



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08645

Date and time of decision: 6 October 2020 12:36:00
K Juttner, 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 the Northern Province of Sri Lanka. He arrived in Australia in May 2013 and on 23 June 2017 he applied for a Safe Haven Enterprise Visa (SHEV). On 24 August 2020, a delegate of the Minister for Immigration (the delegate) refused to grant the visa on the grounds that Australia did not owe protection obligations to the applicant.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). Included in the review materials was an audio recording of the arrival interview with the applicant on 28 August 2013. The delegate had before him the written record of the arrival interview but not the audio recording. The audio recording is a full record of the applicant's arrival interview. It contains additional information (albeit brief) that was not contained in the written record that his father experienced beatings like he did, and to that extent it is new information. In view of this, I am satisfied that there are exceptional circumstances to justify consideration of this information.
3. The more recent interview conducted by the delegate was undertaken by telephone, seemingly because of COVID-19 related restrictions. The applicant was advised in a letter from the Department of Home Affairs dated 3 June 2020 that his SHEV interview was going to take place by telephone (and also that a postponed SHEV interview due to take place in April 2020 was to take place by teleconference to his mobile) and was invited to contact the Department if he was unable to attend. The delegate emailed the applicant a week before the postponed interview in April to ask if he wanted to submit any information to be considered at the interview (and no information was submitted), and again the day before the interview to ask him to turn on his telephone. At the start of his SHEV interview that took place on 19 June 2020, the applicant raised concerns that he did not feel comfortable giving information over the telephone and wanted a face to face interview. The applicant nevertheless proceeded to provide a range of information about his experiences in Sri Lanka in the telephone interview, which was approximately ninety minutes in duration. The applicant appeared to understand the delegate's questions, which included open questions inviting him to talk about his claims, and he responded appropriately to them. At times, he provided fairly detailed responses in Tamil which were translated by the interpreter. Other than some problems recalling when some events occurred, he did not appear to me to have difficulties talking about his experiences. He was given the opportunity to comment on the delegate's concerns about his claims, and to have a "natural justice" break (which he refused). From listening to the audio recording of the interview, it was not apparent to me that the applicant was uncomfortable discussing his claims over the telephone with the delegate. He also did not appear to have difficulties communicating with the delegate (with the assistance of a Tamil interpreter) over the telephone nor otherwise appeared hindered in any material way. He was invited to provide further information to the delegate within seven days of the interview, but no materials were subsequently provided. He has not made any submissions to the IAA about his SHEV interview being conducted by telephone. I am not satisfied that the applicant has been unable to present his claims at his SHEV interview. I do not consider it necessary for me to exercise my discretion to invite the applicant to provide new information at an interview or in writing.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
- The applicant was born and lived in Jaffna in the Northern Province of Sri Lanka.
 - In 2009, during the war, he was tortured by the army and hit with an [implement]. He saw other people being tortured and raped.
 - His father was a fisherman and was often beaten by the Sri Lankan army on suspicion of being associated with the Liberation Tigers of Tamil Eelam (LTTE). In one of these beatings, his [father was injured] and he became bedridden and unable to work as a fisherman. The applicant had to leave school and start working as a fisherman to support his family. He was around [age].
 - He had problems with the navy and army when he was working as a fisherman. He had trouble getting fishing permits and faced restrictions on his ability to fish.
 - In or around May 2012, he was made to work for the Sri Lankan army without pay. He helped with construction of an army camp. He was beaten by the army on a daily basis.
 - On one occasion, he was captured by the army and taken to their camp and kept in a bunker overnight. He was captured because the army suspected he had LTTE links.
 - His family were visited by the navy on one occasion since he has been in Australia. They asked about his whereabouts as he had not been to sea for a long time.
 - He left Sri Lanka illegally by boat and without a passport in April 2013.
 - His personal information was disclosed on the Department of Immigration's website when he was in immigration detention in early 2014.
 - He has attended Hero's Day celebrations since he has been in Sydney.

Factual findings

5. Since his arrival in Australia, the applicant has claimed that he is a Sri Lankan citizen of Tamil ethnicity who lived in Jaffna in the Northern Province of Sri Lanka. He speaks Tamil and his religion is Hindu. With his SHEV application he provided copies of his Sri Lankan birth certificate, a Family Particulars certificate and a fishing pass from the Sri Lankan navy. I am satisfied that he is a Sri Lankan national of Tamil ethnicity, and Sri Lanka is his receiving country.
6. The applicant claimed that he would be harmed by the Sri Lankan authorities because of his Tamil ethnicity, his imputed political opinion as a LTTE supporter and as a failed asylum seeker. He claimed that he was tortured by the Sri Lankan navy during the civil war in 2009, when he was very young, including being hit with [an implement], and that they also tortured other people and raped some girls in front of him. He also had problems with the army and navy when he was aged [age] (which was in 2012). They imposed restrictions on his capacity to work as a fisherman and made it difficult for him to obtain a fishing permit. He was also made to work without pay for the army, helping with the construction of an army camp. On one occasion he was captured by the army and held overnight in a bunker at an army camp. He believes he was captured because he was suspected of having links to the LTTE. The applicant further claimed that his father was often beaten up by the army on suspicion of being associated with the LTTE, and that his [father was injured] in one of the beatings and he became bedridden. After this, the applicant was forced to withdraw from school and to take up fishing to support his family. He was aged around [age] at the time.

7. The applicant first claimed that he had problems in 2009 at his SHEV interview on 19 June 2020. He did not mention having problems with the navy in 2009 in his arrival interview or his SHEV application, where he stated that his problems with the army and navy started when he was [age], in 2012. When the delegate queried why he did not mention being hurt as a 13 year old in his visa application, the applicant responded that he was not able to tell everything in his SHEV application and just gave a summary of what had happened. The delegate commented that he could write as much as he wanted in his SHEV application and no one had asked him to make a summary. The delegate also expressed his concern that the applicant did not mention these serious matters in his SHEV application. The applicant responded that he did not know how to tell what happened to him in Sri Lanka and if the delegate knew what happened, he would be surprised to think that this kind of government exists.
8. The applicant completed his visa application in mid 2017. Accompanying that application is a signed statement from the applicant provided in support of his claims for protection. The applicant received assistance from a Legal Clinic when preparing the statement. It is said to have been prepared over the course of three hours. The statement contains a rider indicating that it is a summary of his claims for protection and not an exhaustive statement of what had happened to him. It states that the applicant would provide further information about his claims at his interview with the Department. It also specifies that it may contain errors and omissions because of the "limited time available devoted to its preparation" and the inability to access accredited interpreters (it was prepared with the assistance of a bilingual volunteer). It was however, with the assistance of that volunteer, read back to the applicant who agreed with its contents.
9. Notwithstanding those qualifications, like the delegate, I have concerns that the applicant did not mention these matters earlier. He received assistance when preparing his statement from a Refugee Clinic. The statement, although not lengthy, is about five pages in length. It contains a specific title "Problems in Sri Lanka". This may well be described as summary of sorts, and it may be readily accepted that it would not contain every detail of the applicant's claims. However, it does contain information about a number of things that the applicant said had happened to him and his father, both in 2012 and in the case of his father, earlier than that. While I accept that not every detail of a person's claims for protection will be covered in the application form (in anticipation of an interview), I do not accept in this case that there would be no mention whatsoever of what are quite significant claims. I do not find his explanation about his failure to mention the 2009 incidents in his SHEV application convincing.
10. I do note that at his arrival interview, the applicant did refer to one occasion when he was beaten by the army and navy with an [implement], but it was clearly in the context of the beatings he said he received when made to work for the army after he turned [age] (ie in 2012). Aside from possibly references to his father's experiences, his account at the arrival interview focused on events after 2012, when he took up fishing, and problems facing fisherman more generally. He was not in my view, referring to events in 2009.
11. In contrast to the 2009 claim, the applicant has consistently claimed that his father was beaten by the Sri Lankan army. In his SHEV application, he claimed his father was often beaten up by the army on suspicion of being associated with the LTTE, and in one of these beatings, his [father was injured]. He told the delegate that his father fished during the civil war, during which they tortured everyone. The applicant also claimed that he was captured by the army and held in a bunker overnight because they also suspected he was linked to the LTTE, similar to the way the army and people in his village viewed his father. He believes that someone in his village may have tipped off the army about his father's suspected involvement in the LTTE,

which may have been the reason he was captured as he was not aware of any other reason he would be held.

12. The applicant said he did not know if his father was in the LTTE or not because he was very young. I note that the applicant was about [age] years old when his [father was injured] and he was forced to leave school and start work as a fisherman. He was aged [age] when he came to Australia and told the arrival interviewer that neither he or his family had been associated or involved with any political group. He was in his early twenties and in regular contact with his family at the time he referred to his father's suspected LTTE associations in his SHEV application. The applicant claimed at his SHEV interview that he is no longer in touch with his family in Sri Lanka and last had contact with them in 2018. He does not know if his mother, father and two sisters are still alive. When asked on two occasions why he has no contact and has stopped contact with his family, he simply said that he does not contact them and does not want to call them, together with a statement that he does not want to return to Sri Lanka. I note that at the time of his 2017 SHEV application, he specified he was in contact with his mother by phone once a month. Beyond those assertions to the delegate he gave no indication of a breakdown in the relationship with all his immediate family members, and gave no reasons (beyond not wanting to all them or return to Sri Lanka) why he was not in contact. The other evidence before me indicates that he was previously in regular contact before this time and did not suggest fractured familial relationships. His evidence to the delegate about stopping contact with his family in 2018 was not compelling. I am not satisfied that he has severed ties with his family in Sri Lanka. While I accept that the applicant was a minor at the time he claimed that his father was beaten, he is now in his twenties, and I find it difficult to believe he had not sought to find out more recently whether his father was in the LTTE, given that it is of some significance to his case.
13. DFAT¹ reports that many Tamils, particularly in the north and east, reported being monitored, harassed, or detained by security forces during the war, who also imputed LTTE support based on ethnicity. I accept that as a Tamil from the Jaffna area, the applicant's father may have been beaten by the army on occasions during the war for suspected LTTE associations, although I am not satisfied that the applicant's father was in the LTTE. Moreover, I have concerns about the applicant's claims that his [father was injured] by the army in 2012 and that the applicant himself was captured and held by the army because of their suspected LTTE associations.
14. Firstly, this claimed interest in the applicant occurred some three years after the conflict ended. He states that he believes a member of his village tipped off the army about his father's suspected LTTE involvement but there was no real evidence for this and the applicant himself professed no knowledge of the claimed involvement by his father in the LTTE. On his own evidence, he was released after one night and he has not claimed he was questioned about LTTE links.
15. Secondly, while the applicant referred to his father's [injury] and his own capture in the SHEV application, he presented a different version of events to the delegate. When asked by the delegate how his [father was injured], he said that the army had issued a "KB Order", had come to their home and taken them away and put them in a bunker. His [father was injured] at the same time that the applicant was tortured. In contrast, he described them as two separate events in his SHEV application. He also claimed in that application that he was captured by the army on the seashore and taken to the camp (rather than the army coming to his home with a

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

“KB Order”). The applicant has not provided any medical evidence about his father’s [injuries], which appear to be quite serious.

16. Furthermore, the applicant’s father has continued to live in Sri Lanka for many years since this claimed incident and has seemingly been of no further interest to the authorities. The applicant claimed that his parents have been visited by the navy since he has been in Australia but did not suggest that the authorities had any interest in his father at the time of that visit. The applicant himself also continued to live in Sri Lanka for a time after this incident. He did claim in his SHEV application that after his release, he was too afraid to go to sea. He said that he remained at home at all times to remain safe, until April 2013 when he left for Colombo and then Australia. At his SHEV interview he said he escaped to Colombo one night when working on the army camp, although when pressed about when this occurred, he could not remember and then said he had to wait for a safe time to leave. I note that both his Family Particulars document and fishing pass issued by the navy (as discussed further below) contain details of his residential address. It is not apparent why in these circumstances the authorities would not have been able to locate him at his home if he was a person of interest to them.
17. Since his arrival in Australia, the applicant has claimed that he had problems with the Sri Lankan army and navy because of his work as a fisherman (which commenced in 2012), and that he was made to work for the army without pay. In his arrival interview on 28 August 2013, he said that they had trouble obtaining fishing permits, and faced problems on a daily basis. When asked why the army would not give them the fishing permits, he told the interviewer it was an everyday problem and the army would beat them when they asked for a fishing pass. He did agree they were generally allowed to fish, but referred to the army and navy not letting him work and taking away his fishing pass for a week or two. The applicant also stated that the army and navy made him work for them for a whole day without pay. They would wait for them, take them and make them work. He was taken to a farm to cut down trees and make bunkers. If he did not listen, they beat him up. He said he had been beaten on a daily basis since he was [age] (ie around 2012).
18. The applicant also referred to having problems with the Sri Lankan army at his age assessment interview on 16 October 2013, where he suggested that the problems with the army had taken place in the year or so prior to his departure, and not earlier during the war. In particular, he stated that his decision to come to Australia was because the Sri Lankan army had become interested in him and made it increasingly difficult for him to work. He told the interviewers he had started working as a fisherman immediately after he finished school (as well as occasionally working on construction sites) and worked for nine months. On the applicant’s evidence, he finished school after he turned [age] in February 2012, which indicated these problems with the army had taken place after that time. He also referred to the Sri Lankan army having some control over the work of a fisherman.
19. In his SHEV application, he also claimed that all of their movements were restricted because they were Tamil and living under the control of the army. The army set times they could go fishing and further restricted those times. He also stated that on many occasions he was forced to work for the army, and helped with the construction of an army camp, which he believes was in and around May 2012, and about two months after he withdrew from school. In his SHEV application, he said he was beaten on some occasions during construction of the army camp, (rather than every day as he indicated in his arrival interview). The army were very intimidating and exerted their power over him as a young Tamil boy forced to work for them. The army also prevented him from going fishing so he could assist with the construction work.

20. At his SHEV interview, the delegate asked the applicant to tell him more about building the army camp. The applicant recounted that he lived in an area controlled by the army and navy, that “people” had to go and work for them whenever they want, and if you turn up late, the army and navy beat you with an [implement]. He did not know which year it had happened or for how long, even when the delegate asked specific and exploratory questions about these matters. Even when the delegate referred to the SHEV application statement that specified that it had happened in or around May 2012, the applicant acknowledged he may have said this in his statement but did not remember the timeframe. Later, when trying to ascertain the timeline of events and whether the applicant fled to Colombo one night after a day working in the army camp or if he stayed at home too afraid to go to sea until April 2013, the applicant responded: *“Don’t ask me about dates, I forget all of them”*.
21. I accept that the applicant may not have a precise recollection of when or for how long he was made to work for the army, but my concerns go beyond this. His description of these events lacked any real substance. Notwithstanding this, I accept that the applicant has consistently claimed he was made to work for the army. It is apparent from the country information that in many areas the military maintained control and influence over the Tamil people during the war and the years that followed, and that there was opportunity for the military to abuse its powers². I am willing to accept that the applicant was made to do some unpaid work for the army in 2012 after he left school and that he may have been beaten or threatened by the army at this time. I do not accept that it was a daily occurrence, as he appeared to initially suggest in his arrival interview.
22. In relation to his claim that the navy restricted his ability to fish, the country information³ refers to the regulation of local fisheries in the Northern province by the central government, and to the Navy managing fisheries in the north. It reports that Tamil fisherman were denied access to fishing banks far from the coastline and had to pay for licences that were geographically and temporally limited. According to the Landinfo, the main reasons Tamil fishermen were not granted concessions and franchises was because of their limited access to, and poor experience with, the bureaucracy. The Danish Immigration Service⁴ also reported some fisherman being beaten by the Navy for going fishing without permission in waters controlled by the Navy on the western coast of the Killinochi district.
23. Although the applicant spoke on arrival about the trouble faced in getting fishing passes, he was nonetheless able to produce a document of that description to the Department. Those statements on arrival appeared to be more general observations about difficulties experienced by Tamil fishermen in Sri Lanka. While I am willing to accept that some fishermen may have had trouble getting fishing permits, I am not satisfied this was true of the applicant. He provided a copy of a fishing pass with his SHEV application that was issued [in] October 2012 and was valid to [January] 2013. It contains a photograph of the applicant and his first name. The left hand side of the front of the fishing pass is partially cut off, but the typed words: “Lankan Navy” and “G Pass – Mandativu” is visible. There is a stamp from the Sri Lankan navy on the back of the pass. When asked at his SHEV interview whether he was ever issued with a

² Landinfo, “Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province”, 1 December 2012, CIS25286; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, 15 June 2017, OGC6E7028826; DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244; Danish Immigration Service, “Human Rights and Security Issues concerning Tamils in Sri Lanka”, Danish Immigration Service, 1 October 2010, CIS19345.

³ Landinfo, “Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province”, 1 December 2012, CIS25286.

⁴ Danish Immigration Service, “Human Rights and Security Issues concerning Tamils in Sri Lanka”, Danish Immigration Service, 1 October 2010, CIS19345.

fishing licence, the applicant agreed that he had a fisherman ID card issued by the army or navy and that he now remembered he had one “at the time”. He then gave a number of reasons why the fishing pass was not reliable. He said that because it was issued by the army and navy, the dates should not be relied upon and were not accurate but he did not elaborate on this. The delegate queried how the fishing pass was issued to him at a time when, on differing versions of his evidence, he was held in an army camp or in hiding at home or in Colombo at that time. The applicant responded that the card was just issued by the army (rather than the navy), and not the government. I am not satisfied that this of itself explains why the card was not legitimately issued. He also claimed that the army issued the fishing licence to everyone as a form of identification rather than as a fishing licence. He said he did not know if the dates were correct, and they might have sent it to him. He was adamant he did not apply for the licence and it was just issued to him voluntarily, for the reason that he “lived in that area during the problematic time”. In this way, he suggested that he had no control over the issue of the fishing pass and it was sent to him rather than being issued to him in person.

24. As the pass refers to the navy and contains a navy stamp, I am satisfied that it was issued to the applicant by the navy. I am also satisfied that is a fishing pass, given that it contains the last letter of “fishing” before the word “Pass”. I do not find the applicant’s explanations about the dates being unreliable at all convincing. I also do not accept that the fishing pass was automatically issued to him (and everyone in his community) as a form of identification, rather than a fishing licence, noting the information from DFAT⁵ that National Identity Cards (NIC) are the primary identification document in Sri Lanka and contain a unique number. While DFAT refers to other identification documents also being used, fishing licences are not amongst these. The country information does not indicate that fishing licences were issued instead of NIC, or issued more generally to those living in that area because of their residence. I am satisfied that the fishing pass was issued to him for the purposes of permitting him to work as a fisherman between October 2012 and January 2013. I accept that the applicant may have faced restrictions on occasion about where and when he could fish, and that his fishing pass was taken away for a week or two. I do not however accept that he was prevented from fishing on a daily basis.
25. The applicant claimed in SHEV application that since he has been Australia, “on one occasion” his parents told him the navy had been to their house to ask about his whereabouts, because he not gone to sea in a long time. His parents told the navy that he was missing, and they did not know where he was. His parents have not had further contact from the navy but feel they are being closely monitored or watched. It is quite possible that the navy enquired about the applicant’s whereabouts because as a fisherman he had not been to sea for an extended period. Although he states his parents believe they are closely monitored, the account of the visit itself does not suggest any nefarious purposes. Moreover it appears the navy have not visited his parents since that unspecified time. Further, while he said his parents’ believed they were being watched there appeared little, if anything to support that conclusion.
26. I accept that the applicant had some difficulties with the Sri Lankan army and navy in 2012, and that he was made to work in an army camp and beaten on occasions and faced restrictions on when and where he could fish. I also accept that the applicant’s father was beaten by the army because he was a Tamil from the Jaffna area during the war. Beyond this, I do not find the applicant’s evidence about his experiences in 2009, or about him and his father being persons of interest to the authorities since the end of conflict for their LTTE associations credible. I do not accept that he or his father were held in a bunker at an army camp or that his [was injured] in 2012. The applicant postulated that the cause of these incidents was suspicions over his

⁵ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244.

father's involvement in the LTTE but his evidence about his and his father's imputed LTTE associations was extremely scant, and I do not accept he was associated with the LTTE, or beyond his wartime experiences as a Tamil, was perceived to have links to the LTTE. He did not provide any documentary evidence about his father's [injuries], which on his account were sufficiently serious to stop his father from being able to work. His own claims of being targeted developed over time, and at times he appeared to project events from 2012 to other incidents said to have taken place in 2009. I do not accept this is attributable to simply having difficulty recalling dates. There were anomalies in the applicant's evidence about being captured and held overnight by the Sri Lankan army. The applicant continued to live in Sri Lanka without repercussion from the authorities until April 2013, which was some time after the claimed incidents. His family also continue to live in Sri Lanka without apparent difficulties. I am willing to accept that the navy may have been to his parent's house on one occasion to ask about his whereabouts in connection to his previous fishing activities. However, I am not satisfied that this other than a passing enquiry. I am not satisfied the applicant was otherwise of interest to the navy, or that they were pursuing him in any adverse way. I am also not satisfied that his parents were or are being watched or that they are of any interest to the authorities. I do not accept that the applicant or his father were of any interest to the authorities for imputed LTTE links when he departed the country or in the years following.

27. The applicant also claimed that since coming to Australia, he has attended every Hero's Day event in Sydney. According to his SHEV application, he has been living in Sydney since January 2015. The applicant has not provided any supporting evidence about his attendance at these Hero's Day events, which DFAT⁶ indicates commemorates those who died fighting for the LTTE, but in any event, he has not claimed that he was anything other than a mere attendee. I am willing to accept he may have attended the Hero's Day event on occasion since he has lived in Sydney.
28. Finally, I note the applicant was advised in a letter dated 14 March 2014 from the Department of Immigration and Border Protection that personal information about people who were in immigration detention on 31 January 2014 had been disclosed by the Department on its website. As the applicant was in immigration detention on that date, I accept his personal information was accessible online for a short period, and that he was subject to the Department's data breach. However, there is no evidence that the Sri Lankan authorities accessed the applicant's personal information, and I am not satisfied that they did.

Refugee assessment

29. 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

30. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

⁶ Ibid.

- 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.
31. I accept that the applicant is a Tamil from the Northern Province. I also accept that when he was aged [age], the applicant encountered some problems with the Sri Lankan army and navy who placed some restrictions on his ability to fish and that on a few occasions they made him work in an army camp for no pay and beat him. I accept that as a Tamil male from that area, his father was beaten by the army during the conflict, although I do not accept that the applicant was harmed by the army in 2009. I also do not accept that the applicant or his father were suspected as having LTTE associations in 2012 or were regarded as persons of interest, or that they were harmed or detained in 2012.
32. DFAT reports⁷ that there is a long history of targeting and marginalisation of minority Tamils by successive Sinhalese governments following independence from the British in 1948. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and detained by security forces during the war, and more Tamils were detained under the *Prevention of Terrorism Act (PTA)* than any other ethnic groups. The UN OISL report for the period 2002 to 2011 found frequent occurrences of extrajudicial killings, disappearances and kidnappings for ransom during the war, particularly in the north and east, which were attributed to both government forces, the LTTE and paramilitary groups.
33. There are reports that torture and mistreatment of Tamils has continued after the end of the civil war in 2009. Country information before me⁸ states that extrajudicial killings continued to occur, and that there have been alleged incidents of torture involving individuals suspected of LTTE involvement and of torture of Tamils between 2015 and 2017. In addition OHCHR reported it had continued to receive credible information about an unspecified number of cases of abduction, unlawful detention, torture and sexual violence by Sri Lanka security forces, which allegedly took place in 2016 to 2018⁹. There have also been ongoing complaints of marginalisation, with Tamils maintaining they have suffered longstanding systemic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures¹⁰. The UN Special Rapporteur¹¹ observed in 2018 that the Tamil community suffered from a pervasive and insidious form of stigmatisation, and

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

⁸ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; Freedom from Torture, "Too Little Change: Ongoing torture in security operations in Sri Lanka", 22 February 2019, 20190227113604; International Truth & Justice Project, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

⁹ United Nations Human Rights Council, "Promoting reconciliation, accountability and human rights in Sri Lanka", 8 February 2019, 20190311120409.

¹⁰ US Department of State, "Country Reports on Human Rights Practices for 2018 - Sri Lanka", 13 March 2019, 20190314103240.

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

were severely unrepresented in all institutions, particularly in the security sector and the judiciary. He also reported that the use of torture remained endemic and systemic for those arrested and detained on national security grounds under the PTA, and that the use of torture and ill-treatment to obtain a confession was routine practice.

34. DFAT has observed that members of the Tamil community have claimed that the authorities have continued to monitor public gatherings and protests in the north and east, practising targeted surveillance and questioning of individuals and groups¹². Country information¹³ indicates that this monitoring and surveillance is most likely to involve people who are associated with politically sensitive issues involving the war (including memorial events), activists and former or suspected former LTTE members. DFAT also reports that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE, and that some Tamils with imputed LTTE links continued to report police monitoring and harassment, although it is less extensive and more subtle than it used to be.
35. Nevertheless, the weight of the country information (including more recent reporting¹⁴) indicates that while there are some ongoing concerns about human rights abuses, torture and ill-treatment, they have reduced markedly over the last few years. I note that the alleged incidents of torture documented in the ITJP and Freedom from Torture reports above took place a number of years ago, and DFAT reported in 2019 that local sources were not aware of these specific alleged incidents of torture and were unable to verify their claims¹⁵. While noting the prevalence of human rights violations under the PTA, the Special Rapporteur welcomed the adoption by the Government of a “zero-tolerance policy towards torture and the appointment in 2016 of a committee to eradicate torture by the police¹⁶. Other information¹⁷ reports that mistreatment and torture by police is not ethnically based or endorsed by senior police. Overall, DFAT assesses that the risk of torture perpetrated by either the military, intelligence or police forces has decreased since the end of the war and is no longer state-sponsored, and that Sri Lankans face a low risk of mistreatment on a day-to-day basis. DFAT also indicates that the security situation has improved significantly since the end of the civil war, with the government maintaining effective control over the entire country, including Tamil populated areas. Travel is no longer restricted and roadblocks were removed in 2015. While some roadblocks were reintroduced after the 2019 Easter Bombings, those in the north (from where the applicant originates) no longer exist. The military continues to maintain a significant presence in the north, although most military personnel are confined to the Security Forces Cantonment on the Jaffna Peninsula and smaller surrounding military camps. DFAT reports that military involvement in civilian life has also decreased. DFAT also assesses that while they may be subject to monitoring, Tamils with links to the LTTE are generally able to live their lives in Sri Lanka without concern for their security due to their past LTTE associations, and that the day-to-day monitoring of people has decreased significantly in recent years. Furthermore, the UK Home Office¹⁸ reported that being of Tamil ethnicity would not in itself warrant international protection, and neither would a person who evidences past membership

¹² Ibid.

¹³ US Department of State, “Country Reports on Human Rights Practices for 2018 - Sri Lanka”, 13 March 2019, 20190314103240; DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244.

¹⁴ UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, 15 June 2017, OGC6E7028826; US Department of State, “Country Reports on Human Rights Practices for 2018 - Sri Lanka”, 13 March 2019, 20190314103240; DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244.

¹⁵ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244.

¹⁶ United Nations Human Rights Council, “Promoting reconciliation, accountability and human rights in Sri Lanka”, 8 February 2019, 20190311120409.

¹⁷ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244.

¹⁸ UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, 15 June 2017, OGC6E7028826.

or connection to the LTTE, unless they have or are perceived to have had a significant role in it or to be active in post-conflict Tamil separatism.

36. Similarly, it is apparent that steps have been taken in other areas to address Tamil disadvantage. USSD¹⁹ has reported that the government had a variety of ministries and presidentially appointed bodies designed to address the social and development needs of the Tamil minority and had implemented a number of confidence-building measures to address grievances of the Tamil community. DFAT's more recent report²⁰ indicates that Tamils face a low risk of official or societal discrimination based on ethnicity, including in their ability to access education, employment or housing. The prohibition on discrimination in the Constitution includes race, language and place of birth, and the Tamil language was granted official status alongside Sinhalese in 1987. Tamils make up 15.3 per cent of the population and are the second largest ethnic group in Sri Lanka, although they comprise 93.8 per cent of the Northern Province where the applicant is from. According to DFAT, some Tamils report discrimination in employment, particularly in relation to government jobs, and there are relatively few Tamil public servants in the north and east. Despite government incentives, the number of Tamil-speaking police officers and military personnel in the north and east remains small. Notwithstanding this, DFAT assesses there is no official discrimination on the basis of ethnicity in public sector employment and Tamil's under-representation is largely the result of language constraints and disrupted education because of the war.
37. The country information²¹ also indicates that attitudes to commemorative events and acknowledging past events have improved since the war. Tamils have been free to hold public ceremonies marking Great Hero's Day (which commemorates those who died fighting for the LTTE) since 2016. Although there are reports there is monitoring by the authorities, the atmosphere at war commemorations was described as "constructive" and Tamils were increasingly comfortable marking these events. There have also been a number of constitutional reforms and rehabilitation programs in Sri Lanka since 2015, such as the establishment of an Office of Missing Persons and an Office for Reparations and advances in relation to freedom of expression and assembly and the strengthening of independent commissions such as the Human Rights Commission, which has continued to work in an independent manner.
38. The overwhelming weight of the country information indicates that the situation has improved considerably for Tamils in the seven years since the applicant has been in Australia. When this was put to the applicant, together with information that the persons the authorities were interested in were high ranking former LTTE members and that the applicant did not fall within that category, he responded that the reports just showed that Sri Lanka was a good country, but that what was happening in the country was covered up. He also denied that he did not have a risk in Sri Lanka, or that things would not happen to him in the future. He said it was not true that Sri Lanka was good. It is true that some problems persist in Sri Lanka, and some concerns have been raised in some quarters by more recent political developments. As noted by the delegate, there was a change of government in November 2019, with the election of Gotabaya Rajapaksa (who served as defence secretary during the final phase of the civil war)

¹⁹ Ibid.

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

²¹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", 15 June 2017, OGC6E7028826; DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; United Nations Human Rights Council, "Promoting reconciliation, accountability and human rights in Sri Lanka", 8 February 2019, 20190311120409.

as President. Articles²² published around the time of his election referred to him running a strongly Sinhala nationalistic campaign, and to his strategy of militarising Sri Lanka by appointing former military cronies to key posts in state institutions and to crush opposition and suppress dissent. Human Rights Defenders, journalists, and trade union activists have expressed concern since the election about the collection of intelligence about them and some incidents of targeting were reported, as well as social media accounts being shut down. The information before me does not support that there has been a return to the practices of the previous Rajapaksa government during the war or that ordinary Tamils like the applicant have been targeted or are otherwise of interest under the new Rajapaksa government. The applicant has not provided any information to suggest otherwise. I accept that there are still monitoring and mistreatment of some Tamils, but that the information indicates that the risks relate to persons who are involved in political or separatist activities or have a significant role in the LTTE. I am not satisfied that the applicant is such a person. I accept that the applicant has attended some Hero's Day events in Australia (as he may do on return), which commemorate fallen LTTE fighters but I am not satisfied that such attendance will give rise to suspicions of political or separatist activities of a type that will attract any adverse attention. The evidence indicates that Sri Lankans are now permitted to attend public Hero's Day ceremonies, and that Tamils have been comfortable attending them notwithstanding the monitoring that occurred. I am not otherwise satisfied that the applicant has taken part in political or separatist activities, or that he has any links to the LTTE. I accept that the applicant had some difficulties with the Sri Lankan army and navy in 2012, but do not accept that either the applicant or his father were suspected of LTTE links after the war or were of any ongoing interest to the authorities or that there is a real chance the applicant will be so perceived on return and in the foreseeable future.

39. In relation to the applicant's claim about his ability to fish in Sri Lanka, DFAT²³ reports that the navy has interests in fishing and restricts access to some fishing areas. Local communities in the north have reported that military involvement in commercial enterprises undercuts local businesses and deprives civilians of employment opportunities, although the military claims these activities provide jobs for the local civilian population. While DFAT refers to some Muslim men in the north and east having been refused night travel passes, which has prevented them from fishing, it does not indicate that Hindu Tamils like the applicant face such restrictions. Having regard to this, and the country information, I am not satisfied that he would be unable to work as a fisherman if he returned to Sri Lanka if he wished to do so, that his fishing rights would be restricted such that he could not fish, or that his capacity to subsist would be threatened.
40. For all of these reasons, I am not satisfied that the applicant would face a real chance of harm in Sri Lanka as a Tamil fisherman from the North with his history and profile.
41. The applicant claimed that he left Sri Lanka by boat. He did not have a Sri Lankan passport. I accept that the applicant left Sri Lanka illegally and may be identified as an asylum seeker who left illegally by the Sri Lankan authorities when he returns. DFAT²⁴ states that the entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1948* (IE Act), which makes it an offence to depart Sri Lanka other than by an approved port of departure and without a valid passport. Returnees who depart irregularly by boat are considered to have committed an offence under the IE Act.

²² International Crisis Group (ICG), 'Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure', 18 November 2019, 20191119144914; International Truth and Justice Project, Journalists for Democracy in Sri Lanka, "Sri Lanka: and the crackdown begins", January 2020, 20200114142534.

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

²⁴ Ibid.

42. DFAT²⁵ reports that returnees are processed by a number of different government agencies at Colombo's International airport, who check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. Processing of returnees at the airport can take several hours, and returnees are processed in groups and unable to exit the airport until all returnees have been processed, although they can use the bathroom and to talk to each another during this time. Where returnees are travelling on temporary travel documents, police conduct an identity investigation, which often involves interviewing the returnee, contacting police in their claimed hometown as well as claimed neighbours and family, and checking criminal and court process. This process would identify someone trying to conceal a criminal or terrorist background or to avoid court orders or arrest warrants. DFAT states that all returnees are subject to these standard procedures, regardless of ethnicity or religion and understands that they are not mistreated during this process.
43. Where an illegal departure from Sri Lanka is suspected, DFAT²⁶ states that the person will be charged under the IE Act and photographs, fingerprints and statements will be taken. Police will conduct further enquiries about their activities while abroad if they are suspected to be former LTTE members. At the earliest available opportunity after investigations are completed, police transport those charged to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. If a magistrate is not available before this time (such as due to a weekend or public holiday), those charged may be detained for up to two days in an airport holding cell. DFAT is not aware of mistreatment of returnees during this process.
44. DFAT²⁷ reports that the penalties for leaving Sri Lanka illegally can include imprisonment of up to five years or a fine. However, information from the Attorney-General's Department, which is responsible for the conduct of prosecutions, indicates that no fare-paying passenger on a people smuggling venture (such as the applicant) has been given a custodial sentence for departing Sri Lanka illegally. (as distinct from facilitators or organisers). Fines are issued to fare-paying passengers to deter future illegal departures and well-placed sources told DFAT the fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163). A guilty plea will attract a fine, which can be paid in instalments, and the defendant is free to go. Where a returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member and where a guarantor is required, returnees may need to wait for the guarantor to come to court. The delegate invited the applicant to comment on the country information that the penalty for people who leave illegally is a fine, regardless of ethnicity and that it did not appear that such people would be subject to serious harm on return. The applicant responded by asking how the delegate could tell him that there is no risk of harm to him in Sri Lanka. He did not address the specific information put to him.
45. I accept that as a person who departed Sri Lanka without a passport, it is very likely that the applicant will be charged under the IE Act for illegal departure and face court action. I am not satisfied that the applicant will otherwise be a person of interest to the Sri Lankan authorities on his return, including once he returns to his community. I am satisfied that the applicant was a passenger on the boat, rather than a facilitator or organiser, and that he will be treated accordingly. I accept that the applicant may be held at the airport, but I am not satisfied that there is a real chance that this would be for any more than a brief period, or that he would be

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

mistreated during this process. I accept that as a consequence of him having departed illegally the applicant may have to pay a modest fine. It is possible, depending upon his plea, that he may face additional processes outlined above. I am not satisfied however that these processes and penalties involved amount to serious harm in this case. Furthermore, and in any event, the evidence before me does not suggest that the IE Act, under which these processes and penalties are conducted is discriminatory on its face, or that it is applied or enforced in a discriminatory fashion. I am not satisfied that the applicant faces a real chance of persecution as a result of his unlawful departure.

46. Moreover, I am not satisfied that there is a real chance that the applicant will face serious harm as a returning Tamil asylum seeker. According to DFAT²⁸, Sri Lankans living overseas have been encouraged all to return home by their government, and many Tamil returnees have chosen to return to the north, either because (as for the applicant) it is their place of origin and they have existing family links, or because of the relatively lower cost of living compared to the south. DFAT assesses that refugees and returnees may face practical issues reintegrating on return, such as with finding employment and housing, although they do not generally experience societal discrimination. Some returning asylum seekers have reported social stigma from their communities on return, including for receiving financial reintegration assistance, although DFAT notes this support is minimal.
47. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis although some, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities. While DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres, it is not aware of returnees being treated in such a way that endangers their safety and security. In particular, DFAT states that Tamils who returned to the Northern Province after failing to secure asylum in Australia reported they had no protection concerns and had not experienced harassment by the authorities or received monitoring visits.
48. At his SHEV interview, the applicant claimed that the authorities would not show interest in him immediately on his return, but will come after him after people in the community slowly inform against him. For the reasons given above, I am not satisfied that the authorities have any interest in the applicant, and neither am I satisfied that there is any reason for community members to inform on him to the authorities.
49. The applicant lived his whole life in Jaffna before coming to Australia and at the time of his 2017 SHEV application, his family continued to reside there. I am not satisfied that the applicant has severed contact with his family in Jaffna as claimed. I note that he attended school until he was [age], and worked as a fisherman for around a year before coming to Australia, where he has also been employed in the fish industry. The applicant has not claimed that he would have problems finding employment or accommodation on his return and I am not satisfied that he would be unable to do so. It is possible that he may face some social stigma as a returning asylum seeker although DFAT does not seem to suggest that this is widespread. While monitoring of some individuals has continued to occur, I am not satisfied that there is a real chance the applicant, in light of his profile and history, would be one of those. I am not satisfied that the applicant would face a real chance of serious harm as a returning asylum seeker.
50. I accept that the applicant's personal information including his name, date of birth, nationality, gender and details about his detention was inadvertently published on the Department of

²⁸ Ibid.

Immigration and Border Protection website in February 2014. As the applicant was advised in the letter of 14 March 2014, the information that was disclosed did not reveal any information about the applicant's protection claims, health information or contact details. There is no evidence before me to suggest the Sri Lankan authorities were aware of the data breach or were able to access the applicant's personal information and I am not satisfied that they have. Even if this information has come to the attention of the Sri Lankan authorities, I am not satisfied it would reveal much more than some biographical details, and the fact that he was immigration detention. It is possible that it may be inferred from this that he had sought or was seeking asylum but for the reasons explained above, but I am not satisfied that gives rise to a real chance of any serious harm.

51. I am not satisfied that the applicant holds a well-founded fear of persecution.

Refugee: conclusion

52. 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

53. 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

54. 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.
55. 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.
56. I accept that the applicant is very likely to be investigated and charged under the IE Act for leaving Sri Lanka illegally, and will be subject to the associated processes and penalties. However, I am not satisfied that the processes and penalties he may face amounts to significant harm. I am not satisfied there is a real risk of the death penalty, arbitrary deprivation of life or torture, or that there is an intention to inflict severe pain and suffering, pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation, such that it would amount to cruel or inhumane treatment or degrading treatment or punishment as defined in the Act.

57. I also accept that the applicant may face some social stigma on his return, although I am not satisfied that this will involve the level of pain, suffering or humiliation contemplated in the definitions of cruel, inhumane or degrading treatment or punishment, or torture or that there is otherwise a real risk of him suffering significant harm. I am also not satisfied that as a returning Tamil asylum seeker, the applicant faces a real risk of the death penalty being carried out or of him being arbitrarily deprived of his life. Nor am I satisfied that this, taken together with the processes and penalties he may face a person who departed Sri Lanka unlawfully, amounts to significant harm.
58. Beyond this, I have concluded that there is a real chance of the applicant experiencing any harm in Sri Lanka for any other reason. The Federal Court has found that real chance in the refugee context has the same standard as real risk in a complementary protection assessment²⁹. Having regard to the country information and findings above, I find that there is no real risk that the applicant will suffer significant harm.

Complementary protection: conclusion

59. 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.

²⁹ *MIAC v SZQRB* (2013) 210 FCR 505.

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.