



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09583

Date and time of decision: 30 August 2021 10:17:00
M Currie, 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 Sri Lankan citizen of Tamil ethnicity and an adherent of the Hindu faith. He arrived in Australia in April 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in June 2017. In that application, his claims for protection were principally related to his family connections to the Liberation Tigers of Tamil Eelam (LTTE).
2. In July 2021, a delegate of the Minister for Immigration decided under s.65 of the *Migration Act 1958* (the Act) to refuse the visa, finding that Australia did not owe protection obligations to the Applicant. On 30 July 2021, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
3. This is a *de novo* decision. My task is to consider the applicant's claims for protection and the materials before me afresh. I am not bound by any earlier findings by the delegate.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the Act.
5. On 20 August 2021, a migration agent sent an email to the IAA on behalf of the applicant. Upon examination, the email was found to contain: (a) a Submission to the IAA; (b) a two-page explanation for new information; (c) duplicate copies of a document said to be a translation of a missing persons compliant lodged in Sri Lanka relating to the applicant's father. On 23 August 2021, another email was sent to the IAA containing: (d) a copy of the original, untranslated, missing persons compliant. Further correspondence from the migration agent on 24 August 2021 included copies of: (e) a 2021 judgement from the UK Upper Tribunal; and (f), a transcript of a June 2021 Senate Estimates hearing.
6. Broadly, the applicant's 2021 Submission to the IAA argued that if returned to Sri Lanka, the applicant would face harm due to his Tamil ethnicity, his family connections to the LTTE; his actual or imputed political opinion; his actual or imputed sympathy for the LTTE; or his attempt to seek asylum in Australia. The submission further argues that the delegate failed to consider or mischaracterised the profile of the applicant's father and Uncle (both LTTE members). To the extent that the Submission is argument, I have considered it.
7. The two page explanation for new information contains a further argument: that the delegate's conclusions were undermined by an overreliance on a 2019 report from the Department of Foreign Affairs and Trade (DFAT) relating to conditions in Sri Lanka, and a 2020 report published by the UK Home Office relating to Tamil separatism in Sri Lanka. It was submitted that these reports should not have been given so much weight by the Delegate in forming his view about the present conditions in Sri Lanka; the DFAT report was specifically identified as not providing an accurate impression of the current situation for Tamils in Sri Lanka, including Tamils with the profile of the Applicant. I have considered this argument.
8. The arguments against the DFAT Report and the UK Home Office report are said to derive from two sources, the 2021 UK Upper Tribunal judgement, and from the June 2021 Senate estimates hearing Transcript. Copies of both of these documents have been submitted to the IAA in support of the arguments against the DFAT report, and the UK Home Office Report. Neither

the UK Upper Tribunal judgement, nor the Senate Estimates Transcript were before the delegate, they are new information.

9. I have reviewed the content of these two documents. I observe that the UK Upper Tribunal related to “the risk in Sri Lanka to individuals on the basis of sur place political activities in the United Kingdom which are (or are perceived to be) in opposition to the government in Sri Lanka”. This applicant has not lodged any sur place claims about activities in the United Kingdom, though, he has lodged some claims about activities in Australia. The 2021 UK Upper Tribunal Judgement was handed down on 27 May 2021, some two months prior to the date of the s.65 Decision. At that time, the applicant was represented by the same migration agent who represents him now. In these circumstances, I am not satisfied that the UK Upper Tribunal Judgement could not have been provided to the delegate prior to the date of the delegate’s decision and so I am not satisfied that s.473DD(b)(i) is met for this judgement. Nevertheless, the UK Upper Tribunal Judgement does contain credible personal information which may have affected consideration of the applicant’s claim for protection and so I am satisfied that s.473DD(b)(ii) is met. Given the content of this Judgment, I am also satisfied that there are exceptional circumstances to justify considering the judgement and so s.473DD(a) is met and I have done so.
10. The 2021 Senate Estimates transcript 164 pages in length and is dated 4 June 2021. It is a record of a Senate Foreign Affairs, Defence and Trade Legislation Committee hearing held on that date. I have reviewed the Senate Estimates transcript. It does not mention the applicant, nor his personal circumstances. The Transcript indicates that during the hearing, several questions were asked of DFAT personnel about the reliability of 2019 DFAT Report, citing the UK Upper Tribunal Judgement. DFAT personnel answered the questions and indicated that the 2019 DFAT report was a point in time assessment, which was meant to be read in conjunction with other information. This hearing was held around almost two months prior to the date of the delegate’s decision. I am not satisfied that the transcript could not have been provided earlier and so s.473DD(b)(i) is not met for the transcript. The transcript does not contain credible personal information in the relevant sense, and so I am not satisfied that s.473DD(b)(ii) is met. As neither limb of s.473DD(b) is met, I must not consider this document. For the avoidance of doubt, I am not satisfied that there are any exceptional circumstances to justify considering the Senate estimates transcript.
11. Neither the missing persons compliant, nor the accredited translation of it were before the delegate. These are new information. This document purports to be a letter from the Sri Lankan Office of Missing Persons to the applicant’s paternal [Relative A], relating to her son (the applicant’s father). The letter indicates that “*information dated [in 2020] regarding the disappearance of [the applicant’s father], has been registered under the above number and is receiving the attention of the Office on Missing Person (OMP)s*”.
12. In the explanation for new information it is asserted that while the report is dated [in] February 2020, the Applicant only “*just received the report from his [Relative A]*” who is described as “*an elderly woman who also fears the Sri Lankan authorities given her family’s involvement with the LTTE during the war*”. These reasons are said to explain why it took so long to obtain and submit the missing persons compliant. Before the delegate, the applicant had indicated his father was missing, but he did not mention that any compliant had been lodged with the Sri Lankan OMP. The status and whereabouts of his father had been central to the applicant’s claims for protection and been the subject of much scrutiny during his 2021 Protection Visa Interview. The OMP compliant indicates that the applicant’s [Relative A] had lodged the information about [the applicant’s father] herself [in] January 2020, some 18 months prior to the delegate’s decision. At interview, and in his SHEV Application the applicant had indicated

he maintained regular contact with his [Relative A and her partner] in Sri Lanka. Even if his [Relative A] was fearful of the Sri Lankan Authorities, I note that this did not prevent her from lodging the complaint in the first place, and so it is not apparent why she would have been fearful of sending a copy of this letter to the applicant. Overall, even taking the explanation into account, I am not satisfied that the complaint could not have been provided earlier. Nevertheless, I accept that, on its face, the OMP Compliant letter is credible personal information in the relevant sense and may have affected consideration of the applicant's claims for protection and so s.473DD(b)(ii) is met. As I have noted earlier, this applicant's principal claims all relate to his family connections to the LTTE, principally to his father who he claims was a senior LTTE member. He asserts that his father has disappeared and connects the disappearance with his claim that his father was an LTTE member. In the circumstances, I am satisfied that there are exceptional circumstances to justify consideration of the OMP Compliant letter, and so s.473DD(a) is met, and I have considered it.

13. I have obtained a copy of a 2021 UK Home Office report relating to Tamil Separatism. This report replaces the 2020 UK Home Office Report on this issue which was cited by the delegate, and which the applicant's submissions identified as problematic. In light of these factors, I am satisfied that there are exceptional circumstances to justify considering the 2021 UK Home Office Report.

Applicant's claims for protection

14. The applicant's claims can be summarised as follows:

- This applicant was born in the Batticaloa District of the Eastern Province of Sri Lanka in [year]. His mother died soon after his birth, and he was raised by his maternal [relatives]. He has no relationship with his father.
- His father was a senior member of the LTTE. He was the [Position 1] of an LTTE camp in the Batticaloa area. His uncle (father's brother) was also a member of the LTTE. He was a personal bodyguard to LTTE leader [Mr A]. He was killed in 1997.
- He and his [relatives] lived in Batticaloa. Between XXX and XXX They resided in a displaced persons camp. After they left the camp, they returned to their home in Batticaloa.
- On several occasions, while the applicant was at school, he was detained by the Sri Lankan authorities. On these occasions, he would be taken to a nearby camp and questioned about his father. Not having any relationship with his father, he was unable to provide any information to the authorities. On each occasion he was held for several hours and released. He was never arrested or charged.
- In 2013 he departed Sri Lanka and travelled to Australia, arriving in this country in April. A few days after his arrival in Australia his maternal [relatives] informed him that his father had been detained by the Sri Lankan authorities and sent to Gaol.
- In 2017 he learned his father had escaped from prison. He is now missing. The Sri Lankan security forces are seeking the applicant in order to discover the whereabouts of his father.
- He fears that if returned to Sri Lanka he would be seriously harmed because of his Tamil ethnicity and because of his family connections to the Liberation Tigers of Tamil Eelam (LTTE).

- He fears being imputed with adverse political opinion due to his familial connections to the LTTE or being imputed as a member or sympathiser of the LTTE
- He fears would face harm for being a failed asylum seeker who departed Sri Lanka illegally.
- He fears that a 2014 data breach by the Department which affected him, would lead to him facing harm in Sri Lanka.
- He fears this harm from the Sri Lankan security forces and other government authorities. He says nowhere in Sri Lanka is safe for him.

Factual findings

15. As part of his SHEV Application, the applicant has provided copies of his Sri Lankan Birth Certificate and his Sri Lankan National Identity Card. He has provided accredited translations for both. These documents provide consistent identity information, which is also consistent with the applicant's verbal claims.
16. I have reviewed all this material. The applicant has established his identity to my satisfaction. I accept that he is a Sri Lankan citizen, of Tamil ethnicity as he claims. I accept that he was born on [date] in the Batticaloa District of the Eastern Province of Sri Lanka. For the purposes of this decision, I find that Sri Lanka is his receiving country.

IDP Camp

17. In his SHEV Application the applicant says that while he mostly lived in Batticaloa area, for three years he resided with his [relatives] in an IDP Camp in Sri Lanka. In his SHEV Application he did not mention which [relatives] he lived with in the camp, but he has otherwise indicated he resided with his maternal [relatives] throughout his life, except for a period when he says he was in hiding in the home of his paternal [relatives], which is discussed further below (and which I have not accepted) he has never indicated he lived with his paternal [relatives].
18. In order to support his claims about his life in Sri Lanka, the applicant has provided a copy of an IDP Registration form which indicates that he was in IDP camp in 2007. However, this document lists the applicant as residing with his paternal [relatives] in the camp, not his maternal [relatives]. This anomaly is not explained in the material before me. Nevertheless, I accept the applicant lived in an IDP camp in Sri Lanka for around 3 years. I accept that after he left the IDP camp, he returned to his normal place of residence where, thereafter, he resided with his maternal [relatives], as he had done previously.

Criticism of DFAT & UK Home Office reports

19. I have noted above that the applicant has argued that the delegate's decision was compromised by an overreliance on two sources, first a 2019 Report by DFAT, and second a 2020 Report, published by the UK home office. I have accepted and considered a copy of a 2021 UK Upper Tribunal Judgement said to support this line of argument.
20. Having reviewed the UK Upper Tribunal Judgment, I have some concerns about the way this has been summarised in the applicant's Submission to the IAA. In my view, the Submission to the IAA overstates the relevance, and mischaracterises the findings of the Upper Tribunal judgement. I observe that in relation to the 2019 DFAT report, the Upper Tribunal did outline

some misgivings about the sourcing of information within the 2019 DFAT report, but overall, found that the report provides “*useful background on issues such as monitoring within the country, the relevance of past LTTE links, and, to a more limited extent, the basis upon which the authorities may take an interest in particular returnees*”. Furthermore, the UK Upper Tribunal judgement expressly indicates that the Tribunal had placed weight on the 2019 DFAT report.

21. In regard to the UK Home Office report, the Upper Tribunal found that the report required some ‘*tweaks*’ in particular in relation to the information about *sur place* activities in the United Kingdom. While it is true the 2020 UK Home office report was withdrawn following the judgement being handed down, new country guidance from the UK Home Office replaced the document cited by the delegate, with a new, updated report, which made similar findings about most issues, and ‘*tweaked*’ the findings in relation to *sur place* claims. The new advice indicates that the earlier country information was still ‘*broadly accurate*’. The UK Upper Tribunal judgement expressly indicates that the Tribunal had placed weight on the 2020 UK Home Office report. As noted earlier I have obtained the 2021 UK Home Office Report about Tamil Separatism.
22. While I note the criticisms of the delegates decisions as they pertain to the 2019 DFAT Report and the 2020 UK Home Office Report, none of the material before me, including the applicant’s submissions argues that these reports are inaccurate or should be discounted. Rather, the submissions only argue that the delegate relied upon them too much. In this context I note that a post-interview Submission this applicant sent to the Department in July 2021, and which were prepared by the same migration agent who now represents him, also contained citations to the 2019 DFAT Report, and the 2020 UK Home Office report and so, it would appear that in July 2021, the applicant and his agent did not have any objection to the use of these sources. The applicant’s submissions do not point to any specific findings from these reports which has been misapplied, or which is objectionable. Both reports were prepared in order to assist decision makers making asylum seeker decisions. They represented the views of the UK Home Office and DFAT at the date of their publication. The principal finding of the UK Upper Tribunal was that the country information relating to ‘*sur place*’ claims in the United Kingdom needed to be revised. I agree with the argument submitted that these reports are not intended to be read in isolation. However, the delegate did not cite these reports in isolation, and I am not persuaded by arguments suggesting that the s.65 decision was undermined by the use of these reports. In this decision, I have continued to cite the DFAT report and the ‘*broadly accurate*’ 2020 UK Home Office Report. I have not relied upon the 2020 Home Office report when considering this applicant’s *sur place* claims, rather, when considering those issues, I have preferred the 2021 UK Home Office report.

Father, harassment

23. The applicant’s central claims for protection, rely chiefly on his claims about his father. He says his father was a senior member of the LTTE. In his 2017 Statement of Claims, which accompanied his SHEV Application the applicant initially stated that he understood that his father was the Commander of a checkpoint which controlled access to an LTTE base in [location]. Later, in the same Statement of Claims he indicated that in May 2017, his [relatives] informed him that his father was actually the [Position 1] of the entire LTTE base. The applicant says that while he lived in Sri Lanka, he personally was targeted by the Sri Lankan authorities due to his father’s work for the LTTE. His principal fear is that if returned to Sri Lanka he would be targeted and killed by the Sri Lankan authorities due to his family LTTE links.

24. In his 2017 Statement of Claims, the applicant stated that a few days after his April 2013 arrival in Australia, he learned that his father had been arrested and sent to Gaol. Later in the same Statement of Claims he says that in June 2017 his paternal [relatives] had informed him the CID had visited [them] because his father had escaped from Gaol, and was being sought by the Sri Lankan authorities. Also, in June 2017 he had contacted his maternal [relatives] and they also informed him that the CID had visited [them] looking for his father. The implication of this account from his Statement of Claims was that the applicant's father had been gaoled in 2013, had escaped from gaol during early 2017 and was subsequently being sought by the authorities in Sri Lanka.
25. Country information continues to indicate that the Sri Lankan remains concerned about any revival of Tamil separatism¹. As a consequence, in the aftermath of the civil war, and for some time thereafter, the Sri Lankan Government detained thousands of Tamils who were suspected of having even remote links to the LTTE. These persons were subjected to detention, and to a formal rehabilitation process by the authorities in Sri Lanka after the war². These events have been widely reported.
26. However, in June 2021, this applicant attended a Protection Visa Interview. On the date of his Protection Visa Interview the applicant provided a document to the delegate. This document was written under the letterhead of [a Rehabilitation Camp] in Sri Lanka. The letter itself is undated, but it indicates that the applicant's father had been released from the rehabilitation camp [in] 2013 having completed his rehabilitation.
27. The evidence suggests that by 2017, only a small number of senior LTTE figures remained in detention³. On its face, the letter provided by the applicant casts significant doubt on the applicant's claims. While it does support his claim that his father had been detained by the Sri Lankan authorities, it indicates that his father had been released from prison in [2013], almost four years prior to the applicant lodging his 2017 SHEV Application. It also indicates that his father was released from prison, not that he had escaped. When these issues were discussed with the applicant at interview, he initially indicated that he believed that his father had been detained a second time. Later, in the interview he conceded that he may have mixed up his accounts of what had happened.
28. Overall, the applicant's account about his father was not persuasive. I have significant concerns about the applicant's claims about his father. At interview, he routinely answered questions about his father by saying he did not know the answer and was not interested in his father. He stated in his SHEV Application and in his Protection Visa Interview and in Submissions that he had no relationship with his father.
29. The applicant claims that due to his father he suffered from serious harassment in Sri Lanka. In his Statement of Claims he states that:
- when he was around [age] years of age, the Sri Lankan Police removed him from school and questioned him about his father. At this time, he informed the authorities that he did not have any relationship with his father and that he had lived with his [relatives] for his whole life. He was later released.

¹ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

² DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

³ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

- Several weeks later, the same thing happened, and he was again questioned about his father. Again, he informed the authorities that he did not have any relationship with his father and could not provide any information about him or his whereabouts.
 - Around a week later, he says that the Sri Lankan Special Task Force started to seek him out. They visited his school and he was taken to a nearby camp and questioned again. Again, he informed the authorities that he did not have any relationship with his father and could not provide any information about him. He was held for three to four hours.
 - Several weeks later the Special Task Force detained him again and questioned him about his father. As before, the applicant denied any knowledge. After a few hours he was released.
 - Afterwards, he says he began to notice that he was being followed by plainclothes members of the Special Task Force.
30. According to the applicant's Statement of Claims, during these various interactions with the Sri Lankan security forces he had been threatened. After these events occurred, he became scared. He decided he was not safe living with his [relatives]. He says he stayed one night in the forest, and then commenced to sleep at the local Hindu temple. When he would wake, he says he would go to his paternal [relatives] home and stay there during the day. He says he live like this for several months in order to hide from the security forces. At various times during this period of hiding, he says the security forces came looking for him at his maternal [relatives]' home.
31. He decided it was unsafe for him to remain in Sri Lanka and decided to leave. A friend assisted him to depart Sri Lanka.
32. I have considered this applicant's claims and evidence. Given the letter from the [Rehabilitation Camp] which the applicant has provided, I accept that the applicant father was detained sometime around April 2013 and underwent rehabilitation. In light of this finding, I am prepared to accept that the applicant's father had been a member of the LTTE. The applicant asserts that his father was a senior member, and the [Position 1] of a local base. I have some doubts about this claim; at interview when asked about his father's role he indicated that when he referred to an LTTE base, he was referring to a border checkpoint, between LTTE controlled areas, and Government controlled areas. While I accept that a person who commanded a border checkpoint on behalf other LTTE must have been invested with some organisational authority, this would seem to be a rather routine administrative function, rather than the role of a senior member of the LTTE. I am not satisfied that such a person would be a [Position 1] or figure in the organisation.
33. In any case, as I have noted, the document provided by the applicant indicates that the applicant's father was released from rehabilitation in November 2013 which would suggest that by the time of his release, around four years after the end of the war, his father's LTTE involvement was not of any further interest to the authorities in Sri Lanka.
34. At his interview, the applicant raised a new claim. He said that he believed his father had been detained a second time, but he did not know when, or where or why his father was detained, but he suspects it is due to his LTTE links. He said his father's escape from prison related to this second period of detention, not the detention which had commenced in 2013, as he had originally claimed. I did not find this claim or his explanations regarding this second period of detention to be at all convincing. This second period of detention represents a significant shift in the applicants account, which did not appear in his Protection Visa Application. I am not satisfied that his father was ever detained for a second time.

35. Turning back to the events which the applicant describes as being targeted and harassed by the Sri Lankan authorities; his four brief periods of detention and questioning. I observe that on his own evidence, this applicant indicates that these four episodes occurred during a period of about 6 weeks, when he was [age] years of age. These events occurred in around 2011. The applicant's account says that after these incidents he went into hiding for "a couple of months" and then he departed Sri Lanka for Australia. However, departmental records, and the applicant's SHEV Application both indicate the applicant arrived in Australia [in] April 2013. He says his boat journey took around 15 – 20 days and that he departed Sri Lanka in April 2013. The applicant's timeline for these events simply does not add up. I have real doubts about his claim to have spent time in hiding.
36. Having found that the applicant's father was a member of the LTTE, I am willing to accept that he was detained and questioned on four occasions about his knowledge of his father. I am willing to accept that after these events occurred, he was followed for a brief time, by the Sri Lankan authorities who were looking for his father. However, on the applicant's own evidence, the point of these activities was to locate his father who was wanted due to his LTTE membership. Country information indicates that the Sri Lankan security forces frequently resorted to violence and threats against detainees⁴. I accept that during these brief periods of detention, the applicant was threatened as he claims. Nevertheless, the applicant's own evidence is that on each occasion he was released after a few hours. He was never arrested or charged with any crime. He continued to live in Sri Lanka, for at least another year prior to departing. There were no further incidents of this type.
37. Overall, I have not found this applicant's claims to be persuasive or convincing. Though I have accepted that his father was a member of the LTTE, I do not accept that he was a [Position 1] or high-level member of the LTTE. He commanded a checkpoint at a border crossing, a relatively junior position. I also accept his father was detained after the war and underwent rehabilitation before being released in November 2013. I do not accept that his father was ever detained for a second time. I also accept that when he was [age], this applicant was briefly detained by the Sri Lankan security forces on four occasions. This occurred during a period of around six weeks. The applicant indicates that the authorities' interest in him related entirely to his father, whom they were searching for at that time. Notwithstanding the applicant's fears arising from these periods of questioning, there would seem to be a genuine reason for the Sri Lankan Government to have an interest in questioning the applicant: He was the son of a known LTTE member who was wanted by the authorities. In the circumstances, it is hardly surprising that the authorities would seek to question him about his father.
38. However, in my view, the applicant has tended to exaggerate his claims, and he has not been entirely forthcoming about his life in Sri Lanka. I conclude he has exaggerated his father's role and status in the LTTE; invented a second period of detention and subsequent prison escape for his father; overstated the level of harassment and 'targeting' he faced in Sri Lanka; and, invented a period of hiding. I do not accept any of these claims. I do not accept that the applicant was ever personally of interest to the Sri Lankan security forces after he was interviewed. I do not accept that the homes of his maternal or paternal [relatives] were visited in 2017. Though he was questioned four times, I do not accept that the Sri Lankan authorities ever had any interest in the applicant personally, rather, as he himself indicates, the authorities were interested in finding his father, a known LTTE member. I am not satisfied the authorities ever had any personal interest in this applicant or his activities. I am not satisfied

⁴ DFAT, '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

that after a brief period of surveillance, when the authorities were looking for his father, the authorities had any further interest in this applicant. I do not accept that he was ever personally suspected of being a member of the LTTE.

39. The applicant says his father is missing in Sri Lanka. However, this claim derives from his claim that his father escaped from a second period in prison, a claim I have not accepted. As evidence that his father is missing, the applicant has provided the letter from the OMP to his [Relative A]. This letter records that the applicant's [Relative A] had lodged the information about [the applicant's father] [in] January 2020. The letter indicates that the OMP was undertaking inquiries in relation to this claim about his father. In light of my earlier findings, I have real concerns about the truth of this claim. While I accept that the letter is a genuine document from the OMP, the letter itself does not indicate that the applicant's father is actually missing, rather it merely acknowledges that the applicant's [Relative A] has reported him missing and indicates that inquiries will be undertaken. No further information about his father is contained in the letter. I note that the source of the information is the applicant's [Relative A] herself, not a disinterested third party.
40. Though I have real doubts about the truthfulness of this claim, considering the OMP letter, I am willing to accept that the applicant's father has gone missing. However, given his father's earlier rehabilitation for his LTTE activities; the passage of time; my finding that his father was not detained for a second time and did not escape prison; and, the applicant's dearth of knowledge about his father, the disappearance or his whereabouts, the applicant has not satisfied me that his father's disappearance has anything to do with his former time as a member of the LTTE. Furthermore, given the applicant's estrangement from his father throughout his life, I do not accept that his disappearance now is of any relevance to this applicant's profile or my consideration of his claims for protection. I am not satisfied that the applicant would be of any interest to the authorities in Sri Lanka for this reason.

Uncle

41. The applicant says his uncle was a member of the LTTE. He says his uncle was personal bodyguard to LTTE leader [Mr A]. In his SHEV Application he said his uncle was killed in 1997, while working as [Mr A]'s bodyguard. He says his uncle died during an ambush by the Sri Lankan Army. He says that some time before his death, his [relatives] had visited his uncle at an LTTE camp and met [Mr A].
42. As evidence of his claims about his uncle, the applicant has provided a document which he describes as a death certificate for his uncle. He has provided an accredited translation for the document. Upon examination, this document is not actually a death certificate, rather, it is a copy of what appears to be a form letter, written in 2003 which indicates that the applicant's uncle had died in an attack on Jaffna [in] March 1995. It refers to his uncle as a [specified rank].
43. In light of this document, I accept that the applicant's uncle was a member of the LTTE. I accept that he was killed in March 1995 as indicated in the letter. The letter does not offer any support for the applicant's claim that his uncle was a personal bodyguard to [Mr A], or that he was killed in an ambush, or that his [relatives] had met [Mr A]. Nevertheless, I am willing to accept these elements of his protection claims. However, the applicant has only asserted that his [relatives] met [Mr A] on a single occasion. This is described as occurring during a visit to see [the applicant's uncle] and so it must have occurred prior to March 1995, at least 26 years ago, and before this applicant was born.

Refugee assessment

44. 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

45. 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.

46. I have found that Sri Lanka is this applicant’s receiving country. Before coming to Australia, he lived his entire life in Batticaloa, except for the time he spent as a displaced person. His family continue to reside in Batticaloa. I conclude that if returned to Sri Lanka, the applicant would return and reside in Batticaloa as he did previously.

Tamil ethnicity, residence in the East LTTE connection, Imputed political opinion

47. Ethnicity does continue to be a source of tension in Sri Lanka⁵. This is unsurprising given the long running civil war in Sri Lanka was fought along ethnic lines with the minority Tamil community seeking to establish a separate state. According to a recent census in Sri Lanka, there are 3.1 million Tamils in the country, up from 2.7 million in 1981. Tamils are the second largest ethnic group in Sri Lanka constituting approximately 15% of the Sri Lankan population⁶. Most Sri Lankans tend to live within their own ethnic communities, although different ethnic groups live within close proximity in major urban areas. Tamils live throughout Sri Lanka but are concentrated in the Northern and Eastern Provinces. In the Eastern Province, Tamils comprise around 40% percent of the population⁷. The Government of Sri Lanka has committed to ethnic reconciliation⁸.

⁵ DFAT, ‘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

⁶ DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

⁷ DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

⁸ DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

48. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds'⁹. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA). Tamils faced less harassment during the 2015 presidential and parliamentary elections than in earlier elections conducted soon after the end of the war¹⁰. There has been a trend towards election of more hard-line candidates, but no return to the violence and intimidation of the past¹¹. DFAT understands Tamils do not receive unwarranted attention from authorities because of their political involvement, including with the TNA or other parties. DFAT assesses there are no barriers to Tamil political participation¹². Even former members of the Liberation Tigers of Tamil Eelam are actively engaged in the Sri Lankan political process. Nevertheless, DFAT reporting indicates that many Tamils in Sri Lanka report that the authorities continue to monitor public gatherings in Sri Lanka and conduct surveillance on persons of interest; usually people involved in politically sensitive issues such as land rights, missing persons and memorial events¹³. These complaints are most commonly voiced in the north of Sri Lanka where a military presence remains¹⁴. I have found this applicant would return to Batticaloa, located in the Eastern Province. The applicant does not claim to have had any involvement in issues such as land rights, missing persons.
49. According to his SHEV Application this applicant maintains regular contact with his family in his home country. I note that the applicant has not claimed that any person he knows, who continues to reside in Sri Lanka, suffers from any ongoing harm merely for being Tamil, or for residing in the Eastern Province. The applicant lived in the Eastern province throughout his life prior to coming to Australia. The government of Sri Lanka had resumed control of the Eastern province by 2009 when the civil war ended, and the applicant did not depart for a further three years. He has not pointed to any specific incident, where his residence in the East was a problem for him at that time. It seems unpersuasive to argue that this would be a problem now. Overall, I am not satisfied that the applicant would face a real chance of any harm in Sri Lanka due to his ethnicity or his former residence in the Eastern Province.
50. This applicant claims that if returned to Sri Lanka, he would face harm due to his family's LTTE connections. In his Protection Visa Interview, he argued, at length, that the Government of Sri Lanka is killing the members of LTTE families. He fears that if he returns to Sri Lanka, he would be killed for this reason.
51. There is a substantial body of historic information that indicates that in the years after the war, having family members who had LTTE links could be a factor in being imputed with pro-LTTE links¹⁵. Sri Lankan authorities continue to be concerned about Tamil separatism. DFAT reporting suggests that former LTTE members may still come under some suspicion¹⁶, but the applicant was never a member of the LTTE, and I have found that he exaggerated his account

⁹ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

¹⁰ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

¹¹ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

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

¹³ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

¹⁴ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

¹⁵ Department of Foreign Affairs and Trade (DFAT), '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; US Department of State, 'Country Reports on Human Rights Practices for 2019 – Sri Lanka', 11 March 2020, 20200312151418; Office of the High Commissioner and the Secretary-General (OHCHR), 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 18 February 2020, p.7, 20200221140652

¹⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

of what happened to him in Sri Lanka. I do not accept that he personally was of interest to the authorities in Sri Lanka at any time.

52. I have accepted that the applicant's father and uncle were part of the LTTE. but these events are largely historic. Documentary evidence supplied by the applicant indicates that his uncle died in March 1995, approximately 26 years ago and around [time period] before the applicant was even born. The applicant says that his uncle was a senior member of the LTTE. He says that his uncle's and his [relative]'s links to [Mr A] would lead to him being targeted upon return. However, the applicant's family links were well known to the Sri Lankan authorities when he resided in Sri Lanka, and The applicant did not face any specific problems associated with his deceased uncle while he lived in Sri Lanka, even though he was known to have come from an LTTE family. He has not indicated that [his relatives], who actually met [Mr A], have had any problems arising from this meeting. While it is well established that [Mr A] was a wanted man by the Sri Lankan authorities, a single meeting with this person, over 26 years ago hardly seems likely to lead to harm now. To my mind, it is very unpersuasive to argue that he would be of interest for this reason now.
53. I have also accepted that his father was a member of the LTTE, but I have not accepted his father was a senior LTTE member. I have also found that his father underwent rehabilitation in 2013. Country information indicates that the LTTE no longer exists, though the Sri Lankan Government remains interested in the wider issue of Tamil separatism or self-determination. The applicant has not claimed his father is active any other Tamil separatist movement or activities.
54. The applicant asserts that if returned to Sri Lanka, he would face harm due to these LTTE connections. In my view, this argument is not persuasive. While I have accepted that the applicant was questioned and briefly followed by the Sri Lankan authorities, these episodes were because the Sri Lankan authorities were looking for his father. I reiterate that on the applicant's own evidence, he himself was never arrested or charged; when he was questioned the subject was his father not his own activities; on each occasion he was questioned he was released within a few hours.
55. While the country information indicates that the Sri Lankan Government is sensitive to issues of Tamil separatism, the applicant's LTTE connections are historic. His uncle died before he was born, he is estranged from his father whom he has never lived with, engaged with, or had any relationship with. The Sri Lankan authorities are aware the applicant is estranged from his father having questioned him about this issue a decade ago. Furthermore, the applicant's father underwent a formal rehabilitation process for former LTTE in 2013, around eight years ago. I have concluded that his father's recent disappearance was unrelated to his earlier membership of the LTTE.
56. After careful consideration, I am not satisfied that this applicant would face any harm, or interest from the authorities in Sri Lanka due his historic family LTTE connections. I am not satisfied he would face persecution for this reason.
57. The applicant claims that he would face harm for his imputed political opinions. He says that his activities in Australia, and his LTTE connections would lead to him being imputed with pro-LTTE, and anti-regime political opinions.
58. In the Statement of Claims from his 2017 SHEV Application the applicant stated that he had attended a hero's day memorial event in Sydney in 2016. In his Protection Visa Interview, he asserted that he attended this event "*every year*". As he only mentioned a single event in his

SHEV Application, I infer he means he has attended every year since the time he submitted his application. He says he fears that he has been filmed or photographed attending these events. When asked, he said he had never actually seen photos or videos of himself attending and could not provide any evidence he had attended these events. He said he had never seen his image online.

59. Country information before me, including the UK Upper Tribunal judgement which examines this issue in detail, does indicate that the Sri Lankan authorities remain interested in the activities of the Tamil diaspora, especially as in regard to issues around Tamil separatism and autonomy. The Sri Lankan Government is suspicious of Tamil events and organisations which appear to offer support for these themes, even if they occur in other countries. Monitoring of Tamil events overseas is known to have occurred. Nevertheless, this applicant has been unable to provide any evidence of his attendance at such events. Even if he did attend such events from the time his lodged his application, this appears to be the entirety of his activities. He does not claim to be a member of any Tamil organisation. He was not a speaker or an organiser at these events, he is not otherwise politically active. He does not claim that he did anything more than attend a single memorial event per year. Overall, even taking into account his profile and family history, I am not satisfied he would be of interest in Sri Lanka for this reason.
60. Overall, even taking into account the applicant's family history, his LTTE connections, his attendance at memorial events in Australia, and the remainder of his profile, I am not satisfied he would be of any interest to the Sri Lankan authorities now. Am not satisfied that he would be imputed with anti-Government or pro-Tamil political opinions in Sri Lanka.

Subsistence

61. In submissions, the applicant has asserted that he fears he would be unable to subsist in Sri Lanka. He says he lacks local knowledge, and consequently, that he would be unable to remain undetected as he previously did in Sri Lanka. In my view, this line of argument is unpersuasive. I have not accepted that this applicant was ever in hiding in Sri Lanka. I do not accept that he ever needed or attempted to pass undetected. Furthermore, I have found that the applicant was never personally of interest to the authorities in Sri Lanka, rather they were interested in his father. I am not satisfied he would be of any interest now. Throughout his life, this applicant has shown resilience. He came to Australia as a minor and has subsequently learned to live in this country. He has found work in Australia and I am satisfied that he would have the capacity to find work in Sri Lanka. He has family members in Sri Lanka who live in the Batticaloa area, and who he can rely on for support. In the circumstances, I am not satisfied that his applicant would be unable to live and work in Batticaloa or that he would be denied the capacity to subsist.

Illegal departure, claim for asylum Data breach

62. The applicant has claimed that he fears harm based upon his illegal departure from Sri Lanka and his status as a failed asylum seeker.
63. I accept that the applicant departed Sri Lanka by boat without passing through normal Sri Lankan immigration and customs checks. I note that such a departure in Sri Lanka is a breach of ss.34 and 45(1)(b) the Immigrants and Emigrants Act (1949) which governs exit and entry from Sri Lanka¹⁷.

¹⁷ DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

64. Upon return to Sri Lanka, the applicant will likely be identified at the airport upon return to Sri Lanka. He will likely undergo an investigative process in order to establish his identity. This will likely involve a range of Sri Lankan agencies including Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department and, at times, the Terrorism Investigation Department who will interview the applicant in order to determine identity and whether the applicant is subject to any outstanding criminal matters. This processing occurs in arrival groups at the airport and can take several hours. During this time, the applicant can expect to be held at the airport while the entire cohort of returnees is interviewed¹⁸. These processes are standardised and are applied to all returnees regardless of ethnicity or religion¹⁹.
65. Whilst the applicant does not have a current Sri Lankan passport, he does have a range of other Sri Lankan identity documents in his possession including an expired Passport, Sri Lankan Birth Certificate and a Sri Lankan national identity card. I conclude the applicant would be able to establish his identity without difficulty if returned to his home country.
66. As the applicant departed illegally, I accept that he would likely face charges arising from his breach of the *Immigrants and Emigrants Act*. This will likely result in him being arrested and charged at the airport in Sri Lanka; police will take photographs, fingerprints and statements from him and other returnees, and further enquire about activities while abroad if returnees are former LTTE members (which the applicant is not). Some returnees from Australia have been charged with immigration offences and with criminal offences allegedly committed before departure²⁰. Apprehended individuals can remain in police custody at the Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate’s Court, after which custody and responsibility for the individual shifts to the courts or prison services²¹.
67. DFAT reporting indicates the Sri Lankan government has directed that all passengers of people smuggling ventures be charged and appear in a court closest to where the offence occurred. The frequency of court appearances depend on the magistrate and vary widely, but those charged are required to return to court when their case is being heard, or if summonsed as a witness in a case against the facilitator or organiser of a people smuggling venture. There can be lengthy delays in court processes²².
68. Penalties for leaving Sri Lanka illegally in most cases result in a fine. DFAT reports that the Attorney-General’s Department claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future. Fine amounts vary from approximately 25 AUD for a first offence to approximately 1,670 AUD. A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine²³. Bail is

¹⁸ DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

¹⁹ DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

²⁰ DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

²¹ DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

²² DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

²³ DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244

usually granted to voluntary returnees. Bail conditions are discretionary and can involve monthly reporting to police²⁴.

69. I accept that if returned the applicant would very likely be charged for offences related to his illegal departure from Sri Lanka. This is his first offence. I have found the applicant does not have a profile of interest to the authorities in Sri Lanka. Having considered the information above, I conclude that the applicant would very likely face a small fine, and possibly a period of bail upon return, but would be otherwise free to go. It is possible that the applicant may be held by Sri Lankan authorities for a short period upon return to that country. While any brief period of detention may be distressing for the applicant, I am not satisfied that a short period of detention like this would amount to any harm.
70. The evidence before me indicates that the provisions of Sri Lankan immigration law are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am not satisfied that any process the applicant may face on return to Sri Lanka because of his illegal departure would constitute persecution for the purpose of the Act.
71. The applicant was affected by a 2014 data breach by the Department. Before me is a Departmental document advising the applicant he was affected. The Department has advised all affected parties, including the applicant, that the information released during the 2014 data breach was not easily accessible, was only available for a short time and included the applicant's name, date of birth, gender, nationality and some details about their period of immigration detention in Australia. Affected applicants have also been advised that no information about any specific protection claims made by them was available during the breach. The data released during the breach is information that would be immediately apparent to Pakistani authorities should the applicant be returned to Sri Lanka (that is, information about his identity and that that he had sought asylum in Australia) and does not contain any information from which the scope of the applicant's claims could be inferred. In the circumstances, I am not satisfied that the 2014 Departmental data breach would lead to this applicant facing a real chance of any harm.
72. DFAT assesses that refugees and failed asylum seekers face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation²⁵. Refugees and failed asylum seekers have also reported social stigma from their communities upon returning to some communities as people resent the financial support provided to refugee returnees²⁶. DFAT assesses that returnees may also face some societal discrimination upon return to their communities, which could affect their ability to secure housing and employment. DFAT further assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities²⁷.
73. Nevertheless, I note that the challenges outlined above are everyday difficulties faced by persons seeking to re-establish themselves after being away from the country for an extended period of time. I note my earlier finding that the applicant will return and reside in Batticaloa as he formerly did, and in my view, the presence of family, even elderly family in the form of his [specified relatives], will mitigate most of these challenges. There is no information before

²⁴ DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

²⁵ DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

²⁶ DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

²⁷ DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

me to suggest that Tamils who have lived abroad are facing harm at the airport or in their home areas on their return to Sri Lanka simply due to the time spent out of Sri Lanka.

74. Whilst government monitoring does continue in Sri Lanka, DFAT assesses that monitoring of Tamils in day-to-day life has decreased significantly²⁸. I accept that if the applicant is returned to Sri Lanka and returns to the Eastern Province where he previously lived, he may be the subject of monitoring for a short period by the authorities. However, I am not satisfied that he would otherwise face any real chance of harm by them. I also accept that he may experience some social stigma within his community as a failed asylum seeker and a person who has not lived in Sri Lanka for a several years. However, I am not satisfied that this treatment, if it does occur, amounts to serious harm. I do not accept that such challenges, any social stigma or monitoring as he may face as a returning asylum seeker from Australia constitute serious harm, individually, or taken together.
75. Overall, I do not accept that the applicant would face a real chance of persecution arising from his illegal departure or his status as a failed asylum seeker or any combination of these or his other claims.

Refugee: conclusion

76. 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

77. 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

78. 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.
79. 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.
80. I have found that this applicant would not face a real chance of harm arising from any of his claims for protection. As 'real chance' and 'real risk' have been found to meet the same

²⁸ DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

standard, it follows that this applicant would not face a real risk of significant harm for any of these reasons. I am not satisfied that he would face a real risk of significant harm for any other reason.

Complementary protection: conclusion

81. 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.