainees are not subject to mistreatment during

¹⁶ 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

¹⁷ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

¹⁸ Ibid.

processing at the airport.¹⁹ The UK FFT report also indicates there is no mistreatment of returnees during arrivals process, regardless their ethnicity or religion.²⁰ The country information does not suggest that involuntary returnees are being mistreated. Neither is there any suggestion that returnees from Australia who spent years in India are being treated differently.

42. Having had regard to the accepted profile/history of the applicant, including his returning as a returned asylum seeker who had departed Sri Lanka illegally, I am not satisfied that the applicant has a profile of concern to the authorities and would be regarded as such. I consider that the chance that the applicant would be imputed with an adverse profile is very remote. Even considering that applicant may face a home visit/monitoring on return as a returning asylum seeker, with his profile I am not satisfied it will be for any prolonged period or that it amounts to serious harm or would lead to a real chance of any other harm.
43. DFAT noted that refugees and failed asylum seekers faced practical challenges to successful return to Sri Lanka including difficulty in finding suitable employment and reliable housing on return and that failed asylum seekers received limited reintegration assistance. Despite the challenges they 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. DFAT reports that some returning failed asylum seekers reported social stigma from their communities including for being beneficiaries of financial reintegration assistance but understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. While there was some social stigma attached to returnees from Tamil Nadu, sources also told DFAT that locals were generally welcoming and returnees did not feel they were treated differently. Returnees from Tamil Nadu that DFAT had spoken to report they were glad to have returned to Sri Lanka and would recommend return to other refugees.²¹
44. I accept that the applicant has no family members in Sri Lanka. He left Sri Lanka [in a specified age range] in 1990 and has since not returned there. I accept that the applicant may face practical challenges in resettling in Sri Lanka. On the other hand, despite being a refugee in India, the applicant was trained in [occupation 1] in India. He had about five years stable employment experiences in India working on [a specified project]. The applicant also had work experience in Australia. The applicant has demonstrated that he is quite resourceful. The applicant is returning to a Tamil majority north.²² The applicant is of [age] years old. He speaks Tamil. I understand that the situation and conditions in Sri Lanka may not be the same as Australia. Even if I were to accept that the applicant may possibly face some stigma attached to being a returnee, on the information before me, I am not satisfied there is a real chance that he would be prevented from obtaining employment, housing or otherwise integrating. The information before me does not support that stigma, if any, the applicant might face, amounts to serious harm. I am not satisfied that there is a real chance that the applicant's capacity to subsist will be threatened. I am not satisfied that the applicant faces a real chance of serious harm or persecution due to any difficulties or treatment or practical challenges of resettling in Sri Lanka.
45. I accept that the applicant departed Sri Lanka by boat in 1990. Country information indicates that where an illegal departure from Sri Lanka is suspected, a returnee can be charged under the I&E Act. The minimum age of criminal responsibility in Sri Lanka is 12 years. No charges are

¹⁹ DAFT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

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

²¹ DFAT, "Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

²² Ibid.

imposed against children under 12 years of age or ‘those persons who were younger than 12 at the time of the alleged offence’²³. The applicant departed Sri Lanka when he was a minor. The applicant has documentation from Indian authorities to prove that he left Sri Lanka when he was under [age range]. His illegal departure from India to Australia in 2013 was not in breach of Sri Lanka law. I am not satisfied that there is a real chance the applicant would be charged for the offence for departing Sri Lanka illegally. Therefore, the issue of bail in relation to illegal departure where a guarantee by a family member may be required does not arise. I am not satisfied that the applicant faces a real chance of being jailed because of his illegal departure. I am not satisfied that the applicant faces a real chance of persecution for having departed Sri Lanka illegally.²⁴

46. 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, if he were to return to Sri Lanka now or in the reasonably foreseeable future.

Refugee: conclusion

47. 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

48. 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

49. 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.

50. 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.

51. I accept that the applicant, may face some practical challenges in resettling and possibly a brief period of monitoring or social stigma, if any, as noted above. 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

²³ Ibid.

²⁴ Ibid.

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.

52. 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

53. 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.