



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09572

Date and time of decision: 9 September 2021 08:34:00
M Simmons, 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 Tamil, a Catholic and Sri Lanka national. On 14 June 2017 he lodged an application for a protection visa. On 26 July 2021 a delegate of the Minister for Immigration refused to grant that visa.

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:
 - The applicant grew up in Batticaloa District, raised by his maternal grandmother.
 - Three of his brothers were members of the Liberation Tigers of Tamil Eelam (LTTE). His younger [brother] died a martyrs death during combat in 1999.
 - The applicant moved to [District 1] in 1991, and shortly after began working for the LTTE in an administrative role in a political office of the [LTTE]. He was quite young at this time, and assumed this job voluntarily to help his family financially.
 - In 1992 the applicant was transferred to an LTTE training camp in Jaffna District where he underwent three months of weapons training. After this he received an LTTE uniform and the LTTE name '[name]'. He then returned to the [LTTE] office in [District 1]. In 1993 he was transferred to a [specified] camp where LTTE [supplies] were made.
 - In 1996 when he was around [age range] years old he decided to leave the LTTE after having served around 5/6 years. He had to serve a 3 month penalty before he could leave, during which he was assigned to a farm to do labour intensive work.
 - In 1997 he was married. Then in 2004 the LTTE began requiring former member to re-join the movement. Fearing he may be forced into a role on the frontline against his will, the applicant voluntarily joined the LTTE's intelligence wing. He was located at the [location] based in [District 1]. He was responsible for gathering intelligence in the LTTE controlled area, and had six agents reporting to him from various locations in [District 1]. At the LTTE base all persons entering had to wear a mask and used assigned LTTE names. He did this work from 2004 until 2007.
 - In 2007, when the war intensified the LTTE needed more frontline recruits. The LTTE conducted meetings across [District 1]. At [Village 1], villagers from that village and three neighbouring areas met on an old school grounds. At that meeting village elders and the LTTE political wing nominated the applicant for a leadership role. He was responsible for sourcing males from those villages and maintaining a roster to send them to the front line to perform duties such as digging bunkers.
 - Sometime in April 2009 he and his family were displaced due to fighting, and moved to [Village 2] close to [an LTTE] base [named]. At this base the head of the LTTE political wing for [District 1] allowed the applicant's family to live in this base with his wife in a temporary shelter, along with the families of other LTTE commanders. They stayed here

for 4-5 days until they were displaced due to fighting and relocated to [Village 3]. From there the applicant, along with around 20 relatives of LTTE fighters boarded a boat intending to travel by sea into an army controlled area at Trincomalee. The applicant agreed to steer the boat provided no LTTE cadre were amongst the passengers. When they departed they displayed a white flag from the front of the boat. They were soon intercepted at sea by the Sri Lankan Navy.

- The applicant was detained with his family and transferred to a displaced persons camp at [Village 4]. While he was detained he was interrogated as the authorities suspected he was involved with the LTTE. He denied this repeatedly. He was released from the camp in early 2013.
- In March 2013, a police officer came to the applicant's shop in [Village 1] looking for him (the shop adjoined his house). At the time the applicant was in [another location] selling [products]. His wife spoke to the police officer who gave her a written request for the applicant to attend [a named] police station the following day.
- The applicant went to the police station the next day as requested. From there he was taken in a jeep to a Criminal Investigation Department (CID) base. He was pushed into a room that was dark and smelt of blood. Around fifteen minutes later three CID officers entered the room and turned on the lights, at which time the applicant could see various weapons and devices which he believes were used for torture.
- The CID officers said that they knew the applicant was from the LTTE intelligence wing and that he needed to provide the details of the agents he worked with. He denied this. The CID officers then offered him Rs [amount] to identify an LTTE agent. He was questioned for around one hour, during which he continued to maintain he was not an LTTE member. The CID officers then returned him to the police station and he went home.
- Around 4 or 5 days later, '[Agent A]', a former LTTE member who had since joined the CID and who the applicant knew, came to warn him. [Agent A] told the applicant that the CID believe he was a member of the LTTE intelligence wing and that [Agent A] had been assigned the task of killing him by the CID. Following this, the applicant fled the country in May 2013.
- [In] July 2013 his home was searched by CID members. [In] February 2015 the CID again searched his home. His wife told them that the applicant was in Australia and they said that if he returns they would take him in for questioning.
- In July 2020 the applicant hurt his leg in a workplace injury and now walks with a limp. He believes he will attract adverse attention in Sri Lanka because of the way he now walks.
- If he returns to Sri Lanka, the applicant fears being harmed because he is a Tamil from a former LTTE area, because he was a LTTE intelligence officer who was responsible for six agents, and because he is well known amongst LTTE cadres. The CID intend to kill him due to his LTTE activities. The applicant claims that the Prevention of Terrorism Act (PTA) is still in force in Sri Lanka and it was still being used to arrest anyone appearing to be supporting the LTTE. He also fears being harmed because he departed Sri Lanka illegally and requested asylum in Australia.
- The applicant also fears harm following the election of the current Sri Lanka government, namely the Rajapaksa brothers, President Gotabaya and Prime Minister Mahinda.

Factual findings

Identity and background

4. The applicant has provided evidence in support of his claimed identity and Sri Lankan nationality, including a copy of his Sri Lankan birth certificate and national identity card. The evidence he provided about his identity and background during an interview shortly after he entered Australia, and in his visa application, mostly accorded with that set out during the interview with the delegate. I accept that the applicant's identity is as claimed, and I accept he is Tamil and a Catholic. I accept he spent his childhood in Batticaloa District in Sri Lanka's Eastern Province, but as an adult mostly lived in [District 1] in the Northern Province. Sri Lanka is the receiving country for the purpose of this assessment.

Experiences in Sri Lanka

LTTE involvement

5. Mostly I found that the applicant provided a detailed and plausible account of his LTTE involvement, and one which has remained consistent since he entered Australia. He provided considerable detail regarding his role in an LTTE political office and the intelligence wing, amongst other postings. He detailed various duties and responsibilities, training he undertook, and the persons he reported to and supervised, amongst other aspects.
6. I note that shortly after entering Australia the applicant undertook an enhanced screening interview during June 2013 where he gave an overview of his claimed LTTE involvement which accords with that set out in his visa application. He stated he was first involved with the group in 1992, left at around 1997 when he got married, then re-joined the movement in the later stages of the war. The applicant also undertook an entry interview in July 2013. While he was expressly told to be brief in his responses by the interviewer, in the entry interview when asked about his reasons for leaving Sri Lanka he also mentions his LTTE involvement. He indicated he joined the movement in 1992 in [District 1] in a political office, and that in 2008 he assumed the role of finding recruits for frontline duties such as digging bunkers as the war intensified. He offered further elaboration upon the various roles he held and the activities he undertook for the LTTE in both his visa application and at interview with the delegate. He gave confident and unprompted response to questioning from the delegate about his LTTE activities.
7. During the interview and noted in her decision record, the delegate asked the applicant why he never mentioned that he worked for the LTTE earlier in 2013 when he initially arrived in Australia and that information was only brought to the Department's attention in 2017 as part of the visa application. I note, as set out above, that the applicant provided early and reasonably detailed disclosure of his various LTTE activities, during two separate interviews in 2013. The delegate accepted the entirety of the applicant's claimed involvement with the LTTE, finding his account to be consistent and plausible.
8. I also accept the applicant's claims in respect of his LTTE involvement. I accept that the applicant joined the LTTE in 1992 in an administrative role in political office, and that subsequently he worked in the intelligence wing where he received information from six operatives and that he was later responsible for sourcing recruits from the [Village 1] area to undertake frontline duties such as digging bunkers. He maintains, and I accept, he did not have a combat role in the LTTE, though he did undertake some weapons training.

9. I am also satisfied that the applicant's brothers were LTTE members, and one is a war martyr. The applicant indicated he did not know much about the nature of his brother's roles in the LTTE, other than that they were combatants and one was a commander. While his account in respect of this matter is not detailed, it has remained consistent over a number of years and is generally plausible in light of reporting before me. At its peak, the LTTE had an armed force of approximately 18,000 combatants, and majority-Tamil civilian populations of areas controlled by the LTTE were required to interact with the LTTE as a matter of course.¹ Given I have accepted that the applicant himself was involved with the LTTE from a young age, I am prepared to accept that his siblings were similarly involved with the movement. I note that during the interview, the delegate asked the applicant why he did not mention his brothers were LTTE members until the 2017 visa application. However, the applicant specifically indicated one of his brothers was an LTTE martyr in the 2013 arrival interview.

End of the war

10. The applicant described being twice displaced in the final stages of the war, and fleeing LTTE controlled territory at Mullivaikkal, departing by sea and surrendering to the authorities. After which he was held in a government run displaced persons camp until early 2010, when he was released. The delegate did not question the applicant about most of these events, though appears to have accepted that they occurred when accepting in its entirety the applicant's claims in respect of his LTTE involvement.
11. I regard the applicant's account of his experiences around the final stages of the war and its aftermath to be plausible in light of country information from that time. Between April 2009 and the end of November 2012, the Northern Province which is where the applicant was located at this time, experienced the highest level of displacement as a result of the conflict.² Reports note that many thousands of LTTE cadres and members surrendered to the authorities and were then interned in camps.³ Given the applicant has offered a generally plausible and quite detailed account, I accept that at the end of the war he surrendered and was interned in a displaced persons camp.
12. His evidence is that in the camp he was repeatedly asked about his LTTE involvement. He denied having any involvement and went undetected during the 6 month period he was detained. He suggests that this may have been due to the fact that because of the displacement he experienced prior to his surrender, he was not detained with people from his village or any others who could inform the Sri Lanka authorities of his LTTE involvement. Following the end of the armed conflict in April 2009, former LTTE combatants and LTTE members and many others suspected of having links with the LTTE went through a "rehabilitation" programme. In addition to security and intelligence screening, the rehabilitation programmes reportedly include counselling and vocational and language training. A total of over 11,000 individuals with alleged links to the LTTE – mostly former combatants, but also drivers, cooks and other aides – have undergone this process.⁴ The applicant has never suggested he was referred for rehabilitation. Tamil ethnicity and place of

¹ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244

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

³ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8.

⁴ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8.

origin was relied upon by the authorities to impute LTTE involvement or sympathy during this time.⁵ It causes me some doubt that the applicant's LTTE links were not detected while he was interned. I note during this period the authorities were exerting considerable effort to locate LTTE members and supporters, and he is a Tamil male he fled LTTE controlled territory during the final stages of the war. However, reporting from that time indicates that a number of LTTE members and cadres did go undetected in the years immediately following the cessation of the war.⁶ I have accepted his account of displacement away from his village in the final stages of the war, and I also note that the interned camp he was held in was located some distance from his usual area of residence. As such it is possible he was not detained with other persons who were previously aware his LTTE involvement. Although I also note his assertion in his visa application that he was well known amongst LTTE cadres, and his contention via written submissions that he held senior roles in the LTTE. I accept his claim that he was not identified as being an LTTE member during this internment and that he was not referred to rehabilitation. I consider his ability to avoid detection is not suggestive of his LTTE involvement being significant or that he was well known within the movement. On his own evidence, the applicant seems to suggest his LTTE activities were only known within his village, as he attributed his ability to avoid detention in the camp to not being interned with others from his village.

Questioning by the CID in 2013

13. The applicant's evidence is that following his release in early 2010 until early 2013, he did not have any adverse dealings with the Sri Lankan authorities. He was then questioned by the CID in early 2013. He claims that the CID told him they knew he was in the LTTE intelligence wing as they spoke to agents that reported to him. The applicant suggested it's possible that the authorities may have come to know of his LTTE links at that time via informants. The applicant's evidence is that during the questioning he denied any LTTE involvement and was released unharmed after around 45min. He then claims a few days later, a former LTTE member turned CID officer who knew the applicant came to warn him that he was being instructed by the CID to kill the applicant. At this time the applicant fled the country.
14. Reporting before me indicates the Sri Lankan authorities routinely detained and harmed actual or suspected LTTE members in the period following the cessation of hostilities.⁷ I find it quite unlikely that if the applicant was truly regarded as having had any LTTE involvement of interest with the Sri Lanka authorities that they would release him after 45 min of questioning. Particularly if they intended to kill him only a few days later. The applicant's evidence is that the CID had specific knowledge of his LTTE background, but that he simply denied this and they released him. At that time the CID had at their disposal various measures to deal with suspected LTTE members, including the PTA which allowed security forces to arrest any individual without a warrant and keep them in detention for up to 18 months.⁸ In this context, I do not accept that if he was truly regarded as having any LTTE involvement of significance that they would release him, or that they would seemingly accept his denials despite apparently having specific knowledge of his LTTE involvement. Moreover I find it implausible that he

⁵ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8.

⁶ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8.

⁷ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009; DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 2019110413524.

⁸ Diplomatic Courier, 'Sleeping Tigers: How the Scars of Sri Lanka's Civil War Still Linger', 28 February 2020, 20200302120323.

would be released from custody only for the CID to seek to kill him a few days later. I am not satisfied that the applicant was questioned by the CID, or that he was released and then warned by a friend and CID officer that he had been ordered to kill him. I am not satisfied that at the time of his departure the CID were aware of his LTTE involvement or that they were actively pursuing the applicant.

Departure, events while in Australia

15. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including the Immigrants and Emigrants Act 1949 (I&E Act).
16. I have rejected his claim that the CID questioned the applicant shortly before he left Sri Lanka and that they were pursuing him at that time, as I do not find the evidence before me regarding the CID interest in the applicant or his dealings with them to be persuasive or compelling. In addition to my concerns set out above regarding the claimed questioning in 2013, I note that he has offered no corroborative material to evidence any dealings between the Sri Lanka authorities and his family since his departure. On the available information I do not accept that the CID visited the applicant's home two times after he left Sri Lanka.
17. Based on medical evidence before me, I accept that during 2020 the applicant suffered a workplace injury and that he now walks with a limp.
18. I accept that were the applicant to return to Sri Lanka, he would do so after having resided in Australia for a number of years and after having requested asylum here. I am satisfied that due to his mode of departure, and that he would be returning from after an extended period in Australia, the Sri Lankan government may assume that he sought asylum from Sri Lanka in Australia.

Refugee assessment

19. 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

20. 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.

21. Independent information before me indicates that the situation in Sri Lanka has changed and overall, the conditions for Tamils have significantly improved since the applicant's departure from that country.⁹ In 2015 there was a change of government with the election of President Sirisena, and a Sri Lankan government focussed on post-conflict reconciliation, transitional justice, democratic renewal and governance and economic reforms.¹⁰ The UK Home Office (UKHO) indicates that under the Sirisena government there were positive developments including: curtailing of executive power; attempts at the reestablishment of independent commissions, including the Human Rights Commission of Sri Lanka (HRCSL); de-proscription of a number of international diaspora organisations; and review of cases held under PTA and release of some detainees. However, progress was slow and little improvement was reported in 2018 and 2019.¹¹ Although reports persist of some ongoing monitoring and surveillance of the Tamil community, security measures such as military checkpoints and restrictions on travel to the north and east have been lifted and monitoring in day to day life has decreased in recent years. In 2019, Tamils who had failed to secure asylum in Australia and since returned to the Northern Province, from where the applicant originates, reported to the Australian Department of Foreign Affairs and Trade (DFAT) they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.¹² While the war previously destroyed factories and other livelihoods, it was reported in 2020 there are now increasing job opportunities in the North.¹³ However, problems persist. In 2021 the United States Department of State notes that Tamils reported suffering systematic discrimination in university education, government employment, housing, health services, language laws, and procedures for naturalization of non-citizens.¹⁴ DFAT have previously attributed some of these complaints as being due to disrupted education because of the conflict and language constraints, rather than being the result of an official policy of discrimination.¹⁵ DFAT's assessment in 2019 was that all Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing.¹⁶ The UKHO assessed overall in 2020 was that Tamils do not suffer persecution simply for their Tamil ethnicity.¹⁷

22. LTTE members and supporters were almost all Tamils, and security forces previously imputed LTTE support based on ethnicity. Towards the end of the war, government security forces arrested and detained a large number of LTTE members, most of whom were sent to government-run rehabilitation centres.¹⁸ In the immediate post-war period Sri Lankan government forces continued to detain those with links to the LTTE, imputed or otherwise, and

⁹ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

¹⁰ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

¹¹ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009.

¹² DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

¹³ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

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

¹⁵ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

¹⁶ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

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

¹⁸ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8.

their use of torture was particularly brutal.¹⁹ The situation in Sri Lanka has shifted considerably since the end of the civil war. Tamil ethnicity no longer forms a basis for imputing LTTE of itself, nor does originating for an area previously under LTTE control. The LTTE in Sri Lanka itself is a spent force, and generally past LTTE connection would not warrant protection.²⁰ There is no suggestion that the applicant has had any involvement with the LTTE since 2009.

23. In its January 2020 assessment from a fact finding mission to Sri Lanka, the UKHO reported that an NGO worker advised that if returning failed asylum seekers were found to have links to the LTTE they would likely face further questioning but it would depend on the case.²¹ While after the war whoever was connected to the LTTE would be arrested, sent to court and go through rehabilitation, the UKHO reported in January 2020 that now just having supported the LTTE is not enough to be arrested.²² Over 12,000 ex-LTTE members have undergone rehabilitation since 2009, the last individual was reportedly released in late 2019 and the program has ended.²³ The Attorney General's Department and CID told the UKHO that former LTTE cadres would only be of interest if there was a pending criminal case against them and that mere membership of the LTTE would not make someone of interest.²⁴ DFAT advises that former LTTE leadership and those who held senior positions in the LTTE military wing and civilian administration are at the highest risk of monitoring, arrest, detention or prosecution on return to Sri Lanka.²⁵
24. Submissions from the applicant's representative to the delegate contend the applicant is a person of interest in Sri Lanka based on the 2012 UNHCR guidelines, because he held a senior position in the LTTE and/or he was an LTTE combatant. I note that those guidelines are now around nine years old and offer little insight in the present situation in Sri Lanka, for which I have taken into account more current reporting. Furthermore, on the applicant's own evidence he was never a combatant and on the details he has provided I do not accept he held a senior position within the LTTE administration. I accept he managed six intelligence operatives while in the intelligence wing, though on his own account he worked at one of a number of bases within the [District 1], where he had at least two superiors to whom he reported to. He also indicated he later assumed responsibilities for deploying recruits from his village to perform frontline duties like digger bunkers. I accept that these roles do not appear to have been at the very bottom of the organisation's hierarchy, however I did not accept that as described they evidence notable seniority or authority. The 2012 guidelines identify persons of interest to the authorities at that time as those having senior positions with considerable authority in the LTTE civilian administration.²⁶ On the applicant's own account I do not accept that he ever held such a role within the LTTE. I have accepted that the applicant was an LTTE member but not a combatant.
25. In 2019, DFAT noted that some Tamils with actual or imputed LTTE links continue to report police monitoring and harassment. Multiple sources in the north reported that former LTTE members, including those considered low-profile, are monitored to guard against the LTTE's

¹⁹ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009; DFAT, Country Information Report Sri Lanka, 3 November 2019, 20191104135244.

²⁰ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

²¹ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

²² UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

²³ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

²⁴ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

²⁵ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

²⁶ UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8.

re-emergence, although monitoring today is less extensive and takes a more subtle form.²⁷ The extent of monitoring depends on one's former seniority within the LTTE; ongoing involvement with politically-sensitive issues, including protests relating to disappeared persons; and links to the Tamil diaspora, particularly elements of the diaspora considered radical by the Sri Lankan Government. Former LTTE members that fit this profile are more likely to be monitored by the authorities. In contrast, those who maintain a low-profile are considered less vulnerable to monitoring.²⁸ The applicant's evidence does not suggest he has had any involvement with the LTTE, Tamil groups, or any politically sensitive issues since entering Australia in 2013. Where monitoring did occur, local sources claimed the authorities – usually undercover police officers or intelligence agents – used more subtle methods, for example inviting individuals to tea in public places and asking questions about their activities. The questioning did not involve violence. DFAT most recent assessment is that while they may be monitored, Tamils with links to the LTTE are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.²⁹ More recently, the Upper Tribunal in KK and RS observed that monitoring undertaken in respect of returnees who are of interest, at not at a level sufficient to justify detention, will not, in general, amount to persecution or ill-treatment.³⁰

26. I have also accepted that the applicant had brothers who were LTTE members, including one of whom was a war martyr. During the interview the applicant indicated his two [brothers] are still living in Sri Lanka and are married and have children. He did not suggest that they have been seriously harmed or have had any ongoing difficulties with the Sri Lankan authorities on account of their past involvement in the LTTE. Unlike the applicant, these brothers were combatants during the war. The applicant gave no suggestions that they had fears in relation to their security, wellbeing or ability to support themselves or their families, notwithstanding they are Tamils and former LTTE cadres. That these brothers are currently experiencing difficulties with the Sri Lanka authorities despite their background accords with the country information I have outlined above.
27. Considering the applicant's own historical LTTE involvement as well as his familial LTTE links, the material before me does not suggest that a person with connections to the LTTE such as the applicant's would currently face a real chance of being seriously harmed by the authorities in Sri Lanka.³¹ I can accept that were to return to Sri Lanka, inquiries would likely be made into his background, including during the process of him obtaining a travel document,³² and I accept it is possible his own and his familial LTTE involvement may come to light. Based on the profile he has described, I accept that there is possibility he could be subject to some monitoring, however the reporting before me supports a conclusion that such treatment is not violent and does not attract a real chance of the applicant being subjected to serious harm.
28. Tamils were disproportionately detained under the PTA in the past. This legislation was suspended between 2016 and April 2019, but it remains legally in force and was used, alongside the Emergency Regulations to detain persons allegedly involved in the 2019 Easter Sunday terrorist attacks.³³ The Emergency Regulations have lapsed and most Tamils detained under the PTA have been released. Of those individuals who have been detained under the

²⁷ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

²⁸ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

²⁹ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

³⁰ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

³¹ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

³² *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

³³ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009; DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

PTA, they were allegedly involved in an assassination plot and the Easter Sunday attacks.³⁴ The number of PTA arrests appears to have increased in late 2020 and early 2021 – including reports that the Rajapaksa government used the PTA to detain Tamils involved in marking the birthday of slain LTTE leader, Vellupillai Prabhakaran and Muslims accused of spreading extremism through WhatsApp.³⁵ Despite these developments, this information does not support a conclusion that the PTA has been recently employed against Tamils in general and nor does it indicate that a real chance of arbitrary detention arises to members of the Tamil community generally or against individuals with an actual or imputed association with the LTTE, and I am not satisfied this is the case.

29. Recent reporting indicates that the persons most at risk in Sri Lanka are those perceived to have a significant role in relation to post conflict Tamil separatism.³⁶ The Sri Lankan authorities will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam.³⁷ The term “significant role” in this context does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been “high profile” or “prominent”.³⁸ This applicant has not suggested he has had any involvement with any separatist groups or any separatist activities at all since entering Australia in 2013. The available information does not suggest he has taken part in diaspora activities during his time in Australia that may be of concern in Sri Lanka, or that he has otherwise taken part in separatist activities that may be perceived as challenging the integrity of the single Sri Lankan state. I am not satisfied that the applicant would be regarded as having played a significant or recent role in any separatist causes and I am not satisfied he faces any chance of harm in Sri Lanka for that reason.
30. Former Defence Secretary Gotabaya Rajapaksa, the candidate of the Sri Lanka Podujana Peramuna (SLPP) party, was sworn in as Sri Lanka’s new President after easily winning the elections held on 16 November 2019.³⁹ On 5 August 2020, the SLPP party and his brother and Prime Minister, Mahinda, decisively won the Sri Lankan parliamentary elections, securing 145 or 225 seats in Sri Lanka’s parliament.⁴⁰ Tamils overwhelmingly voted against the ruling SLPP party in the 2019 presidential and 2020 parliamentary elections because of concerns about its treatment of minority groups.⁴¹ Relevantly, DFAT states that the inclusion of Tamils in political dialogue has increased since 2015 with numerous Tamil political parties. Tamils were not generally prevented from participating in the most recent elections and there are no barriers to Tamil political participation.⁴²
31. The return to power of the Rajapaksa brothers created concern amongst the Tamil community, as Gotabaya Rajapaksa was Defence Secretary, and Mahinda Rajapaksa was President during

³⁴ DFAT, ‘Country Information Report Sri Lanka’, 3 November 2019, 20191104135244.

³⁵ Tamil Guardian, ‘Sri Lankan police arrest 19 and mark further 55 for posting Prabhakaran birthday messages’, 27 November 2020, 20201130114439; International Federation Of Journalists, ‘Sri Lanka: Tamil journalist arrested for social media posts’, 3 December 2020, 20201204143539; Tamil Guardian, ‘Sri Lanka arrests two for allegedly spreading Wahabism’, 3 April 2021, 20210406172936.

³⁶ UK Home Office, ‘Country Policy and Information Note Sri Lanka: Tamil separatism’, May 2020, 20200527172009.

³⁷ UK Home Office, ‘Country Policy and Information Note Sri Lanka: Tamil separatism’, May 2020, 20200527172009.

³⁸ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

³⁹ The Economist, ‘A polarising figure becomes president of Sri Lanka’, 23 November 2019, 20191122115336.

⁴⁰ S. Rajaratnam School of International Studies (RSIS), ‘Sri Lanka Elections: Stronger Powers, At What Cost? – Analysis’, 12 August 2020, 20200812104655.

⁴¹ Eurasia Review, ‘Sri Lanka: Presidential Election And Tamil Politics – OpEd’, 27 November 2019, 20191128103208; The Hindu, ‘Unfair to attribute racist dimension to Tamil vote, says Sampanthan’, 18 November 2019, 20191121095223; Foreign Policy, ‘Rajapaksa Rule’, 14 August 2020, 20200817165533; The Economist, ‘Sri Lanka is becoming a one-family state’, 15 August 2020, 20200814111514.

⁴² DFAT, ‘Country Information Report Sri Lanka’, 3 November 2019, 20191104135244.

the final stages of the civil war with the LTTE, during which many thousands of Tamils were killed.⁴³ Submissions to the delegate contend that as a result of these elections the political landscape in Sri Lanka will change in the foreseeable future, and these developments suggest there is a real chance of harm to Tamils. I note that those submissions were made in mid 2021 but did not cite recent reporting to corroborate such a claimed shift has occurred since either the 2019 and 2020 elections. Since coming to power, Gotabaya and his brother, Mahinda Rajapaksa, have withdrawn from undertakings made by Sri Lanka's previous government to promote reconciliation and accountability following the end of the country's long-running civil war in 2009, and have appointed to senior government positions military figures alleged to have been involved in atrocities committed during the conflict.⁴⁴ The government has also instituted new regulations that – among other things – ban hundreds of Muslim and Tamil organisations and individuals, and allow for the forced 'de-radicalisation' of individuals accused of promoting extremist ideologies.⁴⁵

32. I note that the applicant's evidence is he has two brothers, both of whom are Tamils with former LTTE links, who continue to reside in Sri Lanka. There was no indication either brother had concerns for their security, and the applicant gave no suggestion that there has been a material shift for either of them since the 2019 and 2020 elections. Similarly, recent reporting still affirms that Tamils are not specifically targeted by state actors or other parties solely on account of their ethnicity even following these political developments.⁴⁶ I am not satisfied that the Rajapaksa brothers' return to power creates any particular risk to this applicant such that he may face a real chance of harm for that reason.

33. I have accepted that the applicant walks with a limp due to a workplace injury. He asserts that he will quite easily attract adverse attention from the Sri Lankan authorities for this reason. The applicant and his then representative did not refer to country information to support this contention. The material before me is not suggestive of persons with a limp or comparable injuries being targeted for harm for that reason by the Sri Lankan forces.⁴⁷ It was not suggested that the applicant fears being a presumed war casualty due to this injury, or that persons with such an injury in Sri Lanka are otherwise imputed with an adverse profile. However, I note that in 2019 DFAT stated it is aware of historical reports that people with war-related scarring are more likely to attract adverse attention from the Sri Lankan authorities. Namely, an NGO, Freedom From Torture, reported in 2011 that an unidentified number of people were detained by the Sri Lankan authorities in April or May 2009 because their scarring was deemed evidence of LTTE membership. The cases raised by Freedom From Torture date from the immediate end of the war and DFAT reported it is unaware of more recent evidence of individuals being detained because of scarring.⁴⁸ In any event it is not clear to me, and I am not satisfied, that the applicant's limp would necessarily be perceived as being war related. The applicant has not suggested he will be unable to access necessary medical care related to this injury were he to return to Sri Lanka, or that he fears any kind of discriminatory treatment in connection with

⁴³ Aljazeera, 'Sri Lanka's Tamils are at imminent risk after Rajapaksa's return', 29 October 2018, CXBB8A1DA39443.

⁴⁴ Office of the United Nations High Commissioner for Human Rights, 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 18 February 2020, 20200221140652.

⁴⁵ Aljazeera, 'What is behind the anti-Muslim measures in Sri Lanka?', 12 April 2021, 20210413125122; Eurasia Review, 'Sri Lanka To Set Up Rehabilitation Centers For Extremists – Analysis', 15 March 2021, 20210316115940.

⁴⁶ INFORM Human Rights Documentation Centre, 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', 29 June 2020, 20200702160949; UK Home Office 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 20200527172009.

⁴⁷ Office of the United Nations High Commissioner for Human Rights, 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 18 February 2020, 20200221140652; US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412; DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

⁴⁸ DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

this injury. I am not satisfied that his leg injury imparts upon his any profile of interest in Sri Lanka including with the authorities or that it otherwise attracts any chance of harm.

34. Given his illegal departure, I accept the applicant may be arrested and charged under the I&E Act on return, and enquiries may be made about him. DFAT assesses that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during this processing. Notably, the most recent reports from DFAT indicate that it is very unlikely that the applicant would be detained in a prison while awaiting any court appearance. Returnees will be brought before the Magistrate's Court at the earliest opportunity but subject to magistrate availability, he or she may be detained for up to two days in an airport holding cell.⁴⁹ While I accept that the applicant's LTTE affiliation would likely come to light, reporting I have referred to above suggests a member such as himself who did not have significant role in the movement is unlikely to be detained. There is nothing credible to suggest there would be extant criminal charges or proceedings against him.
35. There is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger on the boat journey to Australia; according to the Sri Lankan Attorney-General's Department no custodial sentences have ever been issued to such persons.⁵⁰ Should the applicant plead guilty to departing illegally, he may be fined a penalty of up to LKR 200 000 and will then be free to go. There is nothing in the information before me to suggest the applicant will plead not guilty and I consider he will most likely plead guilty. If a not-guilty plea is entered usually a magistrate would grant bail either on the basis of personal surety or guarantee by a family member. I am not satisfied there is any reason the applicant would not be granted bail in the event he does plead not guilty (although he has not suggested he would do so). DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances, if required, over protracted lengths of time can be high. On the evidence I am not satisfied the applicant could not pay a fine, or manage arrangements and costs for court appearances if further ones are required noting he has now worked in Australia over several years. I do not consider that questioning, any surety imposed or reporting conditions, the imposition of fines, or the potential costs associated with the further court appearances if required, and possible short term detention would constitute serious harm in the present case, or that there is a real chance he will face serious harm during returnee processing. Separately, I also note reports before me indicate this is conducted and applied in a non-discriminatory manner, and am not satisfied the processes and penalties amount to systematic and discriminatory conduct.⁵¹
36. I accept the applicant has not resided in Sri Lanka for many years and that given this and his mode of departure it may be inferred that they requested asylum in Australia. Country information does not indicate that a person with the applicants' backgrounds face a real chance of harm on return to Sri Lanka because they requested asylum in another country. DFAT reports that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries and most were Tamil. Any reintegration issues that a returnee may face are not considered by DFAT to be due to a failure to obtain asylum, but rather due to employment and accommodation difficulties. There were some reports of social stigma from their communities upon return including resentment of the financial support provided to returnees. Overall, DFAT's assessment is that societal discrimination is not a major concern for returnees,

⁴⁹ DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

⁵⁰ DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

⁵¹ DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

including failed asylum seekers. DFAT advised it is not aware of returnees, including asylum seekers, being treated in such a way that endangers their safety and security after their return.⁵² The applicant's wife and children continue to reside in Sri Lanka, as do two of his brothers and their families. [One child] is currently attending university. I am satisfied he will be able to return and establish himself with the support of his family, noting he has not indicated any concerns in this respect. I accept there is a chance as a returning asylum seeker the applicant may experience some stigma, however given reporting indicates this is not likely to present a threat to security, and he will have the benefit of familial support, I do not consider this presents a real chance of the applicant being seriously harmed.

37. Various commentators have expressed concern in recent years about the ongoing use of torture against persons in the custody of the Sri Lanka authorities. In March 2021, the United States Department of State cited the Human Rights Commission of Sri Lanka (HRCSL) reporting the use of torture by police as endemic, noting many reports of torture referred to police officers allegedly "roughing up" suspects to extract a confession or otherwise elicit evidence to use against the accused.⁵³ The information indicates that there remains a risk of torture for certain individuals with profiles of interest to the authorities in their custody, including political activists and journalists amongst others.⁵⁴ However the material before me does not support a conclusion that the applicant has any profile such that the Sri Lanka authorities may wish to either detained or torture him for any reason. As such I do not accept that there is a real chance of that occurring.

38. I am not satisfied the applicant faces a real chance of treatment amounting to serious harm for any reason advanced or arising on material before me. This includes for reasons related to his Tamil ethnicity, place of origin, personal and familial LTTE involvement, because he left Sri Lanka unlawfully, because he requested asylum from and has resided in Australia, because he now walks with a limp, or because of the return to power of the Rajapaksa brothers. The applicant's fear of persecution is not well founded.

Refugee: conclusion

39. 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

40. 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.

⁵² DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

⁵³ US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

⁵⁴INFORM Human Rights Documentation Centre, 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', 29 June 2020, 20200702160949; Office of the United Nations High Commissioner for Human Rights, 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 18 February 2020, 20200221140652; US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

Real risk of significant harm

41. 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.

42. 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.

43. I accept that on return the applicant may experience some stigma within his community as a returnee. I note that he will be returning to an area where he has familial connections which will aide his reintegration. I also accept that the applicant may face some monitoring from the authorities, though reporting indicates for persons with LTTE involvement comparable to the applicant's that this does not involve violence or unduly impact of day to day living.⁵⁵ I am not satisfied that any such treatment may amount to significant harm in the relevant sense. The material before me does not suggest, and I am not satisfied, it would involve a real risk of the applicant being arbitrarily deprived of his life, being subjected to the death penalty or tortured. Nor does such treatment involve pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation.

44. As 'real chance' and 'real risk' involve the same standard.⁵⁶ For the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary consequence of the applicant's removal to Sri Lanka, he will face a real risk of significant harm for any of the other reasons advanced.

Complementary protection: conclusion

45. There are no 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.

⁵⁵ DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

⁵⁶ *MIAC v SZQRB* (2013) 210 FCR 505.

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.