



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA21/10138

Date and time of decision: 1 April 2022 15:26:00

R Mathlin, 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 applicant is a Tamil woman aged [age], who arrived in Australia by boat with her mother and younger sister, in November 2012.
2. On 29 June 2017 the applicant's mother applied for a Safe Haven Enterprise visa (SHEV application) in which her younger daughter and the applicant were included as members of the same family unit.
3. On 24 May 2017 the applicant's mother advised the Department of Home Affairs (the Department) that the applicant was no longer living at the same address as she was. The applicant was informed that she was no longer considered a member of the same family unit as her mother, and was invited to put forward her own claims to protection. The applicant did so, but maintains that she remained at all times, and is now, a member of her mother's family unit.
4. The delegate did not accept that the applicant was a member of her mother's family unit, and assessed her claims separately. On 10 November 2021 the delegate made separate decisions refusing to grant visas to the applicant, and to her mother and sister. The applicant's mother and sister now have separate matters before the IAA and in a separate decision I affirmed the delegate's decision in relation to the application of the applicant's mother and sister.¹
5. I note that when she was invited to put forward her own claims for protection, the applicant obtained her own separate legal representation. However, she is represented before the IAA by the same representative as her mother and sister.

Information before the IAA

6. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
7. On 3 December 2021 the applicant's legal representative provided the IAA with a submission, and a statement made by the applicant dated 29 November 2021.
8. Insofar as the applicant's statement concerns her claims to be a dependent child of her mother and thus a member of her mother's family unit, and details their financial and living arrangements, this information was before the delegate, and is not new information.
9. The statement also raises some protection claims, stating that when the Department "split" the applicant from her mother's application, the applicant did not understand that she could raise her own claims for protection, and she wanted to do this now. She claimed that when she was in Sri Lanka she was not allowed out by herself, because it was not safe. There were 'grease men' in their area who harassed and mutilated Tamil women and burned Tamil civilians. Because she lived such a sheltered life she doesn't know much about Sri Lankan society.
10. She claimed that since she has been in Australia she has attended annual Martyrs' Remembrance Day, May 18 Genocide Day and Thileepan Remembrance Day events. She has a political opinion against the Sri Lankan government and in support of the LTTE, as the LTTE fought for Tamil rights

¹ IAA references 2021/10139 and 2021/10140

and against Tamil oppression. She reads the Sri Lankan news and is scared to return, as the army and government authorities target, kidnap, torture and kill Tamil civilians, and sexually abuse and torture Tamil females.

11. She fears that if she returns she will be the target of sexual harassment as a young single Tamil woman. She fears being physically harmed, raped and sexually assaulted by the Sri Lankan authorities - police, army and CID.
12. Her mother's siblings do not speak to her because they do not approve of the fact that she lived with her boyfriend in Australia. She will be shunned by her extended family and as a young woman living alone she will be vulnerable to men who will come to her house and do bad things to her. The police will not protect her and she will not be safe anywhere in Sri Lanka.
13. The submission to the IAA argues that the applicant's statement contains credible personal information which was not previously raised in its entirety, but which was raised in the post-SHEV interview submission of 26 July 2021, and arises from the material that was before the delegate. It was submitted that the information could not have been provided before the delegate's decision was made because the applicant did not fully understand the ramifications of being split from her mother's application. It was submitted that there are exceptional circumstances to justify considering the new information because there has been a material change to her circumstances since the delegate's refusal of her application, which is that she could be returned to Sri Lanka.
14. It was submitted that the claims that the applicant was a member of a particular social group of young Tamil women and that she was an LTTE sympathiser were raised in the post-interview submission of 26 July 2021, but the former claim was not considered by the delegate.
15. It was submitted that the applicant fears harm on the basis of her Tamil ethnicity, her membership of the particular social groups of young women, young Tamil women, young single women and young single Tamil women, and because she will be imputed with a political opinion in opposition to the unitary state of Sri Lanka because her father was an LTTE sympathiser.
16. It was submitted that the delegate failed to actively engage with the applicant's circumstances, as a post-civil war returnee with no adult experience of Sri Lanka and without mechanisms and contacts to survive. It was submitted that she has nowhere to live and without personal or family support she will not be able to pay fines or bail imposed because of her illegal departure. She will have no Sri Lankan National Identity card and is a young single Tamil woman with no male protection, and familial links to the LTTE.
17. To the extent that the submission contains legal argument, and addresses and takes issue with aspects of the delegate's findings, it is not new information and I have considered it. The submission does contain some new information that was not before the delegate, including in the applicant's mother's application. The new information in the statement and submission is that:
 - The applicant does not have contact with her mother's siblings and they will shun her because she lived with her boyfriend
 - She has no adult experience of Sri Lanka and will have no mechanisms and contacts to survive. She led a sheltered life in Sri Lanka and was not allowed out as a child. There were grease men in their area who harmed Tamil women. Because she is unfamiliar with Sri Lankan society it will be hard for her to adjust and to live there safely
 - She will not be able to pay fines or post bail

- She does not have a Sri Lankan National Identity Card and this is a crucial aspect of her profile on return
18. I will address below whether this new information satisfies the requirements of s.473DD of the Act.
19. I have obtained documents from the Department's file relating to the applicant mother which were provided to the Department in relation to the original combined SHEV application. The SHEV application and some of the supporting material was included in the review material for the applicant's case. Some documents were referenced in the delegate's Decision Record but were not included in the review material, and I have obtained these: as these documents were before the delegate they are not new information. I also obtained documents from the applicant's mother's file which were apparently not before the delegate in relation to this application, but which I considered may be relevant. These include the applicant mother's entry and arrival interviews, the recording of her SHEV interview, and various submissions with attachments and supporting documents. I also obtained the recording of the interview conducted by the IAA with the applicant's mother on 2 March 2022. I am satisfied that there are exceptional circumstances to justify considering this material, because it contains claims made expressly or impliedly on behalf of the applicant, and provides context and background to the applicant's claims.
20. On 2 March 2022 I obtained new information from the applicant at an interview. As discussed below, some of this new information satisfies the requirements of s.473DD and has been considered, while some has not.
21. I have obtained the Department of Foreign Affairs and Trade (DFAT) Country Information Report for Sri Lanka dated 23 December 2021.² This report was published after the delegate's decision and updates the previous 2019 DFAT report for Sri Lanka which was before the delegate. The DFAT report was prepared specifically for the purpose of protection status determinations and contains the most up to date information about conditions in Sri Lanka. I am satisfied that there are exceptional circumstances to justify considering this new information.
22. The applicant was invited to provide comments on the 2021 DFAT report and the new information provided at the IAA interview, which her representative did by submission dated 9 March 2022.

Applicant's claims for protection

23. As noted above, the applicant's mother initially lodged a combined application which included the applicant. The applicant's mother claimed that both her daughters were at risk of harm arising from the circumstances which she claimed placed her at risk of harm. Both the applicant and her mother maintain, and I accept that they are, in reality (regardless of whether they are under Australian migration law), a family unit. Apart from a period of about three years during which they appear to have been estranged because the applicant was living with her boyfriend, they have always resided together and I accept that they do so now, and that their relationship has been repaired. There is nothing in the material before me to suggest that this situation would not continue, should they return to Sri Lanka. Assuming, for the moment, that neither the applicant nor her mother meets the protection visa criteria, I am satisfied that they will be returning to Sri Lanka together and residing there together. I am satisfied that if the applicant's mother had a profile likely to attract the adverse attention of Sri Lankan security forces, then the applicant herself would be exposed to harm as a consequence of activity such as visits to the family home, monitoring, or the taking of her mother for questioning, and this is essentially what the applicant's

² DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818

mother claimed on her behalf. So far as they are relevant to the applicant's case, her mother's claims can be relevantly summarised as follows:

- She is a [age]-year-old Tamil widow from Eastern Province. She claimed, and it was accepted by both the delegate and the IAA, that her late husband had been a supporter of the LTTE while living and working in Colombo. She claimed that in June 2009 he received a phone call warning him to stop his activity in support of the LTTE. She claimed that his death in September 2009 was suspicious, as it was attributed to a heart attack, when he had not been known to be unwell. The applicant's mother claimed that she, and implicitly her daughters, would be at risk of harm on return to Sri Lanka because of her husband's (and their father's) support for the LTTE.
 - In 2012 the applicant's mother campaigned for the TNA candidate in the Eastern Provincial Council elections, [named]. Because the TNA was at the time viewed as the mouthpiece of the LTTE, she (and implicitly by extension the applicant) may be viewed as an LTTE supporter.
 - While working for the TNA she began a relationship with "A", a member of [the candidate]'s security staff. They became very close and the applicant's mother shared her past history with him, including the information that her late husband was a staunch LTTE supporter. Shortly before her departure from Sri Lanka, A proposed marriage to the applicant's mother. When she declined, A threatened to report what she had told him about her late husband's LTTE support and assistance to the LTTE intelligence wing. Then he forced the applicant's mother to have sex with him. She feared for her life and her children's. She took a sudden decision to flee the country. Since their departure the applicant's mother has been told that A has been coming to the house enquiring about her. The applicant's mother believes that A shot her brother-in-law in 2015 after going to his house on two occasions asking about her.
 - She and the applicant and her other daughter have participated in Tamil diaspora activities in Australia.
 - The applicant's mother's [relative] (referred to by the applicant as her [Relative 1]) was in the LTTE and died in 2007.
 - The applicant's mother fears that she will be perceived as an LTTE supporter because her husband was associated with the LTTE, because she was a TNA volunteer, and due to her Tamil diaspora activities in Australia; and as a Tamil female head of household, who was sexually abused. She fears she will be detained, interrogated and tortured by authorities and that she will be sexually abused and raped, as this has occurred in the past.
24. The applicant's own claims, put forward to the delegate when she was informed that her application would not be considered on the basis that she was a member of her mother's family unit, are that:
- Since she has been in Australia she has attended annual Martyrs' Remembrance Day, May 18 Genocide Day and Thileepan Remembrance Day events. She has a political opinion against the Sri Lankan government and in support of the LTTE, as they fought for Tamil rights and against Tamil oppression.
 - She is a member of a particular social group of young women, young Tamil women, young single women and young single Tamil women, without male protection.
 - She will be imputed with a political opinion in opposition to the Unitary state of Sri Lanka because her father was an LTTE sympathiser.

- The Sri Lankan government's inadequate response to the Covid-19 pandemic brings up Australia's obligations under Article 12 of the International Covenant on Economic, Social and Political Rights recognising the right of everyone to the highest attainable standard of physical and mental health.

25. As noted above, the applicant's new claims made before the IAA are as follows:

- The applicant does not have contact with her mother's siblings and they will shun her because she lived with her boyfriend
- She has no adult experience of Sri Lanka and will have no mechanisms and contacts to survive. She led a sheltered life in Sri Lanka and was not allowed out as a child. There were grease men in their area who harmed Tamil women. Because she is unfamiliar with Sri Lankan society it will be hard for her to adjust and to live there safely
- She will not be able to pay fines or post bail
- She does not have a Sri Lankan National Identity Card and this is a crucial aspect of her profile on return

26. It must be said that it is difficult to discern precisely what the applicant's claims are. They have been put forward in a rather haphazard and unclear fashion, partly because they consist of the claims made on her behalf by her mother, including implied claims, and those she herself has put forward. In addition to the written and oral evidence the applicant herself has provided, numerous submissions have been provided by her different representatives, in which different aspects of claims are added, mentioned once but not repeated, or rolled up together in varying formulations. Notwithstanding the difficulty of identifying her precise claims, I have considered them singly, and on a cumulative basis, noting that many of the risk profiles identified by her representatives overlap.

Refugee assessment

27. 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

28. 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.

29. Based on the identity documents provided by the applicant, which include her birth certificate, I accept that she is a Sri Lankan citizen and the receiving country is Sri Lanka.

30. I accept that the applicant is a Tamil Hindu from Eastern Province.

No National Identity card

31. While the applicant claimed, in an undated statement that was given to the delegate with the post-SHEV interview submissions, that she did not have a Sri Lankan identity card, it was claimed for the first time in the IAA submission of 3 December 2021 that this is relevant to a consideration of her overall profile and risk of harm on return to Sri Lanka. I am satisfied that this last assertion is effectively a new claim which was not explicitly raised before the delegate as an aspect of the applicant's profile relevant to the risk of harm she might face on return. As the fact that she does not have an identity card is a circumstance which has been in existence throughout the processing of her application, including after she was informed that her application would be processed separately from the joint application lodged by her mother, the applicant has not satisfied me that the information that this is relevant to the risk of harm she faces could not have been given to the delegate before the decision was made. I note that she has been legally represented at all times. In these circumstances, s.473DD(b)(i) is not satisfied.

32. While I am satisfied that this is credible personal information not previously known by the delegate, I am not satisfied that if it had been known it could have affected consideration of the applicant's claims. The applicant has not identified any harm, or even consequences, that she claims might flow from not having an identity card. Country information states that National Identity Cards are issued to Sri Lankan nationals over the age of 16 and are necessary to obtain other identity documents and access government services.³ There is no information before me to indicate that the applicant would not be able to obtain a National Identity Card if she were to return to Sri Lanka, and it is not apparent how she might be adversely affected if she were to be without one while waiting for one to be issued. In these circumstances, and as it is not apparent how not having a National Identity Card is relevant to any risk of harm she faces, the applicant has not satisfied me that if the delegate had known that she claimed to have a risk profile because she does not possess a National Identity Card, this could have affected consideration of her claims: s.473DD(b)(ii) is not satisfied. In these circumstances, I am not permitted to consider this new information.

Tamil diaspora activities

33. The applicant claims that if she returns to Sri Lanka she will be subjected to harm because of her activities in Australia which will mean that she is seen as a supporter of the LTTE. The applicant claims to have participated in commemoration events and protests organised by the Tamil Civic Centre (TCC) in Sydney. The applicant's mother provided photographs of herself and both her daughters attending various events. The applicant's mother claims that many people take photos and videos of these events and claims that if the Sri Lankan authorities saw photographs of her or

³ DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818 at 5.36-5.38

her daughters, they would face persecution. This information was before the delegate in relation to her consideration of the applicant's application.

34. At her SHEV interview the applicant said that she participates in these events because when she came to Australia she realised that Tamils should be involved in these events. She said that her mother has lit a lamp for Martyr's Day for her [Relative 1], they have attended several events each year for about four years, they lit lamps and her sister took part in a [performance].
35. The delegate accepted, on the basis of country information, that the authorities monitor pro-LTTE protests and similar activities overseas, but found that monitoring alone will not usually constitute persecution. She did not accept that the applicant would be identified as a participant in the diaspora events, relying on publicly available information which showed that there are thousands of participants in such events, and that there is no evidence to indicate that others who have attended such events have come to the adverse attention of the authorities in Sri Lanka for that reason.
36. At the IAA interview the applicant said that she participates in Australia because they do not have the opportunity to do so back in Sri Lanka because of the Prevention of Terrorism Act. She said that when she was not living with her mother she attended the events with her partner. She said that she would not attend events like these in Sri Lanka because they are not allowed. I put to her that country information indicated that currently they are not allowed because of the Covid-19 pandemic. She said that there are other reasons for which they are not allowed; they are events for LTTE supporters and so they are prohibited.
37. I consider that the information provided by the applicant at the IAA interview about her participation in Tamil commemoration events in Australia is new information. While some aspects of these claims were before the delegate, I am satisfied that the full details could not have been provided to the delegate because at the SHEV interview the delegate did not explore the applicant's claims about her activities here fully: s.473DD(b)(i). The applicant has satisfied me that this is credible personal information not previously known, which may have affected the delegate's consideration of the claims: s.473DD(b)(ii). Having regard to the above, and because the applicant's participation in Tamil activities in Australia is a key component of her claims, I am satisfied that there are exceptional circumstances to justify considering the new information: s.473DD(a).
38. I accept that the applicant has attended events organised by the TCC over a period of some four years from 2016. The applicant has plausibly claimed that she attended the events to express her Tamil identity, and because she would not be able to participate in such events in Sri Lanka, and I am satisfied that she engaged in this conduct otherwise than for the purpose of strengthening her claims to refugee status. I have therefore not disregarded the applicant's conduct in Australia pursuant to s.5J(6).
39. Country information states that the Sri Lankan government operates an extensive intelligence-gathering regime, acquiring information through the infiltration of diaspora organisations, the photographing and videoing of demonstrations and the monitoring of the internet and unencrypted social media.⁴ DFAT confirms that the focus of the authorities now is to ensure that there is no LTTE resurgence, and to this end, it monitors the activities of the Tamil diaspora, many of whom are believed to remain committed to a separate independent Tamil state.⁵ DFAT cites a

⁴ 'Game-changer for Sri Lankan Tamil activists seeking asylum in the UK', freemovement, 07 June 2021, 20210608165118.

⁵ DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818 at 3.54

UK Upper Tribunal decision⁶ which ruled that Tamils with a significant role in diaspora activities would be detained on return to Sri Lanka, while those with a lesser role would be monitored. It stated that a range of activities in the UK, such as attending meetings and demonstrations, holding flags or banners displaying the LTTE emblem, attendance at commemorative events, “meaningful” fundraising, any presence on social media and signing petitions may be perceived as threatening and may trigger harassment on return.⁷ DFAT assesses that depending on their security risk profile, members of the Tamil diaspora returning to Sri Lanka may be monitored on return, and of particular interest would be those holding leadership positions in diaspora groups, particularly groups holding radical views; those who were formerly part of the LTTE; those suspected of raising funds during the war; and those actively advocating for Tamil statehood.⁸ I am not satisfied that the applicant (or her mother or sister) falls within any of those categories.

40. I accept that the applicant has attended a number of public events and demonstrations since 2016, the purpose of which is essentially to publicise the plight of the Tamil population of Sri Lanka and to commemorate the war dead. I accept that at an event in 2020 her mother made a brief speech about her [relative] and lit a lamp. I accept that the applicant’s sister participated in [performances] at Tamil Hero’s day in 2018 and 2019. I accept that people filmed and photographed these events. I note that some of the photographs provided in relation to the combined application lodged by the applicant’s mother, which were obtained by the delegate and considered in relation to the applicant’s application, show the applicant with her mother and sister standing in front of large photographs of the former LTTE leader and a display depicting war graves or memorials, said to have been taken at Hero’s Day 2016. There are photographs of the applicant’s mother and sister at demonstrations. In one, the applicant’s mother is standing behind a row of protesters holding a placard; in another, the applicant’s sister is holding [an object]; she is wearing a face mask that largely obscures her face. In other photographs she is depicted on a stage holding an [object], and as a member of a [group].
41. I have considered the applicant’s claims about her (and family members’) participation in these events, as well as the photographic evidence. There is no information before me to suggest that these, or any photographs or film of the applicant or her family members are publicly available, or that the applicant, or her mother or sister, have any presence on social media or have posted these photographs on social media. While I accept that activities such as these may be monitored by the Sri Lankan authorities in Australia, I am not satisfied on the basis of the evidence provided that the applicant or her mother or her sister would be readily identifiable as a result of their participation; or that the applicant (or the others) would be regarded as having a role of such significance as to cause her (or them) to come to any adverse attention, including questioning or monitoring, on return to Sri Lanka, either when being processed at the airport or after returning to her home.
42. The applicant’s comments at the IAA interview that she would not be able to participate in similar activities in Sri Lanka because they have been banned under the current government are consistent with country information which states that it is illegal to commemorate the birthday of LTTE leader Prabhakaran or Great Hero’s Day, and that in May 2021 Tamils were harassed and arrested for attempting to mark the anniversary of the end of the civil war. I have serious doubts that the applicant would wish to participate in similar events should she return to Sri Lanka; while I accept that she has attended the events in Australia for genuine reasons, I am not satisfied that she has a strongly held commitment or a deep personal connection to the Tamil cause that would lead her to seek to participate in similar events in Sri Lanka, should they be held. I am not satisfied

⁶ *KK, RS v Secretary of State for the Home Department*, UK Upper Tribunal decision 27 May 2021, referred to in submission of 8 August 2021

⁷ DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818 at 3.54

⁸ DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818 at 3.57

that she would refrain from attending because she was afraid to do so for fear of persecution, or because such events were not permitted in a manner amounting to a serious restriction on her freedom of speech or association. I am therefore not satisfied that there is a real chance that the applicant would be at risk of harm in Sri Lanka because she would attend LTTE commemorative events, or that her fundamental rights would be breached such as to constitute serious harm if she was unable to do so.

LTTE profile.

43. The applicant claims, or it was claimed on her behalf, that she may be imputed to be a supporter of the LTTE for several reasons essentially connected with her mother - because of her father's and "[Relative 1]'s" association with the LTTE, because of her mother's work for the TNA and because of the claimed issue with A. There appears to be an implied claim that she may be imputed as a supporter of the LTTE merely because she is a Tamil or a young Tamil woman.
44. Country information indicates that the LTTE was comprehensively defeated in 2009. At the end of the civil war a large number of LTTE members were arrested. Many were sent to rehabilitation camps and some were prosecuted. Security forces questioned and monitored civilians for possible LTTE activity or anti-government sentiment including support for the LTTE and an independent Tamil state, as authorities were, and remain, concerned about the possible re-emergence of the LTTE. However, country information indicates that the highly oppressive security and military presence in the north and east of Sri Lanka has eased, although authorities collect and maintain sophisticated intelligence on former LTTE members, supporters and other separatists, and maintain "stop" and "watch" lists for those with extant court orders or arrest warrants, those whose passports are to be impounded, and those of interest including for suspected separatist or criminal activities. Any former low profile LTTE member who now came to the attention of the authorities and who had not been rehabilitated might be detained, sent for rehabilitation, and following that, might be monitored, particularly if they had a combat role. Some Tamils with actual or imputed LTTE links continue to report police harassment and monitoring such as frequent visits by police to them or family members, and threats. However, such people are generally able to live their lives without fearing for their security. Close relatives of former high-profile wanted LTTE members may be monitored; and there are some reports that family members of former or suspected former cadres are subject to harassment and detention.⁹ While the UK Home Office 2020 report suggests that Sri Lankans returning after a long absence overseas might be monitored on return to their homes, DFAT's more recent 2021 report states that some returnees were monitored, but these were generally those with suspected LTTE links and/or former cadres.¹⁰
45. The country information indicates, and I am satisfied, that Tamils generally are no longer imputed to be supporters of the LTTE for reason of their ethnicity alone. Based on this information, I am satisfied that the applicant does not face a real chance of being suspected of being a supporter of the LTTE merely because she is a Tamil, or a young Tamil woman.
46. For the reasons set out in the IAA Decision Record relating to the applicant's mother, I have not accepted that the applicant's father was known by the authorities to be associated with the LTTE. The applicant's mother has not credibly claimed that she came to any adverse attention because of her husband at any time, including during the period between the end of the war in 2009 and 2012. For the same reasons, and in the light of the applicant's age at the end of the war, indicating that she would be unlikely to herself know anything about her father, I am not satisfied that she is at risk of being imputed with an LTTE profile on account of her father, or that she is at real risk

⁹ DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818

¹⁰ DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818 5.27-5.29

of harm for this reason. Nor am I satisfied that she is at risk of harm because of any adverse attention that her mother might face, based on this association.

47. Accepting that her mother's [relative] was a senior LTTE fighter, I am satisfied on the basis of information provided to the delegate by the applicant's mother that the applicant's mother was never questioned, monitored or placed under surveillance because of this family connection. In these circumstances, given that this relative was killed in 2006 and that there is no credible evidence of any adverse interest in the applicant's mother or other family members after the end of the war, I am not satisfied that the applicant is at risk of being imputed with an LTTE profile on account of her mother's [relative]'s links with the LTTE. Nor am I satisfied that she is at risk of harm because of any adverse attention that her mother might face, based on this association. I am not satisfied that there is a real chance of harm to the applicant arising from her late "[Relative 1]'s" role with the LTTE.
48. The country information does not support a conclusion that supporters of the TNA are regarded as pro-LTTE, and I am not satisfied that the applicant's mother, or by extension the applicant, would be regarded in this way because of the applicant's mother's low-level work for a TNA candidate in the 2012 Provincial Council elections.
49. For the reasons set out in IAA Decision Record relating to the applicant's mother, I am not satisfied that she is at risk of harm from A. I am also not satisfied that the applicant would be at risk of harm from A or his associates.
50. For reasons set out in the IAA Decision Record relating to the applicant's mother, I am not satisfied that unknown persons have been visiting the applicant's mother's home looking for her in connection with A, her husband, her [relative], or because of any suspected links with the LTTE; or, except possibly for the period immediately after the 2012 elections, because of her activity with the TNA. I am not satisfied that the applicant is at risk of harm as a result of any such visits.
51. I am not satisfied that there is a real chance that the applicant would face harm on return to Sri Lanka, including questioning or monitoring, either when being processed at the airport or after returning to her home, because she would be imputed as a supporter of the LTTE on the basis of the family connections mentioned above, including her association with her mother, or because she is a Tamil or a young Tamil woman.

Single Tamil woman, young Tamil woman, member of female headed household without male protection

52. The applicant made claims to the delegate that she faced harm as a young Tamil woman. In her application, the applicant's mother also made claims that she and her daughters faced harm as Tamil women, members of a female headed household, and Tamil women without male protection. Although the applicant (and her mother) were questioned at their SHEV interviews about their relationships with extended family in Sri Lanka, their financial situations and their likely living arrangements on return, which were evidently directed at addressing these claims, the claims were not addressed in the delegate's decisions.
53. The applicant claimed in her statement of 29 November 2021, the IAA submission of 3 December 2021 and at the IAA interview that her mother's siblings in Sri Lanka do not speak to her because in Australia she lived with her boyfriend. She claimed that she would be shunned by the extended family because of her previous relationship with her former boyfriend. At the IAA interview she stated that her grandparents also do not speak to her for his reason. She also claimed to the IAA that she has no adult experience of life in Sri Lanka and will have no mechanisms and contacts to

survive. She led a sheltered life in Sri Lanka and was not allowed out as a child. There were grease men in their area who harmed Tamil women. Because she is unfamiliar with Sri Lankan society it will be hard for her to adjust and to live there safely.

54. Except for the claim that she is unfamiliar with Sri Lankan society, not having lived there since the age of [age], which I consider arises on the material that was before the delegate, these claims are new information. It is submitted that the information was not and could not have been given to the delegate before the decision was made because of her age, because she did not understand the relevance of the information, she did not understand the full ramifications of being separated from her mother's application, and she was not questioned about family support in Sri Lanka by her former representative, or the delegate. It is submitted that it is credible personal information not previously known to the Department, which indicates that she will face a significant threat to her personal security because she will be a single Tamil female belonging to a female headed household without male protection.
55. I do not accept these submissions. The applicant has been legally represented at all times since being informed that the Department did not consider her to be a member of her mother's family unit. She has provided claims and submissions regarding her status as a young single Tamil woman and about her relationship with and dependency on her mother. I am not satisfied that the applicant was unaware of relevant issues. At the SHEV interview the applicant was questioned extensively about her relationship with her Sri Lankan relatives. By that time, she says her relationship with her boyfriend was over, she had mended her relationship with her mother and had returned to her mother's house. She stated at the SHEV interview that she was in contact with her grandparents "a lot", and occasionally spoke to her mother's sister. She was asked about sending money to her relatives in Sri Lanka and said that she gave money to her mother who sometimes sent it to her grandmother in Sri Lanka. In her statement submitted to the delegate post-SHEV interview she said that she gave her mother money which she then sent to her grandparents as a gift from their granddaughter "for simple happiness". At the SHEV interview it was put to her that her grandparents, aunt and uncle seemed to be living normal lives and her mother had been sending money to them; she was asked why she couldn't return and stay with them. She responded that her mother sends money just to take care of her parents. She said that while it is true that they have relatives, they don't have anyone who can actually support them. I consider that it was very clear from the questioning at the SHEV interview that the issue of family support in Sri Lanka was highly relevant to her claims.
56. The applicant claims that her Sri Lankan relatives had stopped speaking to her because it was culturally unacceptable for her to live with her boyfriend. However, the applicant claims that she and her boyfriend had stopped living together long before she repaired the relationship with her mother and returned to live with her in about May 2021, prior to the SHEV interview. As noted above, at the SHEV interview she was questioned extensively about her relationship with her relatives in Sri Lanka. She indicated that she had ongoing contact with them, did not mention that they were, or had ever been cross with her and had cut off the relationship, and did not provide this reason when asked whether she could live with them or rely on their support in Sri Lanka. There is no suggestion that the claimed breakdown in the relationship occurred only after the SHEV interview. In these circumstances, the applicant has not satisfied me that the information about the claimed breakdown in her relationship with extended family members in Sri Lanka could not have been provided to the delegate before the decision was made. Moreover, I am not satisfied that this is credible personal information, as I consider that if there was any credible basis to the claim, the applicant would have raised it when, in my view, she had ample opportunity to do so at the SHEV interview or in the post-interview submissions. The applicant has not satisfied me that either of the limbs of s.473DD(b) is met and I am not permitted to consider this new information. I also note that I do not accept the submission that the fact that the application had

been refused and the applicant faced being returned to Sri Lanka is a material change to her circumstances which constitutes exceptional circumstances to justify considering the new information.

57. The applicant claimed before the delegate, and her mother has always claimed, that she faces gender-based harm on return as a member of a female headed household, or a young single Tamil woman, without male protection. As discussed above, the applicant and her mother have maintained that, at all times, they have been members of the same family unit, despite an estrangement when the applicant lived with her boyfriend. As noted above, they are now residing in the same household, and there is nothing before me to suggest that this would not be the case should they return to Sri Lanka. I am satisfied that they would live together in one household should they return to Sri Lanka.
58. DFAT¹¹ advises that violence against women is common in Sri Lanka, mostly in domestic settings. Sexual harassment is an offence, but is also common, and rarely reported. Victims of sexual violence are reluctant to notify police, not only because of the often inadequate police response, but because of the social stigma involved and the risk of ostracism by families if the abuse became widely known. There are few Tamil speaking police officers, a further barrier to women seeking protection.
59. While the submission of 26 July 2021 refers to the history of female fighters with the LTTE as the motivation for ongoing sexual violence against Tamil women, I am not satisfied that the applicant would be suspected of herself having been involved in any way with the LTTE, given that she was only [age] when the war ended. It is alleged that women with connections to former LTTE members are intimidated and harassed by members of the CID. For the reasons given above, however, I do not accept that the applicant has any relevant connections to former LTTE members that would result in a real chance that she would be harassed or intimidated. According to DFAT, sexual violence against Tamil women during and immediately after the war was widespread, but UNHCR reported in 2017 that the incidence of sexual violence by the military had decreased since the drawdown of troops in 2017, although Tamil women continued to fear sexual assault in areas with a military presence. Following the church bombings in April 2019, military checkpoints in the north and east which had been dismantled were re-established, although apparently a number have now again been removed. However, there remains a “significant” military presence in the north.¹² The UK Home Office advised in 2020 that in the north and east of Sri Lanka some 25 percent of households are headed by women. The Report states that Tamil women in the north, especially members of a number of specified groups including female heads of households, are vulnerable to acts of violence and home invasions perpetrated by military and police.¹³ This Report, together with the DFAT Report, indicates that female headed households are vulnerable to poverty, gender-based violence and sexual exploitation, and face obstacles in accessing services and employment. DFAT notes that there are some government and NGO support services, but in reality support is minimal, and women often face harassment and exploitation when seeking access to services. Support may be available through strong kinship networks.
60. I acknowledge that gender-based violence, harassment and sexual abuse of women is problematic and that certain groups, including Tamil women and female headed households, are particularly vulnerable. I accept that returning to Sri Lanka would be challenging for the applicant, particularly given that she has resided in Australia since she was [age]. While I cannot rule out some small possibility that the applicant might experience some form of low level harassment or

¹¹ DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818 at 3.86-3.96

¹² DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818 at 2.54 -2.55

¹³ 'Country Policy and Information Note Sri Lanka: Tamil Separatism', UK Home Office, May 2020, 20200527172009, Section on Women at 5.3

discriminatory treatment on the basis of her gender, having regard to all of her individual circumstances, and taking into account the situation of her mother and sister as set out in the IAA Decision Record relating to their application, I am not satisfied that there is a real chance that the applicant would be subjected to serious harm of the kinds claimed, as a result of her gender and her membership of any relevant gender-based particular social group. I have not accepted that the applicant would be without family support in Sri Lanka as I am not satisfied that the applicant is estranged from her extended family members. I do not accept that the applicant would be without male protection, in the sense that I am satisfied that she has male relatives with whom she might live, or who would have an active presence in her life. I do not accept that the applicant would be of adverse interest to the authorities in Sri Lanka because of actual or imputed links to the LTTE, including because of any association of her mother's. I do not accept that there is a real chance that the applicant would be subjected to harassment, monitoring or questioning, or that she would be exposed to a real chance of sexual assault or harassment in this context.

61. I note that the applicant is in her early twenties, she has worked in Australia, and there is nothing before me to suggest that she would be incapable of finding employment in Sri Lanka. While I accept that the applicant may face some obstacles accessing employment or services, I am not satisfied that she would be unable to find work or access government assistance, or that she would be denied access to services for a discriminatory reason, or that she would face economic difficulties or deprivation that would amount to persecution. As noted above, I am satisfied that she would be returning to reside with her mother and sister, and the applicant's extended family - grandparents, aunt and uncle - continue to reside in their home area of Sri Lanka and I am satisfied on the evidence before me that she is in contact with them. I accept that they have their own families and busy lives, and that they would not necessarily be able to provide full financial support, but I am not satisfied that the applicant could not access any support from extended family, or that she would be without male protection in Sri Lanka. I am not satisfied that the applicant would be without the presence of male family members such that she would face a real risk of gender-based violence or other mistreatment amounting to serious harm, as a member of a female headed household, a young single woman or young single Tamil women, or any similar group.

62. I am not satisfied that there is a real chance that the applicant faces serious harm for the purposes of s.5J of the Act for reasons of being a young Tamil single woman, who is also a member of a female headed household, or any similar group, also having regard to the fact that she has lived outside Sri Lanka for many years, is unfamiliar with social conditions there, and led a sheltered life prior to her departure as a child. I am satisfied that the applicant would have the support and guidance of her mother and that this would assist in her adjustment to life in Sri Lanka. I accept that returning to a country that she left as a [age] year old would be challenging, but I am not satisfied that the process of adjustment would result in a real chance of relevant harm.

Illegal departure

63. The provisions of the *Immigrants and Emigrants Act* (I&EA) regulate entry to and exit from Sri Lanka, and under the I&EA it is an offence to depart Sri Lanka other than from an approved port of departure. The minimum age of criminal responsibility in Sri Lanka is twelve years and returnees over the age of twelve can be charged with an I&EA offence if they were twelve or older at the time of the alleged offence.¹⁴ The applicant was [age] years old at the time of her departure, and accordingly, I find that she would not be subject to the provisions or penalties of the I&EA because of the circumstances of her departure. I am satisfied that she would therefore not be required to post bail or pay a fine. I note that the applicant explicitly raised this claim for the first time before

¹⁴ DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818

the IAA, but I consider that it arises from the material before the delegate and before me, so I have considered it.

64. Country information indicates that the applicant would be subject to some investigative processes on return to Sri Lanka.¹⁵ Returnees travelling on temporary travel documents (as I am satisfied the applicant would be) are interviewed on arrival by the Chief Immigration Officer and depending on their personal history may be interviewed by the CID and/or other military and security agencies. Identity checks may involve interviews with local police, neighbours and family members, and checks are made against intelligence and immigration databases and criminal records to identify those suspected of concealing a criminal or terrorist background. In my view, based on my findings above, and given that she was [age] years old when she left Sri Lanka, there is nothing in the applicant's profile to suggest that she would undergo these additional interviews. I am satisfied that these checks would not turn up adverse information in the applicant's case. The country information indicates no evidence that mistreatment of returnees occurs during these entry procedures, which can take up to several hours.
65. The applicant's mother would most likely be charged under the I&EA. Country information states that this would involve being charged at the airport and taken to the court at Negombo to be bailed and released. The previous DFAT report, referred to in the delegate's decision, indicated that returnees might be detained for one or two days while waiting to be taken before a magistrate, but there is no mention of this in the 2021 report. Nonetheless, I have considered the possibility that this could occur. Those unable to pay the fine may be imprisoned for fourteen days. Given that the applicant is now aged [age], I am not satisfied that if she were separated from her mother for a relatively short period as a consequence of these legal processes, this would amount to serious harm or persecution.
66. The country information indicates that all returnees, irrespective of race, are subjected to these standard procedures, and I am not satisfied that these procedures involve any discrimination, including discrimination directed against Tamils for reason of their ethnicity. On the evidence before me there is no indication that the laws regarding illegal departure are selectively enforced or are discriminatory or are applied in a discriminatory way. The measures as outlined appear to reflect the Sri Lankan authorities' determination to control and regulate the movement of people and irregular migration, and the country information indicates that fines and penalties are issued to deter illegal departures. For the reasons given above I am not satisfied that the applicant has been or would be imputed to have any association with the LTTE, either because of any family association with the LTTE or because of her diaspora activity in Australia which I am not satisfied would be known to, or of any interest to the Sri Lankan authorities. The country information does not support a finding that Tamils are imputed to hold a pro-LTTE profile merely because they have sought asylum. I am satisfied that on return to Sri Lanka, the applicant would be treated in the same way as any other returnee who departed illegally.
67. I am not satisfied there is a real chance that the applicant would face serious harm amounting to persecution in Sri Lanka because of her illegal departure.

Pandemic response – Article 12 ICSEC Convention

¹⁵ DFAT Country Information Report Sri Lanka', Department of Foreign Affairs and Trade, 4 November 2019, p.67, 20191104135244; Report of a Home Office fact-finding mission to Sri Lanka', UK Home Office, 20 January 2020, pp.25-27, 20200123162928; Country Policy and Information Note Sri Lanka: Tamil Separatism', UK Home Office, May 2020, p.73, 20200527172009; see also DFAT Country Information Report – Sri Lanka, 23 December 2021, 20211223094818

68. In the post-SHEV interview submission it was submitted on behalf of the applicant that Australia's obligations under the International Covenant on Economic, Social and Political Rights arise in relation to health care, as Sri Lanka's response to the Covid-19 pandemic was inadequate; in support of this argument an article in the Diplomat from May 2021 was provided, essentially criticising the Sri Lankan government for not imposing a nationwide lockdown.
69. My assessment of the applicant's circumstances in this case is governed by the relevant provisions of the Act and not by the provisions of and obligations arising under the International Covenant on Economic, Social and Political Rights.¹⁶ While a breach of the provisions of the International Covenant on Economic, Social and Political Rights might, in some circumstances, give rise to protection obligations, there is nothing arising from the credible evidence before me to suggest that this is the case here. I am not satisfied that failing to impose a lockdown, or any other shortcomings in the Sri Lankan government's response to the pandemic amounts to, or would result in a real chance of persecution, or indeed any harm to the applicant.

Refugee: conclusion

70. Having regard to all the applicant's claims, considered singly and cumulatively, I am not satisfied that there is a real chance that she will face persecution if she returns to Sri Lanka.
71. 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

72. 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

73. 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.

¹⁶ See *MIAC v MZYLL* [2012] FCAFC 147. The Full Federal Court, considering the relevance of international law treaties to an assessment under ss.36(2)(aa) and 36(2B) of the Act, found it was neither useful nor necessary to ask how international law treaties applied to the circumstances of that case, rather, the Court considered the circumstances of the case were governed by the applicable provisions of the Migration Act. See also *AXL17 v MIBP* (No 2) (2019) FCA 778; and *FMN17* (by his litigation guardian) v *MICMA* [2018] FCCA 3499 (this point was undisturbed on appeal: *FMN17 v MICMSMA* (2020) 274 FCR 612.

74. 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.
75. Based on the country information regarding the level of gender-based discrimination and harassment in Sri Lanka, I accept that there is a possibility that the applicant, as a young single Tamil woman, may face some difficulties on return. However, having regard to all her circumstances, including the fact that she would be residing with her mother and sister, and that I am satisfied they would not be without male protection, I am not satisfied that there is a real risk that she would face gender-based harassment that would involve the level of pain, suffering or humiliation described in the definitions of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment, or that would otherwise constitute significant harm, as defined. In so finding I have had regard to all of her relevant circumstances according to the claims as accepted, including her Tamil ethnicity, family links with LTTE members, her participation in Tamil diaspora activities in Australia, her unfamiliarity with Sri Lankan society and social conditions, and her mother's work for the TNA.
76. I accept that the applicant may face adjustment difficulties on return, given that she left Sri Lanka as a [age] year old and has spent her teenage and early adult years in Australia, but I am not satisfied that any such difficulties would constitute significant harm for the purposes of the complementary protection criterion.
77. I accept that as a returnee to Sri Lanka who departed illegally, the applicant will probably be questioned for up to several hours at the airport but I am not satisfied that such questioning or investigation would constitute significant harm as defined for the purposes of the complementary protection provisions. While I am satisfied that the applicant would not be subject to prosecution for illegal departure, I accept that she might be caught up in the investigative and legal processes involving her mother, and might be separated from her mother. However, having regard to her age, I am not satisfied that any aspect of the investigation, detention, or exposure to the criminal or judicial systems involving her mother, including a possible short period of separation from her mother, would constitute significant harm, as defined for the purposes of the complementary protection provisions.
78. In relation to the International Convention on Social, Economic and Political Rights, as noted above I do not consider this to be relevant to my assessment of the refugee or complementary protection criteria under the Act. The applicant has not identified how any aspect of Sri Lanka's response to the Covid-19 pandemic would result in the infliction of any form of significant harm, as defined, on her, and I am not satisfied that it would do so.
79. In relation to the remainder of the applicant's claims that I have accepted, I have found that she does not face a real chance of harm on any of these bases. For the same reasons I am also not satisfied she will face a real risk of any harm, including significant harm on any of those bases if removed to Sri Lanka.¹⁷

Complementary protection: conclusion

80. 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).

¹⁷ *MIAC v SZQRB* [2013] FCAFC 33

Member of same family unit

81. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a dependent child. 'Dependent' and 'dependent child' are themselves defined terms under r.1.03 of the Regulations.
82. As neither the applicant, nor her mother or sister, meets the definition of a refugee or the complementary protection criterion, the applicant is unable to meet the family unit criterion in either s.36(2)(b) or s.36(2)(c). It is therefore not necessary for me to determine whether the applicant is a member of her mother's family unit within the meaning of r.1.12.

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.