



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA22/10372

Date and time of decision: 12 December 2022 16:26:00

D Hughes, 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 national of Sri Lanka. He applied for a protection visa on 12 April 2016. A delegate of the Minister for Immigration refused to grant the visa on 30 November 2016.
2. This matter was previously before the IAA. A decision to affirm the delegate's decision was made by the IAA on 2 August 2017 (IAA16/01531). The matter was remitted back to the IAA by orders of the Federal Circuit and Family Court of Australia on 16 August 2022.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The applicant provided one submission to the IAA, in an email received on 21 December 2016. The submission included a photo of his family, purportedly including his cousin. The applicant also contends that his cousin was very close to his family and this was why they were targeted by the authorities after his cousin's death. He contends that his cousin was displaced to Vanni in 1994 and returned in 2002. He believes this could be the reason they thought his cousin was associated with the Liberation Tigers of Tamil Eelam (LTTE). I find the photo and the claim regarding his cousin's time in the Vanni is new information.
5. This information is historic and predates the decision by several years. I consider it could have been provided at any point in this process prior to the delegate's decision. It follows that the applicant has not satisfied me that the information could not have been provided to the Minister before the Minister's delegate made the decision.
6. I accept it is credible personal information. The applicant has provided what evidence he can of links to his cousin and sort to explain why he believes his cousin had an (an imputed) LTTE profile. While there is an obvious his delay in providing this evidence, I am conscious that there can be difficulties in finding such evidence and that he is seeking to respond to the concerns of the delegate in the decision. On its face, I am satisfied this is credible personal information which was not previously known and may have affected the consideration of the applicant's claims. In view of all the circumstances, I am satisfied that there are exceptional circumstances to justify considering the new information.
7. In terms of the applicant's claim that the Sri Lankan authorities continue to harass his family, I do not consider this is new information. The applicant has not always been clear in his evidence on this issue, but I consider his written and oral evidence includes a claim that they have experienced ongoing visits and checks at the family home, and that his family have continued to be questioned. I find this is a reiteration of those claims.
8. The applicant also raised a claim in his submission that he would not be able to live in Sri Lanka without a National Identity Card (NIC) and that if he approached the local government office to obtain a new one, he would come to the adverse attention of the authorities.
9. The applicant did not raise this claim in his earlier evidence, nor did he explain why he could not do so. The applicant has not satisfied me that the information could not have been provided to the Minister before the delegate made the decision.

10. This claim relates to the applicant's fears if he applied for a new NIC. Were his profile accepted, it is not implausible he would additionally fear harm in engaging directly with the Sri Lankan authorities, such as in seeking a new NIC. I also accept he would need to do so to find work, accommodation and access services. To the extent there is new information within this claim, the applicant has satisfied me the information is credible personal information which was not previously known and may have affected the consideration of the applicant's claims. In all the circumstances, I am satisfied that there are exceptional circumstances to justify considering the new information.
11. The submission to the IAA includes two news articles. The first is dated 21 October 2016 and relates to the killing of two university students from Jaffna. The second article is dated 5 October 2016. It refers to the Northern Chief Minister who is quoted as saying that it is not safe for asylum seekers to be returned to Sri Lanka.
12. The articles predate the delegate's decision by over a month. I note the applicant was represented before the delegate. He has not satisfied me that the information could not have been provided to the Minister before the delegate made the decision on 30 November 2016.
13. The Asian times article is about identified individuals and to that extent contains personal information. The other brief news item, while naming a Minister is in the nature of general country information. Neither appear specifically to relate to the applicant or his individual circumstances specifically, apart from relevance to his risk profile. The applicant presents them as examples of incidents of Tamils being persecuted (then) recently, and the risks to returnees. I do not consider the information is at a level that may have affected consideration of the applicant's claims or that it is otherwise credible personal information in the relevant sense. The applicant has not satisfied me the information is credible personal information which was not previously known and may have affected the consideration of his claims. Given the age of the documents, I also consider the reports are of little value in assessing the chance or risk of future harm. In all the circumstances, I am also not satisfied that there are exceptional circumstances to justify considering the new information.
14. No further information was received from the applicant following the remittal of this matter to the IAA in August 2022. I note that officers of the IAA did speak with the applicant on 20 September 2022. They confirmed his contact details, in addition to confirming that his former representative was no longer acting for him. He was advised that he could provide new information. He confirmed he understood this. He indicated that he had no questions and was awaiting the outcome of the review. He has made no further contact with the IAA.

New information obtained by the IAA

15. The delegate's decision in part turned on consideration of country advice, including the Department of Foreign Affairs and Trade (DFAT) 'Country Information Report - Sri Lanka' from December 2015, and two versions of a UK Home Office report 'Country Information and Guidance Sri Lanka: Tamil Separatism' published in August 2014 and May 2016.
16. The IAA previously obtained new information in the course of the first IAA review. Specifically, DFAT's 'Country Information Report - Sri Lanka', published in January 2017, which was published after the date of the delegate's decision.
17. Over 5 years have passed since the decision of the IAA in the first review. Given the time that has passed, I have decided to obtain the most recent versions of these reports – DFAT's

'Country Information Report - Sri Lanka' published in December 2021, as well as the UK Home Office's 'Country policy and information note: Tamil separatism' from August 2022.

18. These new reports provide much more current commentary on the situation in Sri Lanka. While I consider the older reports remain relevant, particularly in terms of his past claims, I consider the sources in the review material are now dated in terms of any future assessment. In all the circumstances, I am satisfied that there are exceptional circumstances to justify considering the new information.
19. As I have obtained the most recent DFAT report, I consider this overtakes the now dated 2017 report. In the circumstances, I am not satisfied that there are exceptional circumstances to justify considering the 2017 report obtained in the first IAA review.

Applicant's claims for protection

20. The applicant's claims can be summarised as follows:
 - He is a citizen of Sri Lanka. He is a Tamil Hindu from (T village/town), Jaffna in the Northern Province of Sri Lanka. He has two brothers. His older brother is living in India (Tamil Nadu) and his younger brother is living in Jaffna with his parents.
 - When he was [age] years old, the Sri Lankan Army (SLA) captured Jaffna. His family were displaced to the Vanni region in 1995. From Vanni they went to Vavuniya and then Trincomalee. They returned to Jaffna by ship in 1999.
 - He completed his Advanced Levels (A Levels) in [year].
 - His cousin owned a [store] in Jaffna Town. His older brother also worked there. They were both accused of helping the Liberation Tamil Tigers of Eelam (LTTE).
 - His cousin was shot and killed by the SLA [in] March 2007. His brother was immediately sent to Colombo and his father later organised for him to be sent to India in 2008.
 - After his brother's departure, masked men began to visit their home. The applicant and his family knew they were from the SLA or Criminal Investigation Department (CID). They questioned the family. The applicant and his father were interrogated many times. He was questioned about his brother and if he was involved with the LTTE.
 - In 2010, several masked men came to their home and his cousin's home. They told them they found LTTE arms at his cousin's shop. The men checked their house for arms. They were forcefully taken to a nearby SLA camp. He and his father were interrogated separately. They asked about his brother and his whereabouts. They asked if they were hiding more arms. He told them he did not know anything and that he was a student. He was beaten on his back during the interrogation. They let them go on the same day, however they continued to check their home and regularly took them to the camp.
 - He does not know if his cousin had links with the LTTE or not, but his whole family has been targeted for it.
 - In August 2011, the Army/CID came to his home. There was a Tamil speaking male who took his father separately. After they left his father told them the Tamil speaking officer had threatened to kill the applicant if his father did not provide information.
 - His parents decided to send him out of Sri Lanka to protect his life and organised this through an agent. He left Sri Lanka in October 2011. He joined his brother in India.

- In August 2012, his cousin's family was trying to leave Sri Lanka for Australia. His father made the decision to send him to Australia with them. He went back to Sri Lanka in August 2012. He stayed at his father's friend's place for less than a month. He left Sri Lanka with his cousin's family in September 2012.
- After he left Sri Lanka, the Army/CID regularly visited his home. They questioned his parents about him and his brother and checked their house. His parents told the Army/CID that he and his brother have left Sri Lanka. They told his parents that they were sent away from Sri Lanka because they have links with the LTTE. They threatened to kill him and his brother on return.
- In August 2014, his father was stabbed by unknown people. He was returning from work with a colleague. Both were attacked and stabbed. His father was taken to [the] Hospital for treatment. They were both lucky to live.
- If he returns to Sri Lanka, he will be harmed or killed because the Army/CID believe that his family has links with the LTTE and has information about arms storage. The Army kills anyone with links to the LTTE.

Factual findings

21. On the basis of his oral and documentary evidence, which includes an English version of his birth certificate, I accept the applicant is a citizen of Sri Lanka and Tamil Hindu from Jaffna in Northern Province. In view of the supporting country advice before me,¹ I accept that he and his family were displaced from Jaffna during the conflict and returned in 1999. I accept his cousin was also displaced, as were a significant number of Tamils.
22. Based on the evidence before me, I find the applicant and his family were able to resettle in Jaffna. I have had regard to his educational documents, including his A levels certificate from [year]. I am satisfied the applicant was able to complete his schooling and obtain his A levels.

Claims related to his cousin and brother

23. The applicant has been consistent about the murder of his cousin in 2007. He has provided a death certificate and complaint to the Human Rights Commission of Sri Lanka that provides some corroboration for these claims. Both documents indicate his cousin was shot and killed by unidentified persons. I accept his cousin was killed in March 2007. I accept the applicant's evidence that his family were close to his cousin and that he at times lived with them.
24. The applicant has also been consistent that his brother travelled to India during the conflict and remained there after the war. Although there is little to corroborate these claims, I consider it consistent with country advice before me about a high number of Tamils travelling to live in India during the conflict.² I also find it relevant that the applicant's brother was a young adult Tamil male living in the north during a period of considerable insecurity for minorities in the country, in particular young Tamil men.³ In the circumstances, I accept his brother left Sri Lanka to live in India in 2008.

¹ UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8.

² UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8.

³ Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637.

25. The applicant contends that both his cousin and brother were accused of helping the LTTE. Based on what evidence is before me, for the reasons that follow, I am not satisfied that the applicant's cousin and brother had any links or associations with the LTTE.
26. In his submission to the IAA, the applicant contends that his cousin was displaced to the Vanni in 1994 and returned to Jaffna in 2002, and that this could be the main reason the authorities suspected he was involved with the LTTE. I note country information indicates that displacement of Tamils in the north during the conflict was in the hundreds of thousands.⁴ Indeed, the applicant's immediate family was also displaced for several years. I understand the point being made by the applicant, but I consider his cousin's displacement was unremarkable and he has not satisfied me that this displacement led the authorities to believe his cousin had LTTE associations.
27. The applicant has not provided any clear indication that his cousin or brother had any actual LTTE involvement or associations. At the visa interview, the applicant stated that he did not know if his cousin and brother were involved with the LTTE, or if they had been involved in hiding LTTE arms near his cousin's shop.
28. I accept the applicant was young at the time when his cousin was killed and may not have known the full story of his cousin or brother's associations at that time. However, I also note the applicant claims he was with his brother in India between 2011 and 2012. His period in India was after the applicant and his father had been detained, mistreated and interrogated about his brother and cousin. Had the applicant's cousin or brother had any actual LTTE association (or knowledge that LTTE arms were hidden near his cousin's shop) I consider the applicant would have become aware of such associations during his time with his brother in India. The uncertainty in the applicant's evidence on this point is some indication to me that his brother and cousin had no actual LTTE involvement or associations.
29. I have also considered whether the applicant's claim that arms were found at the site of his late cousin's former business demonstrates that his cousin or brother had links or associations with the LTTE. The applicant claims they were told the weapons were found at the site of his late cousin's shop in 2010, and that masked men came to his home and checked their house for weapons. He claims that he and his father were forcibly taken to an SLA camp where they were interrogated about his brother's whereabouts and that they were beaten. It was also his evidence that they were released the same day. As I discuss in my findings below, it appears the applicant was never again taken into detention.
30. If it was the case that they had found arms at the site of his late cousin's shop, and if it is accepted that his family's relationship to his cousin's was close, I find it relevant that he and his father were released from the camp that same day, and that the applicant was not detained again. The country advice indicates the Sri Lankan authorities and security forces had extensive arrest and detention powers under the Emergency Regulations and Prevention of Terrorism Act and used these powers with impunity during the war and its aftermath. They could detain suspects for extended periods without charge or court appearance, and shield officials from prosecution for wrongful acts such as torture – which I consider was prevalent.⁵

⁴ UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8; Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637.

⁵ DFAT 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637; UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8.

31. Given the ongoing concern about the re-emergence of the LTTE and Tamil separatism, I consider the discovery of weapons in 2010 would have been a matter of serious concern for the security forces, as would the proximity of their relationship to the apparent suspects. If the applicant and his father were linked to hidden arms found at the site of his late cousin's shop, I do not consider it plausible that he and his father would have been released in a matter of hours and/or that they could have avoided more serious mistreatment (such as torture), arrest or extended detention. I accept the applicant and his father were taken to an SLA camp where they were interrogated and mistreated. However, I do not consider their release that same day – after a matter of hours – is plausible or consistent with the SLA finding weapons at the site of their late cousin's business, or if they suspected his brother had LTTE associations and the family had helped him flee the area.
32. I consider the treatment the applicant and his father experienced – and indeed his cousin and older brother – to be consistent with country advice before me about the treatment faced by ordinary Tamils living in the north and east of Sri Lanka who had no LTTE associations. According to the country advice, while LTTE members and supporters were almost all Tamil, the Sri Lankan security forces also imputed LTTE support based on ethnicity, and the Emergency Regulations (and PTA) were, at times, applied in a discriminatory manner. Regardless of LTTE association, many Tamils, particularly those living in the north and east, reported being monitored, harassed, arrested, detained and harmed by security forces during the war – a number of Tamils were tortured, disappeared or killed.⁶
33. The details surrounding the death of his cousin are opaque. The applicant purported to provide a news article with his visa application, but it is untranslated and cannot be assessed. The applicant states that it must have been the CID that killed his cousin because it happened at curfew, and no one else was able to move around at the time.
34. On the evidence that is before me, I am not satisfied the applicant's cousin or brother had any actual involvement with the LTTE. As young Tamil males (and as young Tamil males involved in a business) living in an area controlled by the Sri Lankan authorities and security forces, I consider it plausible they were harassed by the security forces on the same basis as other Tamils with no such associations. I find that consistent with country advice cited above about the discrimination and harassment faced by Tamils in the north and east and the impunity with which the security forces treated Tamils during this period. I note at the time of his cousin's death, there was widespread violence in Sri Lanka, including in Jaffna, at a time when minorities were largely the victims.⁷
35. Based on that advice, I accept the applicant's cousin was killed in 2007, I consider it plausible that the security forces were involved. However the applicant has not satisfied me and I do not accept that his cousin had any actual LTTE links or associations, or that he was killed on the basis of such links or associations.
36. Given his brother's age at the time and his involvement with his cousin's business, I accept his father sent the applicant's brother to Colombo after the death of their cousin. That indicates

⁶ DFAT 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818; UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8; Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637; UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil separatism, Version 2.0', 19 May 2016, OGD7C848D17; US Department of State, 'Sri Lanka - Country Report on Human Rights Practices 2015', 13 April 2016, OGD95BE926320.

⁷ Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637.

that his father believed his son (the applicant's brother) was at risk, but also that the risks were localised to their home area in the north. Had the applicant's father genuinely feared his son (the applicant's brother) was at risk from the security forces on the basis of any actual LTTE profile or association, or even a suspected profile, I do not accept his father would have sent his son to Colombo, where security forces were also present. I note there were military checkpoints throughout the country, including the capital.⁸ If the applicant's brother had any LTTE association, real or suspected, I consider he would have been just as at risk within Colombo or in travelling from the north to the capital. Beyond his profile related to his ethnicity, I am not satisfied the applicant's brother had any actual or imputed LTTE profile when he left the area for Colombo in 2007, or when he travelled to India in 2008.

37. As I do not accept that his cousin or brother had any involvement or association with the LTTE, I am not satisfied and do not accept that weapons were found at the site of his late cousin's shop. It may be that the authorities claimed that weapons had been found and used this as a pretext to question the applicant and his father, but I am not satisfied it was in fact the case that any weapons were found.

Circumstances following his brother's departure

38. The applicant has not contended that he or his father had any actual LTTE association. At the time his cousin was killed and his brother left for Colombo, the applicant was just [age] years of age. I consider his profile at that time was unmistakably that of a student and I consider his various academic transcripts provide clear evidence of that fact. I note he was still studying [after] the conflict ended, completing his A-levels in [year], which would have further demonstrated that he had no LTTE association or involvement. I also have no reason to consider his father had any LTTE association or involvement. I find they had no such profiles.
39. While I have not accepted his cousin or brother had any LTTE involvement or associations, or that weapons were found at the site of his late cousin's business, I accept that the applicant and his father were detained, interrogated and mistreated by the security forces in 2010. I find the claim plausible and consistent with country advice. I accept that the authorities may have asked about his brother's whereabouts and whether he had any LTTE association, but as I am not satisfied that his brother had any LTTE association or involvement, I consider any questioning relating to his brother would have been motivated by other considerations, such as the discriminatory suspicion that Tamils were involved with the LTTE, and his departure from an area during a time when there was forced registration of Tamils in Jaffna and restrictions on their movement.⁹
40. The applicant's description of the treatment he and his father faced in the period following his brother's departure is plausible and consistent with the country information cited about monitoring, round ups, home visits, forced registration, arbitrary detentions, and harassment and mistreatment faced by Tamils in the north.¹⁰

⁸ Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637.

⁹ Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637; DFAT 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8.

¹⁰ UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil separatism, Version 2.0', 19 May 2016, OGD7C848D17; UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8; Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637.

41. I accept they may have been questioned about LTTE involvement or association during the 2010 detention, but I again consider their release indicates they were not seriously suspected of any such involvement. Were it otherwise, I consider they would have faced arrest or charge, extended detention, more serious mistreatment or even have been sent to rehabilitation. I consider the detention and the mistreatment they experienced was consistent with the country advice above regarding the systematic harassment of Tamils. While I do not discount the seriousness of the treatment the applicant and his father experienced, I am not satisfied and do not accept either of them were seriously suspected of having any LTTE involvement or association, actual or imputed, whether directly or through the applicant's cousin or older brother.
42. I accept the monitoring, harassment and visits continued through to 2011. I again consider it consistent with the country advice regarding the treatment of Tamils generally during this period. However, I do not accept he was ever taken to the camp again. In his written evidence the applicant said that they continued to 'check our home and took us to the camp'. However, his oral evidence was clear that he was not personally taken to the camp again. I found that evidence more specific, direct and credible on this matter. I find that he was only taken to the camp on one occasion and I consider that is a further indication that the security forces did not consider the applicant had any LTTE association or any other profile, nor did they consider the applicant's cousin or older brother had such a profile.
43. At the point of the later visit in August 2011, the applicant was a young man and had completed his schooling. The applicant alleges that a threat was made against the applicant to his father. I consider it plausible the security forces used such threats and I consider this was likely to coerce the applicant's father to provide information about the LTTE (or arms). I also consider such a threat may have been the catalyst for his family's decision that he should leave for India and stay with his brother. However, I am not satisfied and do not accept that this was because the authorities considered the applicant had any LTTE association or any other profile, again whether directly, through his cousin or brother, or for any other reasons.
44. In this regard, I find it significant that he departed Sri Lanka by plane, and returned the next year through the airport, apparently without incident. The evidence before me indicates the Sri Lankan authorities maintain detailed databases on LTTE suspects and meticulous records of people moving in and out of conflict areas.¹¹ The apparent ease of his travel suggests to me that the CID and security forces did not consider him to be a person of interest, or a person with LTTE intel. Whether he remained in Colombo or not, I also do not consider that the applicant's action in returning to Sri Lanka supports a conclusion that he or his family considered him to be at specific risk on the basis of any LTTE association or any other profile.
45. I accept the applicant, his father and family faced a number of visits at their home, and this involved questioning, interrogation, harassment and even threats from the security forces. However, on the evidence before me, I am not satisfied the applicant was a person of interest to Sri Lankan authorities and security forces, or that he was considered to have any LTTE association (whether directly, through his cousin or brother, or for any other reason) or have any other profile, when he left the country in 2012. For the same reasons, I am also not satisfied his father or other family members had any such profile at that time.

¹¹ DFAT 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637.

Departure from Sri Lanka and death of father

46. After his departure from Sri Lanka, the applicant claims the security forces continued to visit his home and question and harass his parents. He also contended that in 2014, his father was stabbed while travelling home from work – he believes the SLA or CID attacked his father.
47. Given my findings as to his lack of LTTE association or other profile, or his brother or cousin having any LTTE profile or association, I have some doubts as to whether the authorities continued to visit his family home after he left Sri Lanka. I note the forced registration of Tamils ceased in 2011, and country advice indicates that monitoring and harassment of Tamils in the north continued to reduce, as did the incidence of arbitrary detention and arrest. Nevertheless, given their past experiences, it is not implausible that visits and monitoring continued after the applicant left Sri Lanka. I note the country information indicates that some monitoring and visits to homes continues to occur.¹² Given that, I am prepared to accept that they may have continued to experience visits from the security forces, at least at the time of his last submission to the IAA.
48. While I am prepared to accept his family have been visited and may have been questioned about his and his brother's whereabouts, I do not accept this is because the applicant, his brother or anyone in his family are or were suspected of LTTE involvement or have any other adverse profile. Whether or not allegations or questions about LTTE involvement have been made during these visits, I am not satisfied they have any such profile. To the extent any visits were made to his family, I consider this is an example of the harassment and monitoring experienced by some Tamils in the north. I note the applicant did not update his or his family's circumstances to the IAA. Given recent country advice before me,¹³ I consider it very likely that any visits have ceased altogether.
49. I found the applicant's claims regarding the attack on his father and a colleague were not particularly detailed or persuasive, nor was it supported by other probative evidence.
50. The applicant provided an untranslated news article purportedly relating to the attack. I am unable to test the content or the reliability of the document. However, I note the date of the newspaper article is 21 August 2014. In his written evidence, the applicant indicated the attack occurred in 2015. In his oral evidence, he stated the attack on his father occurred in 2014. While this is a relatively minor discrepancy in his evidence, it arises in a context where there is not a lot of supporting detail regarding the attack itself.
51. Within his written statement, he was unclear about who the attackers were. He claimed his father was attacked by unknown persons, however he also claimed it was the Army or CID that attacked his father later in the same statement. I note the CID/SLA are separate forces. In his oral evidence, the applicant stated that they cut his father and said that he had 'saved his children' but they would not spare him. However, in his written statement, he does not refer to any comments being made by the SLA or CID that would link the attack to past events. I accept his written statement was a summary of his claims, but such a statement would be significant and I find it relevant that this was not included in his written evidence.
52. He has claimed his father was taken to [the] Hospital and that his injuries were serious. The applicant has not provided any police or hospital reports to evidence the attack or its aftermath. This can be contrasted to the quite detailed evidence surrounding the murder of

¹² DFAT 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 202112230.

¹³ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 202112230.

his cousin in 2007. Given the severity of the claimed attack, particularly where a civilian with no such apparent concerns with the CID or SLA was involved, I find the lack of any health or police records raises doubts about these claims.

53. Given the security environment in Sri Lanka, it is not implausible his father (and his colleague) could be attacked and stabbed in 2014. However, I do not find the evidence regarding this attack to be persuasive. I find it relevant that there is no documentation to corroborate the attack, his father's injuries, or that identify its perpetrators. In view of what evidence is before me, the applicant has not satisfied me and I do not accept the attack occurred, or that his father was specifically targeted by the SLA or CID.

Refugee assessment

54. 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

55. 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.
56. The country information before me clearly indicates that many ordinary Tamils living in the north and east of Sri Lanka, and who were otherwise unaffiliated with the LTTE, were mistreated, harassed, monitored, detained, tortured and arbitrarily killed by the Sri Lankan authorities and security forces during the civil war and in its aftermath.¹⁴ While I accept advice that the situation for Tamils in the north of Sri Lanka was insecure and highly challenging at the time the applicant left the country, the advice before me also indicates the situation has changed considerably in the years that followed the end of the civil war.

¹⁴ UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil separatism, Version 2.0', 19 May 2016, OGD7C848D17; UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8; Minority Rights Group, 'One year on: counter-terrorism sparks human rights crisis for Sri Lanka's minorities', 1 December 2007, CIS15637.

57. At the time of the delegate's decision in 2016, the UK Home Office stated that in its opinion, a person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidenced past membership or connection to the LTTE unless they had or were perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport.¹⁵
58. In its most recent 2022 report, the UK Home Office opines that whilst Tamils may face official discrimination and harassment, in general this treatment is not sufficiently serious by its nature and/or repetition, or by an accumulation of various measures, to amount to persecution or serious harm, based on their ethnicity alone. The UK Home Office again highlighted the elevated risks for those who have or had a 'significant role' with the LTTE and/or Tamil Separatism.¹⁶
59. I consider that consistent with DFAT advice which states that while the LTTE was comprehensively defeated, the Sri Lankan authorities remain concerned over its potential re-emergence, and separatist tendencies in general. It states that the Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members, supporters and other separatists, including 'stop' and 'watch' electronic databases. DFAT states these databases remain active. DFAT assesses that, while they may be monitored, Tamils with former links to the LTTE, and who are not politically active, are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.¹⁷
60. I also consider DFAT's advice is consistent with the UK Home Office in terms of risks to the Tamil community. It states that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity.¹⁸ DFAT highlights some discrimination in terms of certain employment, but also attributes this to the fact that many Tamils do not speak English or Sinhalese. DFAT assesses that Tamil under-representation is largely the result of language constraints and disrupted education because of the war.¹⁹
61. DFAT's advice indicates that surveillance of Tamils in the north and east continues to occur, with particular surveillance of those associated with politically-sensitive issues or former LTTE members. DFAT also assesses that physical violence against those being monitored is not common, and that ordinary Tamils living in the north and east of Sri Lanka are now at low risk of official harassment. I also note that DFAT assesses that even Tamils with former links to the LTTE, and who are not politically active, are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.²⁰
62. Some monitoring may also occur for Tamils returning from overseas. DFAT assesses that the Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their security risk profile, opining that those involved in Tamil diaspora groups would be of particular interest, as may returnees with suspected LTTE links. DFAT says it understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and

¹⁵ UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil separatism, Version 2.0', 19 May 2016, OGD7C848D17.

¹⁶ UK Home Office, 'Country Policy & Info Note - Sri Lanka, Tamil separatism, Version 8.0', 22 August 2022.

¹⁷ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

¹⁸ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

¹⁹ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

²⁰ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

had not experienced harassment by the authorities, nor received monitoring visits, but DFAT stated that it cannot determine if this is the case for all such returnees.²¹

63. I have accepted the applicant and his family faced harassment and mistreatment from the SLA and/or CID in the past. I have found that the applicant was never seriously considered to have any association or support for the LTTE. I have not accepted the applicant, his brother or anyone in his family were or are suspected of LTTE involvement or have any other adverse profile. Other than his illegal departure from the country, I find the applicant has no ongoing adverse profile of interest to the CID, the SLA, or anyone else. As he has no profile, I do not accept his contention that he is recorded on any stop or watch lists, or that he would be the subject of any warrants. I also do not consider the applicant has done anything in the intervening years that would alter that profile on return to Sri Lanka, nor do I consider there is any credible reason to believe he would involve himself in Tamil separatism or 'politically sensitive issues' if he were to return to Sri Lanka in the reasonably foreseeable future.
64. I accept the Tamil diaspora may be monitored by the authorities and that certain diaspora groups may be of interest of the authorities and security forces, but I also note that recent assessments indicate that the Sri Lankan authorities do not regard the entire Tamil diaspora as holding separatist views or being politically active in any meaningful way.²²
65. Given his history and lack of any association to the LTTE or any other diaspora or separatist activity, and in view of the country information before me, I find there is not a real chance that the applicant would face serious harm for any of these reasons, if he were to return to Sri Lanka, now or in the reasonably foreseeable future.
66. While I accept that country advice indicates that monitoring and surveillance of some Tamils (including returnees and asylum seekers) still occurs,²³ as I have found he has no adverse profile and I have no reason to consider he would be involved in politically sensitive issues, I find any surveillance or monitoring he may experience would not be at a level that would amount to serious harm. I also find there is no real chance of him facing harassment for these reasons. Given his lack of profile, I also consider any surveillance or monitoring he may experience for these reasons would not be ongoing.
67. I accept he may face some discrimination on return to Sri Lanka on the basis of his ethnic and related profile. Based on the DFAT and UK Home Office advice, I find that it is not at a level that would prevent the applicant from accessing employment, accommodation or accessing basic services.²⁴
68. It follows that I am not satisfied that any monitoring, surveillance or discrimination he may experience on the basis of his profile, would be at a level that would threaten his capacity to earn a livelihood, cause him significant economic hardship, deny him access to basic services, threaten his capacity to subsist, or otherwise give rise to or constitute serious harm.
69. In view of the country information before me about the situation faced by Tamils, as well as those with LTTE profiles or associations, I am not satisfied the applicant would otherwise face any real chance of harm for reasons of his ethnicity and related profile, his family connections

²¹ DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

²² UK Home Office, 'Country Policy & Info Note - Sri Lanka, Tamil separatism, Version 8.0', 22 August 2022.

²³ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

²⁴ UK Home Office, 'Country Policy & Info Note - Sri Lanka, Tamil separatism, Version 8.0', 22 August 2022; DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

or background, or on any other basis as discussed above if he were to return to Sri Lanka now or in the reasonably foreseeable future.

Profile related to illegal departure and asylum claims

70. Given his method of arrival in Australia, I accept that the applicant left Sri Lanka illegally via boat. As he departed Sri Lanka illegally and has spent around ten years in Australia without a passport, the authorities may find he departed Sri Lanka illegally and sought asylum in Australia. I accept that would be his profile on return to Sri Lanka.
71. Based on DFAT advice, it appears the applicant may be interviewed by a range of agencies on his return to Sri Lanka, which would include the CID. His documentation may be checked against immigration and intelligence databases.²⁵ I note that he has copies of his old national identity card and I consider that may assist in establishing his identity. I have not accepted the applicant or his family have any adverse profile with the Sri Lankan authorities or security forces. I am satisfied he would be assessed as having no adverse profile (or profile of interest) on return to Sri Lanka. I consider this was the case when he travelled to India in 2011 and when he returned to Sri Lanka in 2012, and I am satisfied this would be the case if he returned to Sri Lanka now or in the reasonably foreseeable future.
72. I accept the applicant may have some concerns about return processing given his and his family's past experiences with the SLA and CID. However, DFAT states that it is not aware of detainees being subjected to mistreatment during processing at the airport.²⁶ I have had regard to earlier country advice about the risks to returnees,²⁷ and I accept that for persons with higher profiles (e.g. pro-separatists) there continue to be risks in returning to Sri Lanka.²⁸
73. However, in view of my assessment that he has no adverse profile, I am not satisfied there is a real chance or risk of the applicant facing harm in return processing. I have not accepted his claim he would be on any watch or stop list. Other than any potential penalty or process related to his illegal departure, I am satisfied he would be able return to his home area without being subjected to any further action or investigation by the authorities in relation to his illegal departure and return to Sri Lanka.²⁹
74. The country advice indicates that monitoring of returnees can occur. I accept this may occur. However, as above, I consider any such surveillance or monitoring of the applicant would not amount to serious harm and – given his lack of profile – would not be ongoing.
75. There is reference in the DFAT report to reintegration difficulties, including obtaining identity documents and the impact this can have in obtaining work or access to services, but this is stated to be due to bureaucratic inefficiencies, rather than any profile related to the failure to obtain asylum. DFAT indicates that Sri Lankans over the age of 16 are eligible to apply for a NIC regardless of ethnicity or geographic location. While there can be some delay in issuance due to a lack of Tamils speaking officials in the north, there is no indication of any discrimination in terms of issuance.³⁰ I am not satisfied there is any real chance that he would be harmed in seeking to renew his identity documents, or that there is any chance he would be discriminatorily denied access to an NIC or other identity documentation he may require.

²⁵ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

²⁶ DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

²⁷ UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil separatism, Version 2.0', 19 May 2016, OGD7C848D17.

²⁸ UK Home Office, 'Country Policy & Info Note - Sri Lanka, Tamil separatism, Version 8.0', 22 August 2022.

²⁹ DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

³⁰ DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

76. There is some reporting of community pressure for returnees that have received financial reintegration assistance, and reports of resentment from families due to a returnee's unsuccessful attempt to obtain asylum. DFAT also advises that societal discrimination is not a major concern for returnees.³¹ It is possible that the applicant may experience similar challenges on return to Sri Lanka, however based on the information before me, I am not satisfied that would constitute serious harm in any relevant sense.
77. Given his unlawful departure by boat, I accept the applicant may be charged for breaching the Immigrants and Emigrants Act (1948) (the I&E Act). DFAT states that typically this fine is LKR 50,000-200,000 (AUD350-1400). Those who are unable to pay the fine are permitted to pay in instalments but, if still unable, may be imprisoned for 14 days. DFAT advises that while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. DFAT indicates that regardless of plea, persons charged may be required to appear in court every three to six months for bail hearings. There is also the potential for persons to be called as witnesses in cases against facilitators and organisers of people smuggling ventures.³²
78. Based on the information before me, I am not satisfied the applicant would be unable to pay a fine if one is issued against him. He has not raised any concerns with the delegate's findings in this regard. Given the quantum of those fines, I do not consider any fine levied against him would constitute harm or serious harm. As I am not satisfied he would be unable to pay any fine, it follows that I do not consider there is a real chance of the applicant facing a custodial sentence.
79. If the applicant were required to appear in court every three to six months, I acknowledge this may be stressful and potentially costly for the applicant. However, on the information before me, I am not satisfied that these penalties, processes or court proceedings would constitute serious harm in any relevant sense. In any event, the advice before me does not indicate the I&E Act, and any related processes or penalties for returnees, is discriminatory or discriminatorily applied or enforced.³³ I also find that any penalty, process or court proceedings the applicant may face under the I&E Act does not amount to persecution.
80. In all the circumstances, I am not satisfied there is a real chance that the applicant would face persecution in connection with his return to Sri Lanka, any processing or penalty he may face in connection with his illegal departure, his unsuccessful asylum claims, or any other aspect of his profile, if he were to return to Sri Lanka now or in the reasonably foreseeable future.

Refugee: conclusion

81. 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

82. 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

³¹ DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

³² DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

³³ DFAT 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

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

83. 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.
84. 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.
85. In terms of the applicant's illegal departure, I have accepted he may be subject to the applicable penalties, processes or court proceedings under the I&E Act. Based on the information above, I am not satisfied any processing (e.g. investigation at the airport), penalty (e.g. any fine) or court proceedings would constitute significant harm, or that there is a real risk of him experiencing harm amounting to significant harm for any of these reasons.
86. I have accepted that the applicant may experience monitoring or discrimination in connection with his ethnic profile or his status as a returnee and failed asylum seeker, for example home visits and calls from the authorities, and some barriers to certain employment. I also again note DFAT states that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. While I accept there may be frustration, I do not consider monitoring or discrimination is at any level that would involve the necessary elements to constitute significant harm. Having regard to the information above, I do not consider any monitoring, surveillance or discrimination he may face for these reasons would constitute significant harm as defined, or that there is any real risk of the applicant facing treatment that would amount to significant harm for these reasons.
87. I have otherwise found there is no real chance of the applicant facing harm for any of the reasons he has claimed. Having regard to the same information and analysis, I find there is not a real risk of the applicant facing significant harm in Sri Lanka for any of these reasons.

Complementary protection: conclusion

88. 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.