



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09818

Date and time of decision: 26 October 2021 13:53:00
N Micallef, 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 Tamil from Batticaloa in the Eastern Province of Sri Lanka. He arrived in Australia on or about [date] October 2012 as an unauthorised maritime arrival. On or about 7 June 2017 he lodged an application for a subclass XE-790 Safe Haven Enterprise Visa (SHEV) claiming to fear harm in Sri Lanka from the authorities and the Sri Lankan Army as a Tamil.
2. The applicant participated in an interview to discuss his protection claims on 9 June 2021 (the SHEV interview), with an officer of the Department of Home Affairs (interviewing officer). On 31 August 2021 another officer, a delegate of the Minister for Immigration (the delegate), refused to grant the protection visa. The delegate was not satisfied that the applicant would face a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material). Included in this is the material in which the applicant has provided details of his claimed circumstances in Sri Lanka and why he left there, and then why he seeks protection in Australia. These are, as set out by the delegate in the refusal decision, the applicant's Maritime Arrival Entry Interview of 8 December 2012 (Entry interview), a further statement noted to a case manager in February 2013, his SHEV application lodged 9 June 2017, into which his statement of claims were typed at the relevant sections, and the SHEV interview of 9 June 2021.¹
4. No further information has been obtained or received from the applicant.
5. I have obtained and also considered new information, from the United Kingdom Home Office (UKHO), namely their most recent Fact-Finding Mission Report to Sri Lanka of 2020, and their most recent Tamil Separatism Report of 2021 as concerning the treatment of Sri Lankans of Tamil ethnicity, Sri Lankan citizen returnees including those who return from living abroad or in the Tamil diaspora, Sri Lankan citizen returnees who departed Sri Lanka illegally, and Sri Lankan citizen returnees who are forced to return to Sri Lanka after failing to obtain asylum abroad.² The information is publicly available, general information about these issues and from a reputable and credible source. Although these UKHO reports were published before her decision, the delegate had relied only upon a much earlier UKHO Fact-Finding Mission Report from 2017. These more recent reports provide more up-to-date relevant information from the UKHO than referred to by the delegate. I am satisfied that there are exceptional circumstances to justify considering this new information.

¹ The case manager email of 15 February 2013 erroneously referred to an unrelated third party, promptly corrected in follow-up email of same date

² United Kingdom Home Office ("UKHO"), "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", v 7.0, 17 June 2021, 20210624114752

Applicant's claims for protection

6. The applicant's SHEV application claims can be summarised as follows:
 - He is a Sri Lankan citizen of Tamil ethnicity and Hindu faith from Batticaloa in the Eastern Province of Sri Lanka where he was born in [month, year]. He lived there with his parents and two older brothers.
 - The Sri Lankan Army (SLA) had a base camp near his family home. From 2011 until he left Sri Lanka in October 2012, he suffered constant harassment from the SLA. They treated him badly and forced him to work for them, spoke to him rudely and physically harmed him and threatened to kill him before he left Sri Lanka.
 - He could not seek police protection as they do not help Tamils.
 - If returned to Sri Lanka he will be taken to the 'Fourth Floor' upon arrival and could be killed. He will be harmed in Sri Lanka by the SLA and government authorities because of his Tamil ethnicity, and he left the country to seek protection from the SLA. He could not relocate in Sri Lanka as it is the authorities he fears, and they would find him anywhere; and also, as a Tamil, he cannot just live anywhere and does not know any other areas.

7. In the SHEV interview the applicant also claimed that:
 - Two personnel from the SLA camp regularly sexually abused him when he brought their demanded shopping to them.
 - One of his older brothers had been in the TMVP and the other in the LTTE.
 - In Australia, in 2015, he participated in a protest against the Government of Sri Lanka which was filmed by [a media outlet]. This news footage showed him in [described manner].

Factual findings

8. The applicant came to Australia as an unaccompanied minor, being [age] years old when he arrived in October 2012. He has consistently maintained his claims of his identity and nationality since he arrived in Australia and there is no real contention in the evidence before me about this. The claims are supported by his evidence and the documentary evidence of identity and education in Sri Lanka. Although the applicant had previously provided copies of these documents to the Department back in 2013, he had not submitted evidence of identity, nationality and citizenship with his SHEV application, nor afterwards, despite written request under s.91W(1) of the Act to do so, dated 1 August 2017. The lack of response to the s.91W letter was raised in the SHEV interview, after which the applicant subsequently provided the translation of his birth certificate to the interviewing officer. I am willing to accept he has lost his Sri Lankan National Identity Card. I accept that the applicant's identity and citizenship is as claimed, and that he is a [age]-year-old Tamil male of Hindu faith from [Village 1], Batticaloa in the Eastern Province of Sri Lanka. I am satisfied that Sri Lanka is the receiving country for the purpose of this review.

9. I note that the applicant's claims of his circumstances in Sri Lanka and why he left there have significantly shifted, evolved and escalated since he arrived in Australia. His early claims after he arrived here indicated that he experienced generalised harassment of being questioned by the CID (Criminal Investigation Department) if he was outside, including at night time after 6:00pm, and that there was a round-up of his village but that he was not questioned, mistreated, interrogated or charged, and that his family had hardship as his father who had previously worked in a [workplace] was now blind; and that his brother had been beaten and arrested by the SLA when drunk on a beach.
10. These shifted to his 2017 written claims that in 2011 he was personally harassed by the SLA - treated badly, spoken to rudely, forced to work for them, physically harmed and threatened to be killed; and then escalated to his SHEV interview claim that he was frequently sexually molested by the SLA at their base camp.

Harassment from SLA

11. I accept that during the civil conflict between the Sri Lankan Government forces and the Liberation Tigers of Tamil Eelam (LTTE), which ended in May 2009, many Tamils, particularly in the Tamil-populated areas of the north and east, were monitored, harassed, arrested or detained by security forces. This is attributable to the fact that LTTE members were almost all Tamils and there was at times imputation of LTTE support based on Tamil ethnicity, and discriminatory application of emergency regulations, which powers can include curfew restrictions.³ The Eastern Province is an area where the LTTE exercised some influence and control, at times during the war. I accept that during and in the aftermath of the war there were times of village round ups of civilians, to look for militants, and there were times of curfews. I accept that the security authorities, including SLA and CID, sometimes stopped people, particularly in Tamil areas, to check identity and question their movements, particularly at times of curfews, or if after dark, and I accept that as a young Tamil in Eastern Province, where the LTTE had once operated, the applicant experienced such incidents.
12. The applicant gave evidence in the SHEV interview of his claimed sexual abuse, discussed below, but otherwise provided no evidence in support of his SHEV application claims that he was physically harmed by the SLA or threatened to be killed by them, or by any other authorities or persons. His SHEV interview evidence was only that if he were to have gone to the SLA camp without permission, they would have shown their guns and threatened to shoot him. I do not accept that he was physically harmed or threatened to be killed by the SLA or CID or any other Sri Lankan authorities in 2011 or at any time before he left Sri Lanka.
13. In the SHEV interview the applicant was asked to detail the harassment that he had claimed in his SHEV application the SLA had subjected him to in 2011 until he left Sri Lanka. In contrast to the written claims that the SLA spoke to him rudely and physically harmed him and threatened to kill him, the applicant described that there was an SLA camp very near his home, and when he passed by on his way somewhere, the personnel in the camp would call him and make him go to the grocery shop and buy food or sweets for them and then on return they would call him into the camp, remove his clothes and touch his private parts and all over. It was the same two officers who did this, at the sentry post at the road-side front entrance of the camp, where there were sandbags boxed around. This happened many times. Asked why he continued going past them, he said this was the only road and otherwise if he went the other way he would have had to jump over a fence. He said his parents knew what

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

was happening and wanted to send him somewhere and so decided to send him to Australia. His evidence was that this occurred during 2011. On the SHEV application and Entry interview claims 2011 was the year that he studied for and completed his [specified qualification], and turned [age] in [month] 2011. He left Sri Lanka in October 2012.

14. As did the interviewing officer and the delegate, I have concern about this claim of being sexually abused. In weighing the evidence before me I bear in mind and take into account the myriad matters that can affect presentation of evidence by asylum seekers, including but not limited to difficulties of recall over time, that accounts of an event might vary with repetition over time, the impact of interpretation and cross cultural communication issues and the challenges faced by those recounting claims of sexual abuse.
15. I acknowledge there have been credible reports of sexual abuse of some Tamils during and after the civil conflict by Sri Lankan security forces. However, the country information⁴ indicates that this has primarily involved the perpetration of torture, including rape and sexual violence, against Tamils, including males, held in custody and prolonged detention, for suspicion of being with the Liberation Tigers of Tamil Eelam (LTTE) or of terrorist or national security offences, and as part of the means of torture of prisoners to elicit confessions or information. There are also reports that Tamil women who were single or sole heads of households without male family protection, were vulnerable to sexual exploitation, harassment or assault when dealing with the authorities, or seeking services, including from security forces when military bases were nearby. However, these are not the circumstances presented by the applicant's evidence. I accept that Sri Lanka also has a high incidence of violence, including sexual violence, against children in the family and community.⁵ The USDOS report indicates that primarily perpetrators of sexual abuse of children are those close to them in the community, noting family, teachers, school principals and religious instructors, which I consider commensurate with the secret, hidden nature of the sexual abuse of children, primarily arising within accessible relationships of intimacy or trust.
16. Whilst that of course is not an exhaustive list of possible perpetrators, and even considering the opportunistic manner in which incidents of paedophilic sexual crime or any sexual abuse can occur, and the environment of impunity for abuses by security forces with power over the local community which pertained during and after the war, nevertheless, I have serious concern at the plausibility of the applicant's claim. I note that in Sri Lanka the minimum age of sexual consent is 16 and that same-sex sexual activity is criminalised, such that the claimed molestation was criminal activity on several combined levels, namely non-consensual sexual acts, under-age sexual acts and homosexual acts.⁶ I find it difficult to believe that two SLA sentry officers engaged, in ongoing basis over almost two years on the claims, in criminal acts of sexual molestation of the applicant, possibly when under-age, in such an open public location as the roadside front entrance to the base camp (at which the applicant stated there were many soldiers), notwithstanding the presence of sandbags, given the criminal nature of the activity and the general societal prejudice against LGBTQI individuals in Sri Lanka, including in the workplace, and the more secretive, hidden nature of sexual abuse of children. Indeed, the circumstances of sexual abuse by the authorities, in the country information above, was primarily of secret abuse, behind closed doors. And, moreover, given his claim that he lived at home with his parents (and who he said were aware of what was

⁴ United Kingdom Home Office ("UKHO"), "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017, OGD7C848D112 (UKHO FFM Report 2017); DFAT Sri Lanka Report 2019

⁵ United States Department of State (USDOS), "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412 (USDOS Sri Lanka Report for 2020)

⁶ Ibid.; UKHO FFM Report 2017; DFAT Sri Lanka Report 2019

happening), and had two older brothers, one of whom was, when the applicant arrived in Australia, living in a different part of Batticaloa, I find it very surprising and difficult to believe that the only option available to him to avoid the abuse or having to walk alone by the same route past the army camp whenever he need to leave the house, was to send the applicant to Australia, and which I note was only after he had completed his [qualification] education and then he remained there for a further year, during which time he was unemployed.

17. The interviewing officer in the interview , and the delegate in her decision, respectively, noted their concern at the very different, changed claims from the Entry interview to the SHEV interview. The applicant explained this discrepancy as hesitancy, that he was too embarrassed, and that at that first interview he had been thinking and wondering if he should or should not raise (the sexual abuse claim) and did not do so. It is plausible that if such an event had occurred to a young man in his teens, that this would have been difficult to disclose to strangers early in his arrival here, including in the Entry interview, in a situation where he had not had professional migration advice. I do not rest significant adverse weight on the omission to raise this claim in the Entry interview. However, I have concern that his explanation for thereafter not raising it until the SHEV interview was contradictory. On the one hand he explained that he had been depressed and forgets a lot of things, and that now that the case has been opened up and he is being asked about his case it was only now *"coming into my mind"*, in this interview. But then, on the other hand, when asked why he had not raised it in the SHEV application, he insisted that he had told his lawyer all the details of this sexual abuse in 2017 when he submitted his case. I find these explanations incompatible and the contradiction undermines his credibility. I also find it very surprising and difficult to believe that if he had indeed raised this sexual molestation claim with his lawyer (from an experienced refugee service), when setting out his claims for protection, that this significant aspect of his claims would not also have been included with his written claims for the SHEV application. I find this notwithstanding the relative brevity of the written statement of claims, and that they noted that further details of claims would be provided at interview, as the application form clearly instructed that "all the details about why you are seeking protection must be provided", as a decision could be made on the written information, and there might not be another opportunity to present claims; and I consider this sexual molestation to be a different nature of claim than those otherwise described in the application claims. I am not satisfied this matter would not have been directly mentioned in the written claims if it had, as claimed, been raised with his lawyer assisting him for the SHEV application in 2017.
18. Moreover, I also have concern with the applicant's evidence about why, and what led to the claimed abuse of him by the SLA commencing. His evidence was that he came to their notice and their interest in him stemmed from the incident when his alcoholic older brother had had an altercation with the SLA on the beach. The applicant had raised a claim of his brother being beaten on the beach, in February 2013, with his case manager, who recorded that he had said that when his brother was drunk on the local beach the SLA had beaten his brother; and that *"upon receiving news of this incident, he went to the beach with his mother, and was detained overnight by the army"*. In his SHEV interview, however, the applicant's evidence was that his brother was at the beach drinking, and the applicant was there also, playing; and the SLA saw the applicant there, as when some conflict arose with and the SLA were beating his brother, he got some stones to throw at them and told them to leave his brother alone. He said the SLA took his brother away in a jeep and he was only released the next day. It was because of this that the SLA (whom he otherwise related was two sentries) invited the applicant or approached him and asked him to buy things for them, and then began molesting him.

19. The applicant's explanation for the discrepant details between the two accounts was that that was not how he said it in 2013. Queried about the discrepant details of whether he had been at the beach already or arrived later with his mother after having been told of what was happening there, at first he said he forgot; and then stated that *"from the beach I went and brought Mum and went there"*, as the beach was close to their house, only [distance] away. I am not satisfied that the applicant would have forgotten whether he was at the beach already, or only came with his mother after hearing that his brother was being beaten. I am not satisfied that his 2013 statement would have been recorded as it was if the applicant's claim then was that he was already at the beach and witnessed the assault on his brother before going to get his mother. Queried about the discrepant details of who was detained, in the SHEV interview the applicant insisted that it was his brother who was detained and not him, but then described that *"they were taking me, but my house is near the camp and they leave me"*. Whilst there could be possibility that the 2013 communication as to who was detained could have been affected by lack of clarity of who was detained, a misunderstanding or miscommunication of "he" or "I"; however I consider this possibility is undermined by the applicant's SHEV interview claim that the SLA were also taking him in the jeep. I consider it improbable and not credible that in an incident of public drunkenness and taking the applicant's brother away in the jeep, to be detained, that the SLA would also take the applicant in the jeep at all, whether home or anywhere, if he was not being arrested or detained given he lived only [distance] away and given he was there with his mother. I consider this was effort to insert himself into the scene. I find the applicant's account of his involvement in this beach incident to be inconsistent and his explanations for the inconsistencies to be unpersuasive.
20. I also note, significantly, that there was no claim raised in 2013 that the beach incident then caused the commencement of any form of adverse interest by the SLA or any personnel or authorities in the applicant personally, even without specifying any sexual nature of it. This beach incident was not raised in the SHEV application written claims, either at all, nor as instigating any subsequent harm to or abuse of the applicant. Given his claim that the army camp was close to his house such that he had to pass it whenever he went to the shops or to school, it is not credible that any SLA personnel at the entrance of that camp only became aware of him from the time of this incident. I am willing to accept that there was an occasion when his brother was drunk on the beach, and was arrested and detained overnight by the authorities. However, I consider that the applicant has exaggerated his presence in that incident and its consequences. I do not accept that he was involved in the incident or came to personal attention of any SLA officers or other authorities because of this incident.
21. For all the reasons discussed above I am not persuaded by the applicant's evidence of the claimed sexual abuse of him or personal interest taken of him by the SLA or any other Sri Lankan authorities. I am not satisfied that my concerns with the applicant's evidence are explained by communication difficulties of any nature, including embarrassment of relating claimed sexual abuse, nor by depression or forgetfulness for any reason. I am willing to accept that there may have been occasions when personnel at the SLA camp checked his identity, or demanded the applicant bring food or sweets to them from the shops, or and were rude to him; however, I do not accept that the applicant was called into the SLA camp or sentry box and sexually assaulted or molested in any way, or harmed in any way, by any SLA personnel or any other authorities.

Brothers in the "Movement" / TMVP

22. The applicant claimed in the SHEV interview that part of the reason for the beach-side altercation between the SLA and his brother was that his brother (second eldest) had joined

the "Movement". He clarified that by the "Movement" he meant the 'TMVP'. The TMVP is the Tamil Makkal Viduthalai Pulikal, a political party in Sri Lanka, formed by, *inter alia*, Karuna Amman who was formerly the LTTE commander of Eastern Province before he defected to the Government side in 2004.⁷ Before becoming established as a political party in the mainstream of politics, TMVP was a paramilitary group of former LTTE cadres known as the Karuna Group and which engaged in the conflict, sided with the Government against the LTTE.

23. The applicant's evidence, from the Entry interview and echoed somewhat in the SHEV interview was that his second brother had been recruited by abduction into the TMVP as a child for about two years or so, and that his parents had managed to get him released from the TMVP in 2009 with assistance of UNICEF. Forcible recruitment of children did occur during the war, and I accept this occurred to his brother. However, when asked why his brother being in the TMVP was an issue for the SLA, the applicant's evidence was only about his brother being a drinker, that when he gets drunk, he refuses to listen to anyone. I am not satisfied on any information before me that merely having been a forced child recruit into the TMVP, which assisted the government forces during and after the war, did or would cause the CID or the SLA or any other government authorities to impute the applicant's brother or the applicant or any other family members with any profile of adverse concern. I find the incident at the beach was response only to the applicant's brother being drunk in public.
24. The applicant also claimed in the SHEV Interview that his oldest brother had been forcibly recruited to the 'Movement' in 2006. He said the "Movement" was the LTTE; but later when talking about his second brother who was "*also with the Movement*", and constantly used that term in regard to him, clarified that that was not the LTTE but the TMVP. There was no claim previously raised in the Entry interview or the SHEV application that any brother was in the LTTE, despite questions being asked in the Entry interview about any family members belonging to political groups and the applicant having raised in the Entry interview a brother's involvement in TMVP. In this circumstance I am not satisfied that a brother's forced abduction into the LTTE would not have been raised then, or in the SHEV application, if it were true. Moreover, the applicant's SHEV interview evidence gave no further support concerning any LTTE involvement of his brother or his role in the LTTE other than the bare claim asserted. The applicant claimed that the CID would come to the house to talk to them, searching for his eldest brother. I note on the evidence that the brother arrested for drunkenness was only detained overnight and was released. There is no indication before me that he was ever sent to rehabilitation or detained in prolonged custody for interrogation about either TMVP or LTTE associations or family associations to these. On his Entry interview evidence his eldest brother was living in Batticaloa and there is no indication before me that he was ever sent to rehabilitation or detained in prolonged custody as an LTTE suspect, nor that any family members were ever arrested or detained for interrogation about LTTE associations or family associations to the LTTE or this brother. The applicant made a bare claim that members of the vague "movement" used to get him to buy things for them as well. I find the applicant's evidence unpersuasive on all these claims, and I do not accept that the applicant's eldest brother (or any family members) were in the LTTE or were LTTE supporters. I do not accept that any members of or people associated with the 'movement' or the LTTE or the TMVP ever asked or got the applicant to buy goods for them. I do not accept that the CID, SLA or any other authorities were searching for or had any adverse interest in either of the applicant's brothers as associated with the LTTE or for any other reason of national security concern or any other reasons.

⁷ DFAT Sri Lanka Report 2019 (Karuna's real name is Vinayagamoorthy Muralitharan)

25. I accept that the applicant left Sri Lanka illegally by smuggler boat with no passport in about October 2012. I do not accept that he or any family members were of any personal adverse concern to or targeted by the SLA, CID or any other Sri Lankan security forces or authorities or any other groups or persons for any reason. I find that the applicant's experience of harassment of identity checks and occasional village round ups was the common experience of most Tamils in Sri Lanka during and in the immediate aftermath of the civil conflict.

Sur Place Protest

26. The applicant raised in the SHEV interview for the first time, and only in answer to a direct question about any activities in Australia against the Sri Lankan government, that in Australia, in 2015, he had attended a meeting that had then been on [the] news. He said it was a protest, at which he was filmed or there was a photograph of him (his evidence interchangeably stated both) [in manner specified]. He said he did not know what the protest was about, stating at first it was about asking for justice, and then later that it was for Tamil people, but he was not sure for what. He had not intended to go, but only went because other people called him and said, 'let's go', and so he did, without realising what it was. He has otherwise not been involved in any such activities. He raised no fear of harm or any concern relating to this event. The applicant agreed to look for and provide the video of the protest. However, he notified the interviewing officer before the refusal decision was made that he could not locate or provide it.
27. I find it very surprising that if the applicant had been featured on the news [in the manner specified], that he would never have raised this in the SHEV application made only two years later. Given he claimed to be [undertaking specified activity] I find his vague evidence of not knowing what the protest was about to be very unpersuasive of his presence there. I do not accept this claim. I do not accept that the applicant attended or was filmed or photographed participating in any protest against the government of Sri Lanka or concerning Sri Lanka or its Tamils.

Refugee assessment

28. 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

29. 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.
30. I find that if the applicant returned to Sri Lanka it would be as an ordinary Tamil Hindu male with no previous history of adverse concern or interest to the Sri Lankan authorities or any other groups or persons. As a Sri Lankan citizen, I am satisfied that the applicant has freedom of movement to live anywhere in Sri Lanka, where there are no official barriers to internal relocation.⁸ DFAT reported that most Sri Lankans live within their own ethnic communities, and where they have family connections. I note the applicant's evidence that his parents remain living in the family home in [Village 1] in Batticaloa, with one of his brothers living in the same village, but in a separate house with his wife. He claimed not know where in Sri Lanka his other brother lives; however, he had given his village address in the Entry interview, as also in Batticaloa. I am satisfied that if returned to Sri Lanka the applicant would return to Batticaloa, Eastern Province, where he grew up and where his family are.
31. I note that the applicant's claimed fears about return to Sri Lanka as a Tamil were vague and generalised, that he feared the SLA and that their camp was near his home. His only explanation of his claimed fear of being arrested on arrival, taken to the "fourth floor" and killed, was vaguely that he has heard that that has happened to people returned from Australia. He made no claims to fear harm for reason of his religion and gave no evidence about it. I am not satisfied any claim of any harm or persecution on the ground of religion arises on the material before me.
32. I accept that during the long civil conflict between the Sri Lanka government and the LTTE and in its aftermath many Tamils, particularly in the Tamil-dominated areas of the north and east where the LTTE had operated, faced considerable violence, discrimination and harassment. During the war, merely being a Tamil in an LTTE area could sometimes raise suspicion of LTTE association.⁹ I accept that like many Tamils the applicant experienced some harassment of identity checks and occasional village round ups. However, on the country information before me, whilst reform has not been complete and issues remain, I find that in the years since the end of the war and since the applicant left Sri Lanka in late 2012, there has been substantial improvement in Sri Lanka both generally and for Tamils.¹⁰
33. Since the end of the war and the defeat of the LTTE the government has effective control across all of Sri Lanka and the security situation significantly improved; armed militia groups are no longer prevalent and much of the military-seized land has been returned to Tamil civilians. There has been review of and a decrease in Tamils held in detention under the *Prevention of Terrorism Act (PTA)* and the Act was effectively suspended between 2016 and

⁸ DFAT Sri Lanka Report 2019

⁹ DFAT Sri Lanka Report 2019

¹⁰ DFAT Sri Lanka Report 2019; UKHO FFM Report 2017; USDOS Sri Lanka Report for 2020; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928 ("UKHO FFM Report 2020")

April 2019. Whilst the Sri Lankan authorities remain sensitive to Tamil separatists and any potential for re-emergence of LTTE hostilities, their focus on Tamils, in Sri Lanka or in the Diaspora, is on those who are or who are perceived to be committed to or actively working for a separatist Tamil state in Sri Lanka. In this, the Sri Lankan authorities rely on sophisticated intelligence on former LTTE members and supporters, and activists for Tamil separatism; and maintain intelligence database lists of persons of interest for such concerns and regarding criminal activities or outstanding arrest warrants or court orders.¹¹ Indicative that the imputation of LTTE support that once could arise for Tamils by virtue of ethnicity or their origins from an LTTE area in the north or east, is that the Sri Lankan authorities are not generally interested in ordinary low-level LTTE members or supporters or their families, as so many Tamils were forced to be, nor do they regard the entire cohort of the Tamil diaspora as either holding separatist views or being politically active in any meaningful way.¹² Rather, their interest is on those of adverse concern for actual or imputed separatist activity; and whether a person would be listed in the intelligence data base and of adverse concern warranting arrest on a “stop” list, or of interest to warrant monitoring on a “watch” list (with some of those of sufficient adverse concern to be arrested later after some monitoring), depends on the level of or significance of their role in the former LTTE, and or in separatist activism, or nature of their criminal activity.¹³ There is no indication before me that the TMVP or its members are or are perceived to be involved in or activists for Tamil separatism in Sri Lanka. Indeed, the TMVP remains aligned with the national government parties and a TMVP MP elected to national Parliament has been appointed to a Co-ordinating Committee in the Eastern Province by the current President Rajapaksa.¹⁴

34. As discussed above, I find the applicant and his family had no association to the LTTE. I find he was not of adverse concern to any authorities when he left Sri Lanka, including for his brother’s forced TMVP involvement as a minor. And I have not accepted that the applicant attended any protest or meeting in Australia as claimed. There is no claim or indication before me that the applicant holds separatist views, or has any interest in this, or has had any involvement in separatist organisations or activities in Sri Lanka, nor any credible evidence that he has had any such involvement in Australia or in the Tamil diaspora. There is no claim or indication before me that he would hold such views or work towards Tamil separatism or a revival of LTTE hostilities on return to Sri Lanka or has any such interest. I am not satisfied the applicant is on any watch list or stop list and I find he is not. I find he has no profile of concern for criminal activities or offending. I am not satisfied that any aspect of the applicant’s ethnicity, or his profile as a young Tamil male, from Batticaloa, including whose brother was forced as a minor into the TMVP, would cause or lead to any real chance that the applicant would be imputed on return to Sri Lanka or in the reasonably foreseeable future, by any authorities or other persons, to be committed to, or an activist for Tamil separatism in Sri Lanka or to be of any other adverse concern. I am not satisfied that he would face any real chance of any harm on this basis.
35. DFAT assessed that non-Muslim Sri Lankans, including Tamils, face a low risk¹⁵ of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing, and, moreover, that under-representation of Tamils in public sector employment is mostly attributable to language constraints and war-disrupted

¹¹ DFAT Sri Lanka Report 2019; UKHO FFM Report 2020; UKHO, “Country Policy and Information Note. Sri Lanka - Tamil Separatism”, v 7.0, 17 June 2021, 20210624114752 (UKHO Tamil Separatism Report 2021)

¹² Sri Lanka Report 2019; UKHO FFM Report 2020; UKHO Tamil Separatism Report 2021

¹³ DFAT Sri Lanka Report 2019; UKHO FFM Report 2020; UKHO Tamil Separatism Report 2021

¹⁴ USDOS Sri Lanka Report for 2020

¹⁵ Explained in the DFAT Sri Lanka Report 2019 as “DFAT is aware of incidents but has insufficient evidence to conclude they form a pattern”.

education. Policies mandated by the previous Rajapaksa government in 2012 aimed to increase the proficiency in both Sinhala and Tamil of all civil servants, and gave Sri Lankans the right to communicate in Sinhala, Tamil or English. I consider DFAT's assessment accords with the UKHO reporting in 2020 which indicated that although Tamils, like other minorities, may sometimes be subjected to discrimination, Tamils are not specifically targeted and do not suffer persecution just for being Tamil.¹⁶ Tamils are the second largest ethnic group in Sri Lanka, and are concentrated in the Northern and Eastern provinces of the country. Tamils have a substantial level of political influence and there are no barriers to their political involvement.

36. I note that Sri Lanka has returned to a Rajapaksa government, headed by Gotabaya Rajapaksa as President, since 2019, with Parliamentary elections in 2020 consolidating his brother, Mahinda as Prime Minister, voted in on a nationalist Sinhalese-Buddhist voter base; and that Tamils are reportedly concerned by an increased authoritarianism under this government, a Sinhalisation of Tamil areas, and a militarisation of civilian power including by appointment to government positions of people implicated in war crimes and human rights abuses during the civil conflict.¹⁷ There are indications that lack of accountability and ongoing impunity for war-time abuses will largely continue and that the devolution to the provinces of executive power and repeal of the PTA, desired by Tamils may not eventuate.
37. However, I note in context, that the Rajapaksas were formerly in government in an era when the focus and repressive measures of security forces was to end the long war and prevent resurgence of LTTE or separatist conflict, and suspicion of Tamils' associations with the LTTE was still a heightened issue. As noted above, there has been reform and substantial improvement in Sri Lanka since that time. The information before me does not indicate there has been a significant worsening of conditions for Tamils since 2019. Whilst Tamils are disproportionately monitored and harassed by security forces, this is not all Tamils or ordinary Tamils generally, and the reports of harassment or detention or physical harm largely concern Tamils with profiles for being political activists, journalists, human rights defenders, particularly when associated with sensitive matters, and former or suspected former LTTE members (with DFAT observing a higher risk of this for high-profile ex LTTE members) and activists for separatism.¹⁸ Monitoring of Tamils generally has reduced in Sri Lanka, although DFAT observed that Tamils in the north and east report the authorities continue to monitor public gatherings and protests, and undertake targeted surveillance of individuals and groups associated with politically sensitive issues. I am not satisfied on any evidence before me that the applicant has or would involve himself in protests or politically sensitive issues in Sri Lanka.
38. Although there is still a military presence, the east and north of Sri Lanka have been largely demilitarised since the applicant left. The PTA that was used widely against Tamils in the past, was effectively suspended from 2016 to the 2019 Easter Bombings. The 2019 Easter Bombings in Sri Lanka led to emergency regulations and restrictions being introduced, and the military presence in the north and east of the country were on high alert. But their focus on restrictions and checkpoints was not directed at Tamils, but to check for Islamist terrorists;

¹⁶ UKHO FFM Report 2020

¹⁷ Sri Lanka Campaign for Peace and Justice, "Sri Lanka's slide into authoritarianism", 10 June 2020, 20200612151317; Tamil Guardian, "Sri Lankan Presidential Task Forces are "grounded in Sinhala-Buddhist nationalist ethos" and signal deepening militarisation – PEARL", 4 June 2020, 20200605073146; The Economist, "A polarising figure becomes president of Sri Lanka", 23 November 2019, 20191122115336; Sanjana Hattotuwa, "6 days", 24 November 2019, 20191128105113; USDOS Sri Lanka Report for 2020

¹⁸ USDOS Sri Lanka Report for 2020; UKHO FFM Report 2020; UKHO Tamil Separatism Report 2021; DFAT Sri Lanka Report 2019

and PTA arrests since have predominantly been related to that event.¹⁹ Those emergency regulations since lapsed and the heightened security eased, although some military deployment has since remained, as part of the government's Covid-19 response, although USDOS reported that the increased military presence was largely in the Tamil north; however, military no longer have arrest authority.²⁰ Other than for those with profiles of concern to authorities as discussed above, the country information does not indicate that ordinary Tamils are the focus of attention by Sri Lankan military or authorities or arrests under the PTA. I do not consider there is anything in the applicant's profile to give rise to a real chance he may be detained or arrested under the PTA, or taken to the "fourth floor", or killed or harmed in any way, or targeted for any form of harassment or any other concern by any SLA or CID or military or security personnel or any Sri Lankan authorities or other groups or persons on the basis of being a Tamil or a male Tamil from Batticaloa or Eastern Province, including whose brother was once involved in the TMVP, even if there is an SLA camp near his home.

39. On my analysis of the applicant's circumstances and the country information discussed above, I find the applicant is an ordinary young Tamil male without any adverse profile. The UKHO reported in 2020 that Tamils are not persecuted merely for being Tamil.²¹ I find as an ordinary young Tamil man the applicant does not face a real chance of any harm in Sri Lanka, now or in the reasonably foreseeable future from any state or non-state actors, for reason of his ethnicity or because he is a young Tamil man from Batticaloa or Eastern Province, including whose brother was once involved in the TMVP, or who lives near an SLA camp, or for any combination of these factors.

Returnee / Illegal Departure /Failed Asylum Seeker

40. The applicant had claimed he would be harmed for leaving Sri Lanka to seek protection. He also claimed he would be arrested on arrival on return to Sri Lanka and taken to the fourth floor where he could be killed, and claimed to fear this because he had heard this has happened to other returnees from Australia. I give this very vague anecdote little weight, as there is no substantiating evidence about when such incidents occurred or to whom nor any details of their personal circumstances. As noted in the country information, people of certain profiles discussed earlier above, including those who are on "stop" lists for criminal warrants or of significant adverse concern on "watch" lists, risk arrest and possible mistreatment if returned to Sri Lanka.²² I find the applicant has no such profile of concern and would not be on any such lists. I note the delegate assessed the applicant's chances of harm in Sri Lanka as a Tamil returnee failed asylum seeker but also as one who had departed Sri Lanka illegally and lived for a period abroad.
41. I accept that there is chance the applicant may be arrested at the airport on return to Sri Lanka for his illegal departure. It is an offence under Sri Lankan law to depart the country other than via an approved port of departure and with passport: ss.34 and 45(1)(b) of the *Immigrants and Emigrants Act* (I&E Act). The penalty for doing so can be up to 5 years imprisonment and a fine of LKR 200,000. DFAT reports that only a fine is imposed on passengers who depart illegally. Custodial sentences have been imposed only on persons facilitating or organising the boats. For Sri Lankan returnees convicted of illegal departure

¹⁹ USDOS Sri Lanka Report for 2020; UKHO FFM Report 2020; DFAT Sri Lanka Report 2019

²⁰ USDOS Sri Lanka Report for 2020

²¹ UKHO FFM Report 2020

²² UKHO FFM Report 2020; UKHO Tamil Separatism Report 2021; DFAT Sri Lanka Report 2019

the fine imposed on those who were mere passengers is usually between LKR15,000 and LKR20,000 (approximately AUD122 to AUD163).²³

42. The following procedures are reported to routinely occur for citizens being returned to Sri Lanka who departed illegally: for those returning on a temporary travel document (TTD) (which the applicant may do having left without a passport), they are first questioned in the Sri Lankan High Commission office issuing the TTD in the country from which they will return to Sri Lanka; then on arrival in Sri Lanka they are questioned by authorities at the airport to confirm identity and travel information and checked against intelligence and criminal databases for any outstanding warrants; any questioning beyond this (other than about illegal departure) is only reasonably likely to occur if the person is already on a “stop” or “watch” list; those suspected of illegal departure may be charged under the I&E Act; the police take their photograph, fingerprints, and a statement of the details of departure; returnees can be held at the Airport CID’s office for up to 24 hours during processing and charging; the returnee is taken to the closest Magistrate’s Court; if a magistrate is not available, because it’s the weekend or a public holiday, the returnee can be held for up to two days in an airport holding cell; and the magistrate normally grants bail for mere passengers on a people smuggling boat.²⁴ DFAT reported that on an I&E Act prosecution of a passenger, a guilty plea will attract a fine which can be paid in instalments and the defendant is then free to go, although the process can be protracted until all parties of a smuggling venture have been located. There is no indication before me that the applicant would not plead guilty, or would be denied or unable to meet bail, or would be unable to pay any fine or costs associated with proceedings under the I&E Act. I note he has family members in Sri Lanka, with no indication before me that he would not be able to draw on any assistance, if any were required, from them.
43. DFAT indicated that there are no reports of mistreatment during the processing of returnees who departed illegally. The UNHCR told the UK Home Office that returnees to Sri Lanka are no longer subjected to intensive questioning at the airport; and the UKHO Tamil Separatism report indicated that much of the background information will have already been recorded by the SLHC during issue of TTD.²⁵ It is not an offence to seek asylum outside Sri Lanka. The authorities are only interested in persons returning with outstanding criminal offences or those with profile of adverse concern and listed on stop and watch lists.²⁶ The UK Home Office FFM reported there was no distinction between Tamil and Sinhalese returnees. Many thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum. The Sri Lankan authorities are reported to have said refugees and failed asylum seekers are welcome to return.²⁷ There is no information before me that returnees or Tamil returnees, including who departed illegally are targeted or imputed to have any profile of adverse concern merely for seeking protection or for being failed asylum seekers who lived for several years overseas including in Australia. Tamil failed asylum seekers who returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment or monitoring.
44. The country advice before me does not support that ordinary returnee Sri Lankans or returnee Sri Lankan Tamils are arrested at the airport and taken to the “fourth floor” and killed or are mistreated in any way on their return. And I do not accept this would occur or that there is any real chance of this happening to the applicant for returning to Sri Lanka as a

²³ DFAT Sri Lanka Report 2019

²⁴ UKHO Tamil Separatism Report 2021; DFAT Sri Lanka Report 2019

²⁵ UKHO FFM Report 2020; UKHO Tamil Separatism Report 2021

²⁶ Ibid.; Ibid

²⁷ DFAT Sri Lanka Report 2019

Tamil or for leaving Sri Lanka illegally or for seeking asylum in Australia or for any other reasons.

45. I am not satisfied the returnee processing for return and on arrival, being charged and convicted of an offence under the I&E Act, or the costs and appearances of such proceedings, or the imposition of a fine, amount to serious harm under s.5J(5) of the Act. In the unlikely event the applicant is detained for a few days for returning on a weekend or public holiday I am not satisfied this possible short period of detention amounts to serious harm under s.5J(5) even if the holding cell is uncomfortable or the applicant is distressed by the detention. I am not satisfied the applicant faces a real chance of harm on return to his home village because he is returning as a failed asylum who departed Sri Lanka illegally and lived abroad in Australia. Even considered cumulatively with his Tamil ethnicity, his gender and origins from Batticaloa in Eastern Province, where there is an SLA camp near his home, and that his brother was in the TMVP, I find the applicant does not face a real chance of harm as a returning Tamil failed asylum seeker who departed illegally and lived abroad in Australia.
46. Considering all the applicant's circumstances and the information before me, as discussed, I am satisfied that the applicant does not have a well-founded fear of persecution in Sri Lanka.

Refugee: conclusion

47. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

48. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

49. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
50. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

51. The applicant may be charged under the I&E Act on return to Sri Lanka, and may be detained for up to two days if he arrives on a weekend or public holiday. I rely on country information referred to above that supports a finding that the applicant would not be mistreated during returnee processing for return and on arrival, or charging at the airport or any period of detention. I find the processing at the airport, being charged under the I&E Act, possible short period of detention, and possible conviction and court appearances and their costs, and fine, do not amount to significant harm, and I am not satisfied he faces a real risk of significant harm during any such processing or I&E Act procedures or short detention on return. Even if the applicant is distressed by a period of detention of up to two days, I do not accept the distress amounts to torture, or cruel or inhuman treatment or punishment, or degrading treatment or punishment as defined by the Act.
52. I have otherwise found the applicant would not face a real chance of harm if returned to Sri Lanka on any of the claims raised or arising before me. Noting that the Full Federal Court has set out that the “real risk” test for complementary protection is the same standard as the “real chance” test, it follows that, based on the same information and analysis, and for the reasons stated above, I am also satisfied that there is not a real risk that he will face significant harm for any or any combination of those reasons, including cumulatively, if returned to Sri Lanka.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.