



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10356

Date and time of decision: 30 September 2022 16:06:00
C Wilson, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Batticaloa, Sri Lanka. He arrived in Australia [in] August 2012 as an unauthorised maritime arrival. He applied for a Safe Haven Enterprise Visa (SHEV) on 1 December 2015.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the application on 13 July 2016. The delegate found the applicant did not face a real chance or real risk of harm in Sri Lanka for reason his past activities with the TNA, as a Tamil, returning after departing Sri Lanka illegally, or for any other reason.
3. A reviewer of the IAA affirmed the delegate's decision on 23 August 2016. The applicant sought judicial review. On 12 July 2022 the Federal Court ordered by consent that the first IAA decision be set aside and remitted to the IAA for re-determination.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

New information provided in 2016

5. On 30 July 2016 the applicant provided new information to the IAA consisting of a statement raising new claims to have been a member of the Liberation Tigers of Tamil Eelam (LTTE) from [Year 2] to [Year *] and an active participant in pro-LTTE activities in [Country] and Australia. In support of these new claims he provided new information including: 3 photos said to show the applicant hosting an LTTE martyr's day in his apartment in [Country]; a letter from the [Official] of the [Organisation 1] saying the applicant participated and volunteered in Tamil remembrance day activities in Australia from 2013-2016; an article from TamilNet dated 14 March 2003 regarding an LTTE officers graduation; an untranslated article from Tamilwin including a photograph said to show the applicant at a remembrance event in Australia in July 2014; and two other photographs said to show the applicant at Tamil events in Australia.
6. The new information regarding his alleged involvement with the LTTE pre-dates the delegate's decision. The applicant said he chose not to disclose it to the persons assisting him in May 2015 to lodge his written application. He says this is because he feared telling the truth to strangers and he feared any consequences for doing so at that time. He has not further explained why he did not provide the information to the delegate at the SHEV interview in May 2016, or at any other time before the decision was made. I note within weeks of the delegate's decision he provided the information, without explanation of why he was now able to do so then but could not a few weeks earlier. I am not persuaded that the new information could not have been provided to the before the decision was made and therefore find s.473DD(b)(i) is not met in relation to it.
7. The new information regarding his claimed involvement with the LTTE is personal information that may have affected the consideration of his claims. I have concerns however about whether it is credible. The applicant made no claims in his 2013 invalid application, his 2015 SHEV application, or at his SHEV interview, to have had any involvement with the LTTE. I consider raising it only after his SHEV application has been refused may indicate the

information is not credible. It also appears inconsistent with his other claims. It does not seem credible that his involvement with the LTTE would be unknown to the Sri Lankan authorities when he claims that he and his family were known and active TNA supporters, and that the CID monitored and threatened him for these activities. The applicant travelled in and out of Sri Lanka on his own passport during the conflict without problems, demonstrating he was not known or suspected of any LTTE involvement. I consider his claims to have been in an LTTE training college for 2 years, had a leadership role in the LTTE, engage in active combat, accompany senior LTTE leaders, and been exposed in 2004 when Karuna and others defected from the LTTE, when considered against his ability to live normally in his home area, travel internationally, voluntarily return twice to Sri Lanka, actively engage in TNA politics, and never face detention or suspicion of involvement in the LTTE, renders the new claims not capable of being believed. Having regard to the lateness of the new claims suggesting they were fabricated after the SHEV visa was refused, and the implausibility of the new claims when considered against his lived experience in Sri Lanka, the applicant has not satisfied me that the new information regarding his alleged involvement with the LTTE is credible personal information that may have affected the consideration of his claims. I find s.473DD(b)(ii) is not met. As s.473DD(b) is not met, I must not consider this new information.

8. The new information that he hosted a remembrance day event for LTTE cadres in his apartment in [Country], said to be shown by 3 photographs, and that he organised and participated in LTTE events in [Country], refers to events that happened prior to 2012. I am not satisfied this information could not have been provided to the delegate before the decision was made. I have concerns about whether it is credible personal information, given none of this was raised in his SHEV application. The photographs said to support this new information are undated and it is not apparent where or when they were taken. I note the date 2010 in the background of one photograph, but this could mean it was taken in 2010 or that they were commemorating an event from 2010. Even if I accept the claim and photos are capable of being believed such that they meet s.473DD(b)(ii), I am concerned by the lateness of him providing this new information. I have considered his general explanation that he did not include in his claims that he was a member of the LTTE because he feared telling the truth to the 'strangers' from [Organisation 2] who took his statement, but given his claims to fear harm as a politically active Tamil I do not accept he would not have included Tamil activities in [Country] in his written claims or at the SHEV interview, if such activities had occurred. I am not satisfied there are exceptional circumstances to justify considering this new information, taking into account his lack of explanation about why he did not tell the delegate he engaged with the Tamil and/or LTTE community in [Country], the vagueness of his new claim that he organised and participated in 'events' that are not further described, and the inconclusiveness of the photographs as to where, when and why they were taken.
9. The article from TamilNet dated 14 March 2003 and the untranslated article from Tamilwin July 2014 both pre-date the delegate's decision by some years. I am not satisfied they could not have been provided to the delegate before the decision was made. As I am unable to read the untranslated Tamilwin article, nor recognise the applicant in the photograph in the article, I am not satisfied it amounts to credible personal information that may have affected the consideration of his claims. The TamilNet article names identifiable individuals, but is provided as country information regarding the training of LTTE officers to support the applicant's claim that he underwent such training. He is not relying on any the personal information in that article to support his claims. I am not satisfied the article amounts to credible personal information that may have affected the consideration of his claims. If I am wrong about this, I consider in any event there are not exceptional circumstances to justify considering this article. In coming to this conclusion I have taken into account the lack of any personal connection the applicant or any family members in the article, that it could have

been provided to the delegate but was not, and my findings above that I am not considering his new claim to have been involved in the LTTE.

10. In relation to the claim that he has actively participated in pro-LTTE/Tamil activities in Australia, and will attract adverse attention on return for this reason, I am not satisfied this information could not have been provided to the delegate before the decision was made. I acknowledge the letter from [Organisation 1] was only written on 28 July 2016, two weeks after the delegate's decision but, with the possible exception of the Black July day in 2016, the information contained in that letter pre-dates the decision. I consider only the new information that he attended an event in late July 2016 meets s.473DD(b)(i). I accept however his participation in Tamil events in Australia, which is supported by a letter from [Organisation 1] and two photographs, may amount to credible personal information that may have affected the consideration of his claims. I am not however satisfied there are exceptional circumstances to justify considering this new information, noting I find below there are exceptional circumstances to consider more recent and more detailed new information from [Organisation 1] and the applicant's claimed involvement in such activities.
11. The applicant also provided a photograph said to be of his arm, showing burn marks on his wrist. Due to the quality of the photograph, I cannot clearly see scars on the arm, and there is nothing in the photograph to evidence that it is the applicant's arm. However I note the applicant showed his arm to the delegate, who saw the burn scar and referred to it in the decision record. For these reasons, if the photograph does show burn scars on the applicant's arm, I do not consider it to contain new information.

New information provided in 2022

12. On 21 August 2022 the applicant provided the following new information to the IAA:
 - Written submission from his representative;
 - Statutory declaration from the applicant dated 21 August 2022;
 - Letter from [Organisation 1] dated 18 August 2022;
 - Two photographs purporting to show shrapnel injuries on the applicant's body;
 - Photograph of the applicant, purportedly taken when he was in the LTTE;
 - Thirty photographs of the applicant participating in Tamil remembrance days between 2014 and 2022.
13. The written submissions refer extensively to new information from various news articles, official reports and British caselaw. None of these articles, reports or cases were provided with the submissions. An officer of the IAA contacted the representative on 6 September 2022 after receiving the new information to remind him that as per the IAA's Practice Direction dated 1 May 2020 (a copy of which was provided to the applicant) he needs to provide full copies of any articles and reports that are relied upon as new information. He was advised the reviewer may not have regard to the information in the submission if it did not comply with the Practice Direction. However to date the representative and applicant have not provided copies of any of the article, reports or cases referred to in the submissions to the IAA. I have decided to use my discretion not to accept the submissions and new information in paragraphs 14 onwards dated 21 August 2022 because they do not comply

with the Practice Direction. I note also at paragraph 26 the representative raises new information that appears inconsistent with the applicant: for the first time saying the father supported the LTTE, he comes from Manar (north-west Sri Lanka), and that he participated in Memorial Sports events in Sydney organised by the Tamil Co-ordinating Committee. This information is not repeated by the applicant anywhere in his application or in his new information, and given it's inconsistency with the applicant's background being from the east of Sri Lanka, I consider this new information is not about him. I have concluded this information refers to another client of the representative and has been erroneously included in the submissions, is not relevant to this application, and therefore I have not accepted it.

14. The applicant's statutory declaration dated 21 August 2022 contains a mix of new information and submissions.
15. The applicant repeats the new information from 2016, that he was a member of the LTTE, and provides further new information that it was through his work in the LTTE's political wing that he got involved in supporting a TNA candidate, that as a young person he was compelled to join the LTTE, that former rehabilitated LTTE cadres are working at Colombo airport since 2010 to identify former LTTE cadres returning to Sri Lanka, and that he left Sri Lanka without surrendering as a former LTTE cadre to avoid 5 years rehabilitation. The applicant says he was cautious about disclosing his involvement with the LTTE because Sri Lankan Tamil asylum seekers were screened out and returned to Sri Lanka and he believed he would be deported if he admitted to an LTTE involvement. However, the applicant's risk of being screened out occurred well before he applied for the SHEV application in 2015. This does not explain why he continued to conceal claims regarding the LTTE, yet was happy to be open about them immediately following the visa refusal when he may have been at risk of being deported. All of this new information regarding an alleged involvement with the LTTE refers to old events. I am not satisfied the information could not have been given to the delegate before the decision was made. As to whether it is credible personal information, for the same reasons given in paragraph 7, I find this information is not credible when considered against his ability to live normally in his home area, travel internationally without incident, voluntarily return twice to Sri Lanka, actively engage in TNA politics, and never face detention or suspicion of involvement in the LTTE. As s.473DD(b) is not met, I must not consider this new information.
16. The applicant makes a new claim that he will be suspected of being involved with the LTTE because he is from a former LTTE area. Whilst he has explained why he did not disclose an alleged association to the LTTE, he does not explain why he failed to provide information to the delegate that he feared being suspected of LTTE involvement because he was from a former LTTE area. I consider however the new claim that as a Tamil from Batticaloa he may be suspected of an association with the LTTE is not new information, but rather a new claim relying on known facts about him. I have therefore considered this claim in my consideration of his SHEV application.
17. The applicant says he believes his personal information may have been made public on the internet in February 2014, such that the CID will know he has sought asylum in Australia and made claims against the Sri Lankan authorities. I am aware of the data breach in 2014 in which personal details of person in immigration detention were briefly available on the internet, but the applicant has not clearly stated that he was part of this data breach. He has not explained why he could not have raised this as a claim before the delegate if he feared harm on return to Sri Lanka for reason of the data breach. He has not explained why if he was part of the data breach, why that would cause the CID to know he sought asylum in Australia, when such details were not part of the data breach. If he is hinting that they will

infer he sought asylum, this could equally be inferred if he applies from Australia for travel documents to facilitate a return to Sri Lanka. I am not satisfied this new information could not have been provided to the delegate before the decision was made. I have doubts about whether the information amounts to credible personal information that may have affected the consideration of his claims when he has not clearly claimed to have been part of the data breach. In any event, even if s.473DD(b)(ii) is met, I am not satisfied there are exceptional circumstances to justify considering this new information when no explanation has been provided as to why this was not raised earlier and the new claim is lacking substance and detail.

18. The applicant provides new information that he will be detained and investigated on arrival in Sri Lanka because his elder brother [Mr A] and his friends were arrested, detained and charged. There is no further information about when these alleged arrests, detention or charges were made. Without this detail, it is not possible to know whether this information could have been provided to the delegate before the decision was made. In any event, I am not satisfied this is credible personal information that may have affected the consideration of this claims, because the applicant does not have an elder brother called [Mr A]. The two brothers he has included in his application, one younger and one older, have quite different names to [Mr A]. Even if the arrests, detention or charges were made against these individuals post the delegate's decision, and s.473DD(b)(i) could be satisfied, I am not satisfied there are exceptional circumstances to justify considering this new information when it is not clear if [Mr A] and friends are in any way connected to the applicant or what they were charged with.
19. The applicant provides new information that he has a profile because he is a young Tamil man from the Eastern Province. I note however the applicant is aged in his mid-[Decade]. He does not explain why he would be perceived as a young Tamil at his age. He does not explain why he did not raise this earlier, and I am not satisfied he could not have made this claim to be a young Tamil man from the Eastern Province to the delegate before the decision was made. I am not satisfied this is credible personal information that may have affected the consideration of his claims because I am satisfied about the credibility of the new claim and whether it would have affected the consideration of his claims, when he is not in fact a young Tamil. I find s.473DD(b) is not met, and therefore I must not consider this new information.
20. The applicant also claimed for the first time that at his interview with the delegate on 25 May 2016 his 'personal crisis generated to severe stress and emotion during the said interview' and that he struggled to speak through the Tamil interpreter at his SHEV interview because she was [Nationality] and unfamiliar with the situation in Sri Lanka. Although not previously raised, I consider this is a submission rather than new information.
21. In his statutory declaration the applicant referred to a number of country information reports that are new, but did not provide copies of them to the IAA. He is also critical of the delegate for not obtaining various reports or considering certain country information, but the reports he says the delegate should have considered post-date the delegate's decision (e.g. a UN Special Rapporteur report from 2018, and reports regarding Rajapaska's Presidency in 2019). As referred to above, the Practice Direction requires applicants to provide full copies of any reports that are new information. The applicant has not provided these reports, even after an IAA officer contacted the representative to remind them of this requirement under the Practice Direction. Accordingly, I have exercised my discretion not to accept the new information in this statutory declaration at paragraphs 20, 22, 25, 27, 31, 40, and 42 regarding new country information from reports he has failed to provide.

22. The applicant provided new information in the form of a letter from the [Official] of [Organisation 1] dated 18 August 2022. The letter is essentially a support letter which also includes information on the purpose of [Organisation 1], the applicant's attendance at events, and submissions. I accept the letter from 2022, containing information on events that post-date the delegate's decision, could not have been provided to the delegate before the decision was made. Aspects of the letter contain personal information about the applicant that is capable of being believed and may have affected the consideration of his claims. I am satisfied there are exceptional circumstances to justify considering this letter as recent information on the applicant's sur place Tamil activities. I find s.473DD is met in relation to the letter from [Organisation 1].
23. The two photographs purporting to show shrapnel injuries on the applicant's body are undated, however they are said to show injuries allegedly suffered in October [Year 2] and July [Year 3]. The photographs are said to be of the applicant's [Body parts]. His face is not shown in the photographs. It is not possible from the detail in the photographs to be satisfied they are of the applicant. I am not satisfied the new information contained in the photographs could not have been provided to the delegate before the decision was made, given they are said to show scars from [Number] years ago. I am not satisfied the photographs are of the applicant, or any other identified person, and therefore I am not satisfied they amount to credible personal information that may have affected the consideration of his claims. I find neither s.473DD)(b)(i) or (ii) are met and therefore I must not consider this new information.
24. The applicant provided a photograph that he claims is of him on [Date] at [Location], Sri Lanka. It is a photograph of a young man sitting alone in an unknown place. It may be a photograph of the applicant, but it does not contain any evidence of where or when it was taken or the purpose of the photograph. As an old photograph, I am not satisfied it could not have been provided to the delegate before the decision was made. As the photograph merely showing a young man sitting alone at an unknown place, I am not satisfied it amounts to credible personal information that may have affected the consideration of his claims. I find neither s.473DD)(b)(i) or (ii) are met and therefore I must not consider this new information.
25. The applicant provided a bundle of photographs that he says show him at various Tamil remembrance and celebratory days in Australia from 2014 to 2022. I consider only the photographs taken from July 2016 meet s.473DD)(b)(i). I accept however all appear to be photographs of the applicant attending Tamil remembrance and other days in Australia and amount to credible personal information that may have affected the consideration of his claims. Even though the applicant failed to raise his sur place activities with the delegate, I give weight to the bulk of the evidence being post-2016 and accept that it could not have been provided to the delegate and that the information is relevant to his claims. I accept there are exceptional circumstances to justify considering the new information in the form of photographs of his sur place activities. I find s.473DD is met in relation to these photographs.
26. On 26 August 2022 the applicant provided a copy of DFAT's Travel Advice regarding Sri Lanka. Noting the Travel Advice is dated 2 August 2022 I am satisfied it could not have been provided to the delegate before he made the decision in 2016. It is not however credible personal information that may have affected the consideration of his claims. DFAT's Travel Advice is published on the Smart Traveller website and is intended as advice for Australians considering travel to Sri Lanka. Whilst it contains an overview of the security situation, it does not provide any detail on the situation for failed asylum seeker Tamils returning to Sri Lanka. I have obtained other country information that provides more detail on the current situation

in Sri Lanka. The applicant has not identified which, if any, parts of the Travel Advice are relevant to his claims. For all these reasons I am not satisfied there are exceptional circumstances to justify considering the Travel Advice for visiting Sri Lanka

New information obtained by the IAA

27. The original decision dates from 2016 and the country information before me is therefore dated. Apart from the DFAT Travel Advice, the applicant has not provided any country reports. In such circumstances I have exercised my discretion to obtain new country information regarding the situation for Tamils, TNA supporters and returning asylum seekers to Sri Lanka by obtaining the following reports: the most recent DFAT Country Information Report Sri Lanka dated 23 December 2021; and the most recent relevant reports from the UK Home Office on Sri Lanka, that is, the Report of a Home Office fact-finding missions to Sri Lanka dated 20 January 2020, and the Country Police and Information Note Sri Lanka – Tamil Separatism dated 25 August 2022. I have also obtained recent reports regarding the current economic and political instability in Sri Lanka: The Economist, In with the old – Sri Lanka picks a new president to replace the one that fled, 20 July 2022; International Crisis Group, For Lanka a Long Road to Democratic Reform Awaits, 24 July 2022; Office of the UN High Commissioner for Human Rights (OHCHR), Sri Lanka: UN human rights experts condemn repeated use of emergency measures to crackdown on protests, 8 August 2022; and Human Rights Watch (HRW), Sri Lanka: New President Should Chart Path Upholding Rights, 9 August 2022. Noting it has been 6 years since the delegate’s decision I am satisfied there are exceptional circumstances to justify obtaining and considering this new country information.
28. As noted above, the applicant and his representative referred to a variety of country reports in their submissions but did not provide copies of these reports. I have considered whether I should exercise my discretion to obtain these reports. I have however decided not to obtain these reports, in circumstances where I have obtained other recent relevant country information, and taking into account the applicant was represented, and that the representative was reminded of the need to provide copies but chose not to.

Applicant’s claims for protection

29. The applicant’s claims can be summarised as follows:
 - He is a single Tamil man from Batticaloa. He has two brothers.
 - His family were long-time supporters of the Tamil National Alliance (TNA) party and the applicant was an active supporter from [Year 1] His family were known for being TNA supporters and for hosting meals after party meetings and for people who worked on election campaigns.
 - He was a member of a [club] called the [Club]. Such clubs are used in Sri Lanka by politicians as sources of support. As a member of the club he supported a Tamil candidate Joseph Pararajasingham (JP) in the 2004 elections. During the campaign the Criminal Investigation Department (CID) warned they should not support the TNA but should instead support the current government. They ignored this and continued to support the TNA by going to meetings and putting up posters.
 - Two weeks before the election in 2004 he and other supporters were chased by CID officers when they were out putting up posters. A week later the CID came to his family home and told his mother he should stop supporting the TNA or they would shoot him. Two days before the election a group of them were caught putting up a banner. Other

supporters ran away but the applicant could not as he had climbed up a lamp post to affix the banner. The men who stopped him ripped the banner, set it alight, and threw it at him burning his arm. He was too scared to go to hospital in case it was reported to police and the CID would arrest him. He avoided going out at night but continued to work for the party.

- The candidate JP won the election on 2 April 2004.
- After the election the CID were angry the TNA had won, so they started looking for the applicant as a TNA supporter. Whenever they saw him on the street they threatened him that if he supported Tamil parties they would shoot him.
- He left Sri Lanka [in] July 2004 to go to [Country] to work. His uncle arranged for him to leave Sri Lanka.
- His family told him that [in] November 2004 two people who had worked with the applicant for the TNA were shot and killed by the CID at their homes. On Christmas Day 2005 the candidate JP was shot and killed at church.
- [In] September 2006 the uncle who had helped him leave Sri Lanka was killed by the CID. They had questioned his mother about him and she told them her brother had helped the applicant to leave. For this reason the uncle was killed.
- In December 2008 the applicant went back to Sri Lanka. In Sri Lanka he was identified by the CID and extorted by them for 25,000 rupees. The CID also threatened to kill him if he supported a Tamil party again, and threatened they would shoot him like they shot his uncle if he didn't work instead for a government party.
- The applicant returned to [Country] in April 2009. He returned to Sri Lanka in April 2012 as his mother wanted him to come back to marry. However, no marriage was arranged as the potential suitor's families feared for their daughters if they married the applicant, a person who had been threatened and whose uncle was killed by the CID.
- When he was in Sri Lanka in 2012 another TNA candidate asked him to work for him. However in July 2012 a CID officer approached the applicant when he was in front of a school, put a gun to his head, and threatened he would shoot him if he got involved in the election. This scared the applicant so he started making plans to leave Sri Lanka again. He could not return to [Country], as his visa had expired.
- If he is returned to Sri Lanka he fears serious harm from the CID who have already extorted him and killed two of his friends and his uncle. He will be identified at the airport and will be arrested or killed.
- He has been active in Australia in attending and assisting at Tamil remembrance and other celebratory days. The Sri Lankan authorities are sensitive to such activities.
- He also fears harm for leaving Sri Lanka illegally.

Refugee assessment

30. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

31. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
32. I accept the applicant is a citizen of Sri Lanka from Batticaloa, based on the identity documents he provided to the Department. I find Sri Lanka is his receiving country.
33. The applicant claims to be of Tamil ethnicity and a Hindu, and I accept that he is. He made no claims to fear harm for being Hindu, but claims he was harmed and threatened in Sri Lanka for being an active Tamil supporter of the TNA. He also fears returning to Sri Lanka because of Tamil activities he has participated in whilst in Australia, and for having left Sri Lanka illegally.

Tamil from Eastern province

34. The applicant is from Batticaloa in the Eastern province. He indicated in his SHEV application that his parents and two brothers lived there, and has not advised of any changes to this. I find Batticaloa is the area he is likely to return to, given his family live there and it is the area he returned to when coming home from [Country].
35. There have long been tense relations between the majority Sinhalese population and Tamils. In 1983 the LTTE launched an armed insurgency against the Sri Lankan government to fight for an independent Tamil state. The war lasted until 2009, when government forces re-took control of the north and east and militarily defeated the LTTE. The conflict is reported to have resulted in 100,000 deaths and the displacement of 900,000. During the civil war Tamils living in the north and east of Sri Lanka were often imputed to be LTTE members or supporters, merely for reason of their ethnicity and residence in LTTE-controlled areas.¹ Thousands of Tamils were rounded up into rehabilitation camps because they were known or suspected LTTE members or significant supporters. The International Commission of Jurists reported in 2010 that any association with the LTTE at that time was grounds for arrest.²
36. The conditions generally have improved for Tamils since the end of the civil conflict in 2009 and since the applicant left Sri Lanka in 2012. Tamils are the second largest ethnic group in Sri Lanka, and are concentrated in the Northern and Eastern Provinces. There is a significant Tamil population in the applicant's home area of Batticaloa. Some Tamils report

¹ DFAT, Country Information Report Sri Lanka, 23 December 2021.

² DFAT, Country Information Report Sri Lanka, 18 December 2015.

discrimination in employment, particularly in relation to government jobs, but other sources reports this is because many Tamils speak neither Sinhala nor English. There is no official discrimination in public sector employment.³

37. Monitoring and harassment of Tamils has been reported as an issue in the previously LTTE areas of the north and east of Sri Lanka, particularly during the conflict. The authorities possessed extensive powers to arbitrarily detain and arrest people under emergency regulations and the Prevention of Terrorist Act (PTA). Tamils have been disproportionately detained under the PTA. During the conflict the security forces imputed LTTE support merely for Tamil ethnicity. But monitoring is now more sophisticated, with targeted surveillance and questioning of individuals and groups associated with politically sensitive issues.⁴ I note in the past the applicant was never questioned by the authorities for any reason, and certainly not for any politically sensitive issues, and I do not accept he would have such a profile on return to warrant individual monitoring.
38. I accept that during the civil conflict Tamils could be imputed with LTTE association merely for reason of their ethnicity and residence in LTTE-controlled areas. The Sri Lankan authorities also maintained intelligence on Tamils in the north and east of the country.⁵ The applicant was never treated as someone suspected of an association with the LTTE. He was free to travel, never stopped and questioned at the border, nor detained in the mass rehabilitation camps at the conclusion of the conflict. There is no evidence his father, or two brothers, were ever detained for rehabilitation or questioned for suspected or actual LTTE connections. I consider it farfetched that he would be imputed with any LTTE link now, when the LTTE is a spent force and the applicant, and his close family members, faced no such suspicion in the past.
39. I acknowledge the PTA remains in force in Sri Lanka. Despite indications some years ago it may be repealed, this has not occurred and may not be for the foreseeable future. The PTA has in the past been used disproportionately to detain Tamils, particularly those suspected of involvement in the LTTE. It continues to be used arbitrarily for people vaguely defined as 'terrorists'.⁶ In the case of the applicant however I do not accept he has a profile as a suspected LTTE member, terrorist or other profile of adverse interest that would give rise to a real chance that he may be detained under it.
40. The UK Home Office reported in 2020 that Tamils are not targeted nor suffer persecution just for being Tamil.⁷ There is no information before me that his parents, brothers, or any extended family or friends in his home area have been targeted or harmed merely for their Tamil ethnicity in Batticaloa, Eastern province, at any time in the past or when Rajapaksa took the presidency in 2019, or during the current instability. I am not satisfied the applicant faces a real chance of harm merely for reason of his Tamil ethnicity if he returns to Batticaloa.

TNA supporter

41. The applicant claims he and his family were long-time supporters of the TNA. He says he personally started getting involved in election campaigns from [Year 1], but makes claims only about facing harassment from the 2004 election. He said he supported the TNA

³ DFAT, Country Information Report Sri Lanka, 23 December 2021.

⁴ UKHO, Sri Lanka: Tamil Separatism, 25 August 2022; DFAT, Country Information Report Sri Lanka, 23 December 2021.

⁵ DFAT, Country Information Report Sri Lanka, 18 December 2015; DFAT, Country Information Report Sri Lanka, 23 December 2021.

⁶ DFAT, Country Information Report Sri Lanka, 23 December 2021; UKHO, Sri Lanka: Tamil Separatism, 25 August 2022.

⁷ UKHO, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020.

candidate JP through his [club], the [Club], because clubs would help politicians hand out flyers, put up posters, and hold events. He says the people at the club were warned by the CID not to support Tamil candidates, but they continued to do so anyway. He says they were once chased by the CID when putting up posters, and on another occasion the CID stopped him putting up a banner by setting it alight, with the applicant suffering a burnt wrist as a result. He says that after the TNA won the election, the CID were looking for the applicant. He says they threatened him if they saw him on the street. I note these elections occurred during the civil conflict period, and I accept the CID could have harassed the local population about their support for Tamil candidates at that time. I do not accept however they had a particular interest in the applicant, even if the CID came to his house to threaten him in 2004, as the threats made to him were made broadly to the members of his [club] involved with helping the Tamil candidate. I note the applicant was never arrested, detained or questioned by the CID, nor physically harmed beyond the incident with the burning banner.

42. The applicant gave inconsistent information about his claims that other members of the [Club] were killed by the CID for the support they gave to the TNA during the elections. In his SHEV application he said two people from his club were shot dead in November 2004 when CID came to their houses and told them to come outside. This occurred when the applicant was living in [Country] and he says his family told him about it. The delegate was unable to find any reporting on this and invited the applicant to provide any evidence he had. Nothing was provided. Of more concern is that in his earlier invalid application from 2013 the applicant's account was different. He said three people from his club were hunted down and killed by the CID and so he fled to [Country] in July to avoid such harm. When this inconsistency was put to the applicant at the SHEV interview, the applicant said there was not much difference, he had told the delegate two people were shot. I consider the difference between two or three people is not significant, as the difference may be explained by exaggeration. The timing of the alleged killings though is very significant. In one account it is the catalyst for him leaving Sri Lanka in July 2004, in the other account he says he was already in [Country] when he was told it happened in November 2004. I consider this difference renders the claims unreliable, and I do not accept two or three friends of the applicant from the club were killed for the reasons claimed, if at all.
43. The applicant says the politician JP that he supported was killed on Christmas Day 2005. I accept this occurred and note this has been widely reported. However, I do not accept this had any connection to the applicant. There is no further country information before me to suggest supporters of JP were targeted following JP's assassination.
44. The applicant claims his uncle was killed by the CID [in] September 2006 for having helped him escape Sri Lanka. His uncle was the person who helped arrange his passport and paid for him to go to [Country]. In his written statement he claimed the CID had questioned his mother about where he was and she told them the uncle had helped the applicant to leave Sri Lanka. At the SHEV interview he gave further detail that the CID extorted his uncle and he gave the CID money 2 or 3 times to appease them, but finally they shot him. The applicant thinks they shot his uncle to either take revenge for the applicant leaving or to scare the applicant. That a Tamil man was extorted and shot by the CID during the conflict period is plausible. What I consider not to be plausible, on the information provided by the applicant, is that his uncle's death had anything to do with the applicant. The applicant was able to obtain a passport, even if money was paid as a bribe to quicken the process. He departed legally through the international airport, subject to all the usual checks, and did not attract any adverse interest at the airport on return. I do not accept a Tamil man would have been able to fly in and out of Sri Lanka at that time without any issues, if he was of such interest to the CID that they would kill the uncle who helped him to leave. The timing of the uncle's

death, two years after the applicant left, also raises doubts that it has an connection to him. Further, I do not accept if the applicant believed the CID had killed his uncle to get at him that he would have voluntarily returned to Sri Lanka two years later for a 4 month stay. I note he said it was a condition of his work and visa that he needed to temporarily leave [Country] after 4 years, but he could have gone to a third country, avoided his home area, or stayed for a shorter period, if he genuinely thought he was of adverse interest.

45. The applicant returned to Sri Lanka in late 2008 for four months. He does not appear to have actively supported or worked for the TNA during that time. He claims he was recognised by the CID and they tried to extort him. He has also said the CID were with the Tamil Makkal Viduthalai Pulikal (TMVP) and they were the ones he paid 25,000 rupees. to He claims that because it was coming up to another election, the CID also threatened him not to support any Tamil party but instead to work with them to support a government party and convince other Tamils to do the same. He claims he was harassed constantly and threatened he would be shot, but nothing happened to him in the four months that he remained in Sri Lanka. I accept he was extorted by the CID or TMVP but consider this was likely because they knew he had returned from working overseas. There is no suggestion the applicant was in hiding during these 4 months in Sri Lanka. He experienced extortion, but was otherwise unharmed, never detained, nor prevented from leaving. I do not accept he was individually of adverse interest to the CID or other violent groups such as the TMVP at that time.
46. The applicant returned again to Sri Lanka in April 2012. Although it was not his reason for returning, provincial council elections were due to held after that time. He says he met a TNA candidate who asked him to work for him. He doesn't say what if any work he did for this candidate, but in July 2012 he says a CID officer came up to him, pointed a gun, and said he would shoot him if he got involved in the election. The applicant claims it is this threat that made him leave Sri Lanka. It is plausible a CID officer was threatening a Tamil man perceived to be supporting a Tamil candidate. Fortunately no violence occurred. There is no information before me that the CID or any Sri Lankan authority has made any enquiries with his family since he left.
47. The applicant provided a letter dated 21 December 2012, which is purportedly a letter of support from a Member of the Provincial Council, Eastern Province. The information in that letter provides a different account to the applicant's, and the delegate put to him at the SHEV interview that he didn't believe the letter was about him. The applicant also gave inconsistent evidence at the SHEV interview about when and how this letter was obtained. The delegate found the letter was not genuine. I note the applicant's complaints that he was severely stressed at the interview, but he made no attempts after or since the interview to provide an explanation of the provenance of the letter or why the contents differ from his claims. Without an explanation from the applicant as to why the letter refers to events that differ from or are not contained in his claims, I too have concerns about the genuineness of the letter and have not considered it further.
48. The applicant spoke at the SHEV interview about wanting to support the TNA when he was in Sri Lanka because he believed a greater representation of Tamils in the Parliament would lead to better outcomes for Tamils. I accept he was sincere in his support for the TNA. There is no evidence he has been actively supporting the TNA from Australia, but I accept that if he returns to Sri Lanka he would again consider himself a supporter of the TNA, or other like Tamil party, and may get involved again in handing out flyers, putting up posters, and similar work. I do not accept however that he would be a senior or significant person in the party, even in his local area, as he has not held such positions before nor indicated he intends to.

49. The political landscape of Sri Lanka has changed since the end of the conflict. Obviously Tamil parties are not viewed in the same light now as they were when the LTTE was fighting for a separate Tamil state. The TNA is a mainstream party and remains the largest single Tamil party in Sri Lanka and is essentially a coalition of Tamil parties. In the 2015 elections the TNA won 16 seats, out of a total 225 seat. In the 2020 elections the TNA won only 10 seats in an otherwise landslide victory by President Rajapaksa's Sri Lanka People's Freedom Alliance (SLPFA). The TNA has actively participated in local, provincial and national elections since the applicant left Sri Lanka as a mainstream party. In the Tamil majority north the TNA held the majority of the Northern Provincial Council. Country information indicates that historically elections in Sri Lanka had been marred by political violence and intimidation, particularly elections during and in the aftermath of the civil conflict. However later elections have been peaceful, although some incidents of voter intimidation was reported in the 2020 election.⁸ There are no reports before me of TNA supporters being targeted for violence in recent elections.⁹ Whilst TNA and other Tamil members of parliament are in a minority, this is commensurate with Tamils being a minority group.
50. The information before me does not indicate members or supporters of the TNA are targeted for reason of being associated with the TNA. The TNA is an accepted mainstream party in Sri Lanka. I do not accept the applicant, if he returned to supporting TNA candidates as he did in the past, would experience the type of threats and intimidation he experienced as a member of his [club] or when he returned in 2008 or 2012. I find he does not face a real chance of harm for his past or potential future support for the TNA.

Tamil activities in Australia

51. The applicant claims to have been an active participant in Tamil remembrance days and other celebrations in Australia. In support of his he provided a letter of support from [Organisation 1] and a number of photographs of himself at various events.
52. The letter from [Organisation 1] describes the group as a community organisation that actively makes representations to government and other agencies and service providers on issues concerning Tamil people's welfare, and promoting the Tamil language and culture in Australia. It also hosts remembrance days to commemorate those who died in the conflict in Sri Lanka. The applicant is not described as an employee or leader at the [Organisation], but the author of the letter confirms the applicant has attended remembrance days and other celebrations from 2013 to 2022 and had volunteered to set up the stage and assist the crowd at events.
53. The photographs provided by the applicant in support of his attendance at Tamil and LTTE commemoration events are said to date from 2013 to 2022. The photographs appear staged: the majority are pictures of him standing alone in front of signage or large photos of the late leader of the LTTE, seemingly to evidence his attendance at these events. Apart from the few 'selfies' he took of himself sitting in a crowd or at meetings, the photos do not show him participating in the events or attending with other people. There are no photographs of him doing any volunteer work at the events. There is also a series of photographs of him apparently home on his own celebrating the late leader's birthday. There is no indication any of these images have been used on [Organisation 1]'s website, nor that any of the images have been uploaded to social media. There is no explanation why he took all these

⁸ DFAT, Country information Report Sri Lanka, 18 December 2015; DFAT, Country information Report Sri Lanka, 23 December 2021.

⁹ DFAT, Country information Report Sri Lanka, 23 December 2021; UKHO, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020;

photographs, and the staged appearance suggests they were taken to strengthen his application for protection. I have not however disregarded the information under s.5J(6) as I consider that although the photographs appear to have been taken to strengthen his claims, that may not be the only reason he attended these events. I accept as a Tamil man in Australia he would also have interest in attending Tamil commemorations for cultural and social reasons.

54. Celebrating the birthday of the leader of the LTTE and remembering the LTTE militants who died on 'Great Heroes Day' are celebrations that are highly sensitive in Sri Lanka. DFAT reported in 2021 that such commemorations are illegal, although Tamils are known to defy the ban. The attitudes to the holding of commemorations had relaxed, and recent bans may have been related to Covid-19 isolation orders. There were reports of some people facing arrest or harassment for commemorations in 2021, but not widescale arrests. The public display of LTTE symbols is also banned.¹⁰ Although the applicant has provided photographs of himself with LTTE symbols and commemorating these days in Australia, there is no evidence or claim he ever did so in Sri Lanka. He has not claimed he would do so in Sri Lanka on return. There is no information his family or local community engage in these activities or have suffered any harm for doing so. He has not claimed an intention to participate in commemoration events in Sri Lanka in the future. There is no indication he would be an organiser of such events, and given he has not undertaken such a role even in Australia where he is free to do so, I do not accept he will organise such events in Sri Lanka.
55. There are reports the Sri Lanka authorities monitor sur place activities, and are particularly interested in the activities of proscribed organisations.¹¹ There is no information before me that [Organisation 1] is a proscribed organisation, nor that it has a Tamil separatist agenda such as to attract adverse attention. The applicant's involvement with [Organisation 1] is to turn up at events and provide some assistance in setting up. He is not a leader or employee at the [organisation]. He does not speak publicly nor have a prominent, or any, role at the events he attends. There is no evidence of engagement in protest activity. He has no social media presence. His activities fall far short of anything like the 'significant role' in a Tamil separatist organisation, identified by the UK Upper Tribunal as putting people at risk of treatment amounting to serious harm. I find his attendance at the events organised by [Organisation 1] does not amount to the level of engagement that would attract the adverse attention of the Sri Lankan authorities. I find he does not face a real chance of harm for reason of his sur place activities in Australia.

Current situation in Sri Lanka

56. Sri Lanka has recently experienced significant political and economic challenges. A number of factors, including the impact from COVID-19, poor economic management and failed attempts at organic only agriculture, has resulted in severe shortages of food, fuel and other essential services. Mass protests from March 2022 put pressure on the Rajapaksa-led government and ultimately led to the removal of Rajapaksa as President Wickremesingha has been sworn in in his place, although political and economic stability continues.¹²
57. Although the applicant doesn't expressly claim a well-founded fear of harm due to the current instability in Sri Lanka, the letter from [Organisation 1] states they are of the opinion the applicant will personally be of risk of torture by the Sri Lankan Armed Forces due to

¹⁰ DFAT, Country Information Report Sri Lanka, 23 December 2021.

¹¹ UKHO, Sri Lanka: Tamil Separatism, 25 August 2022; DFAT, Country Information Report Sri Lanka, 23 December 2021.

¹² The Economist, In with the old – Sri Lanka picks a new president to replace the one that fled, 20 July 2022; ICG, For Lanka a Long Road to Democratic Reform Awaits, 24 July 2022.

ongoing protests, attacks on peaceful protestors, and attacks on Tamils in the north and east of Sri Lanka. The reports regarding the crackdown on protests in Sri Lanka draw attention to the crackdowns occurring on the large protests in Colombo. There is no reporting that Tamils in the north or east, or Tamils generally, are being targeted by the authorities in their response to protest activity.¹³ There is no claim the applicant intends to protest if he returns to Sri Lanka, and there is no evidence he has been involved in any protests or social media activity in Australia responding to the situation in Sri Lanka. I do not accept the applicant faces a real chance of harm from the Sri Lankan Armed Forces or any other group because of the current economic and political situation in Sri Lanka.

Illegal departure

58. The applicant claims to fear harm for reason of his illegal departure from Sri Lanka in 2012.
59. It is an offence under Sri Lankan law to depart the country other than via an approved port of departure: 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 up to LKR 200,000.¹⁴
60. For returnees travelling on temporary travel documents, police will take steps to confirm their identity upon arrival. DFAT reports they are unaware of returnees being subjected to mistreatment during processing at the airport.¹⁵ The UNHCR told the UK Home Office that returnees to Sri Lanka are no longer subjected to intensive questioning at the airport. The authorities are only interested in persons returning with outstanding criminal offences. The UK Home Office reports there was no distinction between Tamil and Sinhalese returnees.¹⁶
61. Those returnees charged under the I&E Act are required to appear before a Magistrate, and may be required to appear at court every 3-6 months until the case is resolved. They may also be called up as witnesses in cases against people smugglers. Cases can take years to resolve, which may be because the case is not closed until all persons involved in the people smuggling for that boat are located, but may also be because of the workings of the Sri Lankan justice system. DFAT reports it is unaware of any prison sentences being imposed on people merely for departing illegally. The harsher penalties can be imposed on facilitators or organisers of the people smuggling boats. The fine for illegal departure is typically between AUD350-1400.¹⁷
62. The applicant claims he will be detained or arrested on his arrival in Sri Lanka, in addition to any short detention at the airport for processing. It is not clear on what basis this would happen. He was not detained on the two occasions he returned from [Country]. He does not have any outstanding charges. I do not accept he has created any profile in Australia such that he would be arrested on return. I find this fear of arrest on return is not well-founded.
63. I do not accept the processing on return, being charged, prolonged court procedures, and possible conviction and fine for an offence under the I&E Act, amounts to serious harm under s.5J(5) of the Act. I do not accept any possible short detention during processing amounts to serious harm under s.5J(5), even if he is distressed by the detention. I do not accept he faces a real chance of physical mistreatment amounting to serious harm whilst being processed,

¹³ OHCHR, Sri Lanka: UN human rights experts condemn repeated use of emergency measures to crackdown on protests, 8 August 2022; HRW, Sri Lanka: New President Should Chart Path Upholding Rights, 9 August 2022.

¹⁴ DFAT, Country Information Report Sri Lanka, 23 December 2021.

¹⁵ DFAT, Country Information Report Sri Lanka, 23 December 2021.

¹⁶ UKHO, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020

¹⁷ DFAT, Country Information Report Sri Lanka, 23 December 2021.

charged, or in on-going court appearances. I do not accept he will face imprisonment, as the evidence indicates mere passengers who depart illegally are not given prison sentences.

Refugee: conclusion

64. 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

65. 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

66. 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.
67. 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.
68. I accept the applicant may be charged and convicted under the I&E Act on return to Sri Lanka for reason of his illegal departure. I rely on country information referred to above to find the applicant would not face mistreatment amount to significant harm during processing, appearing at court, or any possible short detention period.
69. I have found the applicant does not face a real chance of harm from the CID or anyone else for reason of his Tamil ethnicity, imputed association with the LTTE as a Tamil from Batticaloa, support for the TNA, activities in Australia, or because of the current political and economic situation in Sri Lanka. 'Real chance' and 'real risk has been found to equate to the same threshold. For the same reasons given above, I find the applicant does not face a real risk of significant harm for any of the reasons claimed.

Complementary protection: conclusion

70. 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.