



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08736

Date and time of decision: 10 December 2020 14:19:00
F Kerr, 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 Hindu Tamil from Sri Lanka. He arrived in Australia as an unauthorised maritime arrival [in] April 2013. On 25 May 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 28 October 2020 a delegate of the Minister for Home Affairs (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant's SHEV interview was conducted by telephone. The interview was interrupted at one stage due to technical issues; the applicant was also asked on one occasion whether he could find a quieter spot and to talk more directly into the phone as the delegate had trouble hearing him. Additionally, the interpreter sometimes had to clarify the applicant's answers or ask him to repeat what he'd just said. Nonetheless, it is not apparent that the applicant had any problem understanding the delegate's questions and making himself understood. The applicant was asked at the end of his interview if he had put forward all his claims; he said he had mentioned everything, thanked the Australian government and said that he enjoys living in Australia.
4. On 23 November 2020 the IAA received an unsigned letter from the applicant dated 21 November 2020 (the November letter). The letter makes some submissions about conditions in Sri Lanka, particularly for Tamils, since the election of Gotabaya Rajapaksa as President and provides reasons why new information should be accepted by the IAA. To that extent, I do not consider this to constitute new information and I have had regard to it.
5. The majority of the November letter, however, comprises information about the extent of his and his family's involvement over an extended period of time with the Liberation Tigers of Tamil Eelam (LTTE) including the very serious claims that on two occasions he was detained and tortured and on one occasion sexually assaulted because of his involvement with the LTTE (the LTTE claims). The November letter also refers to a number of other matters which the applicant says his mother informed him of "last week" and which appear to relate to these new claims. They concern a visit to his family home by the CID, threats and violence to his family, and threats that the CID would continue to come until they could arrest him.
6. The LTTE claims and the claims of recent visits and threats are new information and I am not permitted to consider them unless the preconditions set out in s.473DD are met.
7. In relation to the events which are said to have occurred before the applicant left Sri Lanka in April 2013, the applicant did not raise these claims before the delegate notwithstanding that they involve events which occurred before he left Sri Lanka in April 2013, in some cases, by many years. It is apparent that the applicant was assisted in lodging his application by specialist refugee advisors. On 17 August 2020, the applicant was sent an invitation to attend the SHEV interview, by telephone. The invitation was accompanied by a document titled 'Important information about your Protection visa interview', in English and Tamil. The document outlines the purpose of the interview, and specifies how important it is that applicants present all claims for protection during the interview, and provide all information in support, and that there may

not be another opportunity to raise new claims if the application is refused. The applicant's SHEV interview was conducted on 9 September 2020. The applicant indicated he had read and understood the information provided and stated that it was in Tamil and "he had gone through that". The delegate stressed the importance of the applicant providing all his information and evidence in support during his interview and he was offered more than one opportunity during the interview to raise any additional claims. Some six weeks elapsed before the delegate made her decision. On referral to the IAA, the applicant was provided with an information sheet about the IAA's review function and processes.

8. An explanation has been provided in the November letter that he feared disclosing the information as he was told when he arrived (by whom it is not clear) not to mention his involvement with the LTTE as the Australian government would deport him with an immigration officer and he would be handed over to the Sri Lankan authorities with all his personal details; he feared being either killed or sent to prison permanently.
9. I accept that someone with the kind of involvement with the LTTE that the applicant is now claiming may initially be distrustful in encountering a foreign government and may be afraid to divulge that information for fear of being deported. However, I do not accept that this fear would persist some seven years after the applicant arrived and after having sought and obtained specialist assistance in lodging his application for protection, as well as receiving assurances written and oral (information sheet and SHEV interview) about the confidentiality of the protection process. At the SHEV interview, in addition to being told that if his application was refused, he may not have another opportunity to raise new claims he was specifically told that the SHEV interview was an opportunity for him to provide any new claims he had. He was also asked if there was anything in his application he wanted to correct; he said no. Not only has the applicant failed to raise these very significant new claims before, but he has not explained what has changed, including since his SHEV interview was conducted, such that he no longer fears disclosing his LTTE involvement.
10. Moreover, in my view, a number of the new facts referred to in the November letter and which the applicant wants the IAA to have regard to could readily have been disclosed by the applicant without implicating himself and his involvement with the LTTE, for example, his father's and uncle's fundraising work for the LTTE, his father's torture by the authorities, his brother's time serving with the LTTE, his friend A's involvement with the LTTE, or even that he himself was a victim of the LTTE (having been kidnapped) rather than willingly actively involved. I do not consider it credible that the applicant would fail to mention any of these matters previously including in his SHEV interview when he told the delegate that he had been required to attend combat training by the LTTE (but didn't because he has asthma) and that the authorities would consider him of interest because he lived in an LTTE controlled area. Overall, I do not accept his explanation and I am not satisfied that s.473DD(b)(i) is met.
11. Having regard to the nature of the claims themselves, the information provided in the statement is limited to a number of broad generalisations which contain little in the way of meaningful detail and in my view, amount to little more than bare assertions. The applicant has not provided corroborating evidence about any of these claims which extend over many years and I do not consider it at all credible that, in the circumstances of this case, these matters would not have been raised until now (after the delegate refused the application) if they had any basis in fact; in the circumstances, the information is, in my view, not capable of being believed. In reaching this decision I have considered the other new information provided but for the reasons discussed below, I am of the view that it does not assist. The applicant has not satisfied me that the new information which pre-dates the delegate's decision could not have been provided to the delegate before the decision was made, or that the information is credible: s.473DD(b).

12. As to the other matters which the applicant says his mother informed him of “last week” concerning a visit to his family home by the CID, threats and violence to his family, and threats that the CID would continue to come until they could arrest him, this information concerns events that are said to have occurred after the delegate’s decision and on that basis, I am satisfied it could not have been provided to the delegate before she made her decision: s.473DD(b)(i).
13. In considering whether the claims which post-date the delegate’s decision constitute credible personal information which was not previously known and, had it been known, may have affected the consideration of his claims, I accept that the information is personal in the relevant sense and that, if true, it may have affected the consideration of the applicant’s claims in that it would tend to indicate that the applicant is a person of adverse interest to the authorities such that should he return to Sri Lanka there is a real chance or real risk of his suffering serious or significant harm. I do not, however, consider it credible in the circumstances. The applicant has not explained what the claimed visits to his family by the CID and paramilitaries were about. The inference appears to be that they are connected to the LTTE claims which, as discussed above, are lacking in meaningful detail and amount to little more than bare assertions, with little detail and no supporting evidence. I do not consider credible the claims of recent visits to his family which, I infer, are connected to the LTTE claims. This information therefore does not meet s.473DD(b)(ii).
14. In considering whether there are exceptional circumstances to justify considering the new information, although some of the new information meets s.473DD(b)(i), I have found none of the new information to be at all credible and I am not satisfied there are exceptional circumstances to justify considering it: s.473DD(a).

Applicant’s claims for protection

15. The applicant’s claims can be summarised as follows:
- He was born [in] the Batticaloa District, in the Eastern Province of Sri Lanka, an area formerly controlled by the Liberation Tigers of Tamil Eelam (LTTE).
 - In around 2000, the LTTE demanded that one member of his family join the LTTE. His family refused and moved to another area of Batticaloa and the LTTE did not try to recruit him again.
 - In about May 2009, he guaranteed a loan involving two friends. He borrowed money from V and lent it to another friend S. Three months after receiving the money, S left the country leaving the applicant responsible for repaying the loan.
 - V asked him to repay the loan as guarantor. The applicant told him he couldn’t. V sued the applicant for the full amount of the loan. He was sent letters between May and August 2009 to attend a court hearing but they were sent to his home address. He did not receive them because he usually stayed at the shop where he worked.
 - Because he didn’t respond, in October 2010, the CID arrested him at his workplace. He was imprisoned in [Jail 1] for three months. He was beaten once when the officers were under the influence of alcohol. After three months he was released on bail on the condition that he did not leave the country.

- In April 2011, the court ordered him to repay the debt in monthly repayments of [Amount 1] rupees. He began paying the court ordered instalments but stopped making the full repayments after two or three months. He made partial payments and eventually, he stopped his repayments altogether. In 2012, the CID arrested him again for failing to make the payments and they confiscated his national identity card (NIC).
 - [In] August 2016 his mother was asked by the court to tell him to appear in court. She was asked again to tell him to appear by [December] 2016. They have said that his jail sentence will be doubled if he doesn't return which means he will spend four years in jail. He cannot afford to make the repayments required of him.
 - He fears he will be subjected to serious harm including being arrested and jailed for four years, and tortured in custody. He believes his Tamil ethnicity makes it more likely he will be mistreated by the authorities in custody.
16. He made the following additional claims in his SHEV interview: he was required by the LTTE to undergo compulsory combat training but didn't go because he's asthmatic; and he'd twice unsuccessfully attempted illegal departures from Sri Lanka, been caught by the Sri Lankan navy (SLN) and been jailed, then released on payment of bail monies by his mother.

Refugee assessment

17. 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

18. 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.
19. The applicant has provided documents which support his claims as to his identity and nationality including a copy of his birth certificate and a copy of his NIC, issued [in] January 2010 (which he told the delegate he'd taken in order to obtain a mobile phone). Based on this documentary

evidence which support the claims he has consistently made orally, I am satisfied he is a Tamil Hindu from the Batticaloa district in the Eastern Province of Sri Lanka. I am satisfied that he is a national of Sri Lanka and no other; Sri Lanka is the receiving country for the purposes of the Act.

20. Since arriving in Australia, the applicant has consistently claimed in both his SHEV application and at the entry interview that he has an outstanding legal case in Sri Lanka because he borrowed money from a friend and had trouble repaying it.
21. In his SHEV interview he made the new claim that he had twice been intercepted by the Sri Lankan Navy (SLN) attempting to flee Sri Lanka illegally on a boat. He told the delegate in his SHEV interview that this meant that he has three outstanding cases at court – the debt matter and two illegal departures. For the reasons that follow, I do not accept a number of these claims.
22. In regard to the debt matter, in his written SHEV statement he said that after he failed to respond to the court letters in 2009, he was arrested by the CID in October 2010 and jailed for three months; he was beaten once while in [Jail 1] when the officers were under the influence of alcohol; this was on a Sunday at the start of his sentence. At the SHEV interview he said that during the journey from Negombo to Batticaloa the police questioned him and came to know about his case; they were angry he cheated and beat him (rather than when he was in jail). The delegate asked what happened when he was imprisoned for three months. He said he had to clean the toilets and when asked if anyone tried to harm him in jail, he said only that his cellmates had asked him for the details. The delegate then asked if anything else had happened to him in prison from the authorities. He said no but that after he was beaten, he was told Human Rights would approach him but he shouldn't reveal to them what happened to him. In assessing his evidence, I conclude he has been broadly consistent about being detained for three months in [Jail 1] in relation to an outstanding debt but his evidence as to the claimed beating has differed between his accounts.
23. I have a number of other concerns with his evidence about this matter. He says he guaranteed the money for his friend, S, in about May 2009 and after about three months he became responsible for the loan because S left Sri Lanka, which puts it around August 2009. The suggestion in his evidence that letters asking him to attend a court hearing were sent to his home between May and August 2009, that is, at least in the earlier date range, before he claims he became responsible for repaying the loan. Relatedly, the applicant says that three letters were sent in that period (May and August 2009) but that he didn't see the letters because he only went home every three or four months. I do not consider it plausible that if letters from a court were sent to the applicant's home over a period of around four months, his family members would not have taken steps to alert him to that fact. Moreover, on his evidence he was not arrested until October 2010 and I consider it highly unlikely that over that period when he would occasionally visit his home, he would never have seen the letters, or at least have become aware some letters had been sent to him. I have considered the possibility that the reference to the letters being sent between May and August 2009 is a typographical error and they were in fact sent between May and August 2010. In any case, the applicant has not produced any evidence of these letters.
24. In his SHEV statement he said he was released from jail on bail after three months (around January 2011) on condition he didn't leave the country. A decision was made in April 2011 by the court that he had to pay back the amount in monthly repayments of [Amount 1] rupees. He said he began paying the court ordered instalments for two or three months then only made partial payments then stopped altogether. He was then arrested again in 2012 when the CID confiscated his NIC. In 2016 his mother was told twice (August and December) by the court he had to attend or his jail sentence will be doubled.

25. In his SHEV interview he said that one of the conditions of his bail when he was released in January 2011 was that he should pay the debt in monthly instalments and if he failed to, he would go to jail for two years. He said he paid for a year but then stopped and this resulted in his further arrest by the CID in 2012. He said that a friend bailed him out but there were no conditions attached to his bail, although he was advised to pay the full instalment amount. He said he paid what he could with the help of his mother but couldn't remember when he stopped making the payments. In his SHEV statement he did not refer to making any further payments after his arrest in 2012. No documentary evidence of these matters has been provided.
26. He made a number of new claims in his SHEV interview including that he was jailed for four days when he was arrested in 2012 and that in September 2013 further court documents were issued which show he is currently wanted. The delegate asked whether, since he had arrived in Australia, there had been any contact from the authorities in regard to that court order. He said that his mother and siblings had moved to a different address so the authorities may not know their new location. It wasn't until he was prompted by the delegate that he referred to the claim in his SHEV statement that the court contacted his mother twice in 2016 to tell him he had to appear. He said local police had visited his mother's home and passed on the message that she had to attend court; there was no paperwork or evidence. He also made the significant new claim that because his mother had posted bail for him and he had left the country, somebody then had to bail out his mother and she spent three hours in custody while this happened. He did not claim that anything had happened to the friend he said had bailed him out more recently in 2012. Again, no corroborative evidence has been provided to support these claims.
27. I do not consider it credible that having been released from jail in 2011 subject to the condition he pay the debt in instalments or face jail for two years, that he would subsequently be arrested in 2012 for failing to meet the conditions of his release (to make the repayments) but then be released with no conditions attached, other than simply an advice that he repay the instalments as directed. In this context, the claim that four years later in 2016 his mother faced legal problems because she posted bail for him in 2011 and that she was told that his jail sentence will be doubled is difficult to accept. I note the delegate accepted that a doubling of his prison term would be the case under Ordinance No 405 of the *Sri Lankan Penal Code*. Having reviewed this provision, it is not apparent to me that this is the case.
28. On a number of occasions throughout his SHEV interview, the applicant was asked if he had evidence of these matters, including that he would be subject to a double sentence if he doesn't return. He said there was no evidence that he had been imprisoned for failing to attend a court hearing but he has court letters. He said he had evidence that if he failed to pay the debt in monthly instalments as ordered by the court, he would go to jail for two or more years and agreed to provide that evidence along with the court order.
29. In relation to the previous attempts to flee Sri Lanka, the applicant said in his SHEV interview that the first time he was arrested by the SLN, he thinks it was on a Sunday, and was questioned by the officers about the reason for his journey. He said they were drunk and they took a harsh approach to him. When the delegate asked what he meant, he referred to falling asleep during processing and as punishment having to stand for 15 minutes with a big rock on his head. He said that on the first occasion he was kept in [Jail 2] for a week before being released by a court [in] March 2012 after his mother paid a fine to release him. Later in his interview, he said the amount paid [was] in fact bail, paid for by his mother.
30. The second time he tried to leave was in the latter part of March 2013. He said on that occasion he was taken to [Jail 1] and was also released that time on bail; he gave a different name and ID number to escape from them or he would have been kept for six months in jail.

31. The delegate again asked whether he had any evidence of these matters. He said he had court letters, including one from July this year for him to appear in court; his mother went to court. He was asked if he could send the documents as well as translations and he agreed to do so.
32. Despite indicating several times in his SHEV interview that he had a number of court documents evidencing all of these matters and that he would provide them to the delegate, including court letters and English translations, while large parts are in English, much of that material is virtually indecipherable. On 17 September 2020, the applicant was asked by the delegate to produce English translations for the documents he provided. As at the date of this decision, the applicant has not provided the requested English translations for some of the documents and it is not clear on their face, nor has he explained, which of the documents provided relates to which of the court cases.
33. One of the documents provided appears to be a document issued by the Magistrates Court in Batticaloa to the Department of Immigration & Emigration indicating the Court has ordered the suspect '[the applicant]' to be arrested, produced in court, and prevented from leaving the country. The document is dated [June] 2010 and signed by the Court Registrar.
34. I have some concerns about this document. Firstly, the case number appears to have been amended by hand. Secondly, it pre-dates the time the applicant says he became responsible for the loan. It is difficult to understand why an arrest warrant would have been issued around two months before the applicant says he left the country so he, the applicant, became responsible for repaying the loan. Thirdly, there is nothing on the face of the document which indicates the reason why there was an order for the applicant's arrest, except perhaps an indirect one by way of the file reference. Finally, he claims his previous illegal departures were in 2012 and 2013. For these reasons I place no weight on this letter as evidence either that the applicant was subject to an arrest warrant (or travel ban) for non-payment of a debt or that he has outstanding cases against him for previous illegal departures.
35. Another set of documents range in dates (to the best I am able to discern) from [June] 2010 to [May] 2013. Each separate page comprises a series of handwritten notes with multiple dates, some in English, some in what appears to be a Sri Lankan language; as the delegate noted, to the extent there is some English content it is, for the most part, illegible. The applicant has not provided translations for the content not in English nor has he individually identified what each of the documents relates to and what it contains; the only explanation for what they show is what he said in his SHEV interview. To the extent I am able to make out their content, one is headed "Minute Paper", one bears a notation at the top "Magistrate's Court", others do not have any heading; there are wet stamps on some pages but they are illegible; the one headed "Magistrate's Court" refers to a summons issued possibly [in] September 2012, although that is not clear nor is it clear to whom it was issued; a name appears in some other notes which may be the applicant's; some figures (50,000, 1 million) are also mentioned. I acknowledge that the applicant has indicated in very broad terms what these documents relate to but as presented, I consider them of limited corroborative value.
36. A further three documents were provided with 2020 dates bearing wet stamps from the magistrate's court in [Town 2] (the 2020 documents). The applicant provided these under cover of an email in which he stated "we attached more document warrant issued against me we paid RS [amount] to the court we attached the receipt". One is a photocopy of a cash-receipt form filled out by hand; the other two are handwritten notes in English; the applicant's name does not appear in any of the documents. The cash receipt does seem to refer to a fine (and references a case number) which may be a receipt for the amount ordered in another of the 2020 documents, (although it uses different terminology and refers to both a bond and surety).

The third 2020 document also refers to payments of lesser amounts. However, from the face of that document I do not accept it relates to him.

37. In his SHEV interview, the applicant said a warrant had been issued against him on [date] July 2020 in relation to his arrest on the second occasion he tried to leave Sri Lanka illegally and that he was expecting the documents in a parcel from his mother. The 2020 documents may be the ones he referred to in his SHEV interview. However, none of the 2020 documents, on their face, appears to be a warrant, nor does the applicant's name and any charges which he faces appear on any of them.
38. It is clear that one of the 2020 documents is a receipt in the amount of RS [amount] the name of the person from whom the payment was received bears some resemblance to that of his mother's. I also note that the reason stated on the cash receipt appears as "Being fine in case no. [Number]". This could be taken to indicate that the amount paid was to discharge a fine for an unidentified matter which seems to be what the applicant is saying in the covering email. However, in the SHEV interview he did not claim that his mother had been to court since 2016 on his behalf and paid a fine, only that a warrant had been issued recently ([Date] July 2020) which his mother had told him about. The first of the 2020 documents (which certifies that the following pages are certified copies of documents filed in a case in the Magistrate's Court of [Town 2]) bears two different dates. One date (top of the page) corresponds with the date on the cash receipt: [date] July 2020; however, the note underneath (referring to both a bond and surety and which bears the notation "mag.sig") appears to indicate that surety of [amount] was paid [in] August 2020, some two weeks later than the date on the cash receipt. I also note that the case number in the first document is similar, but not identical, to the one on the receipt. Further, the 2020 documents themselves, while they bear a wet stamp, are handwritten and do not otherwise bear any official notation, seal or heading. Noting these matters and the prevalence of document fraud in Sri Lanka¹ I am not satisfied the documents are genuine.
39. I am not satisfied on the evidence before me that an arrest warrant was issued for the applicant on [date] July 2020 and that if he goes back he'll be arrested.
40. In summary, I do not accept that there are three outstanding court cases against the applicant.
41. In relation to the debt matter, given the issues discussed above with his evidence about this matter I have considerable concerns about this claim. I note, however, that he has been consistent about the existence of the debt and his failure to maintain paying the required repayments, resulting in his detention for three months (October 2010 to January 2011) for failing to attend a court hearing in relation to the debt matter. I have also taken into account the documents provided but, as discussed above, I consider them of limited corroborative value. Overall, I accept that the applicant did agree to guarantee a loan for a friend and that court action was taken against him for repayment. However, in view of the matters discussed above and on the evidence before me, I am not satisfied the debt matter is unresolved, that he is required to attend court because of it or that he faces up to four years jail on the debt-related matter. Nor do I accept that the CID confiscated his NIC in 2012.
42. In relation to his claim to have twice previously attempted to depart Sri Lanka illegally, I note the applicant said in his written SHEV statement that it is only a summary of his claims for protection, not an exhaustive statement of what has happened to him in the past and that he will provide further information during his interview. Nonetheless, I find it very hard to accept that he would

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

omit from his SHEV statement such a significant matter as two outstanding criminal cases against him for illegal departures. On the evidence before me, I am not satisfied that he made two previous attempts at illegal departure for which he was arrested. It follows that I am not satisfied that the applicant has two outstanding cases against him in Sri Lanka in relation to two previous attempts in 2012 and 2013 to leave Sri Lanka illegally or that there is a real risk of legal action (arrest, jail) being taken against him should he return because of two previous attempts to depart Sri Lanka illegally.

Tamil from an LTTE controlled area

43. The applicant has made different claims about attempts by the LTTE to recruit him. In his written SHEV statement he said that in 2000 the LTTE called his family and demanded that one person from the family join; his parents refused and moved to another area of Batticaloa because they were scared the applicant would be the one they tried to recruit as his two older brothers were in Colombo at the time; after they moved the LTTE did not try to recruit him again.
44. In his SHEV interview he said the LTTE did try to recruit him and he had to go for combat training but didn't go because he was asthmatic. He also said his mother was harassed by the LTTE that at least one person from the family should join; he did not give any date for this.
45. It is uncontroversial that the LTTE was supported by both voluntary and forced recruitment of Tamils, including children². I note from his SHEV application form that the applicant was living in Colombo from 1995 to 2002, that is, at the time he claims his family was approached by the LTTE in Batticaloa; he then lived [in] North Central Province from 2002 until 2010. Given this and the changes in his evidence, I am not satisfied the LTTE did at any time try to recruit him, although I accept that forcible recruitment by the LTTE would have been a concern for his parents, at least in relation to those of their children who remained living in the then LTTE controlled Eastern Province.
46. The applicant maintains that because he lived in an LTTE controlled area he would be considered of interest to the authorities.
47. There is ample credible information from a number of authoritative sources about the suspicion which attached to Tamil people, particularly in the east and north which were areas controlled by the LTTE, during and after the conflict. Many Tamils complained of being monitored, harassed, arrested or detained by security forces both during and after the conflict, with LTTE support imputed on the basis of ethnicity³. A report from the UN covering 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, largely attributed to government forces, the LTTE and paramilitary groups⁴.
48. The country information before me indicates a significant shift in country conditions since the end of the war and in particular, since the applicant left Sri Lanka seven years ago. The Sri Lankan Government exercises effective control over the entire country, including Tamil-populated areas, and the security situation in those provinces has improved greatly⁵.
49. While some monitoring by the authorities continues to occur, particularly in relation to sensitive issues, Tamils have been free to hold public ceremonies marking Maaveerar Naal (Great Heroes'

² DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

³ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

⁴ DFAT "DAFT Country Information Report Sri Lanka" 4 November 2019 20191104135244

⁵ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

Day) since 2016. Maaveerar Naal commemorates those who died fighting for the LTTE. A local source told DFAT the atmosphere at war commemorations was 'constructive' and Tamils were increasingly comfortable marking such events⁶.

50. The applicant claims that abductions, harassment and intimidation are continuing against Tamils and the incidents aren't reported as journalists and the media fear they would be persecuted and the new President Gotabaya Rajapaksa uses his power to control from publication that Tamils are still being persecuted. He also claims the President has ordered the authorities to arrest, detain and even kill former LTTE militants still are large; these murders by the security officers are not known to the world only locals, who are too afraid to speak up for fear of being punished under the *Prevention of Terrorism Act (PTA)* which the government continues to use to arrest, intimidate and kill Tamils to prevent the LTTE reforming.
51. There is no indication in the information before me that Tamils are any longer subject to the type of oppressive monitoring, harassment and worse than was the case during and immediately after the war. There have been no recent reports of white van abductions and while there continue to be reports of torture in police detention, these reports appear to relate to sensitive cases where there is pressure to make an arrest; reports of incidents of torture generally have greatly decreased; where claimed, the Human Rights Commission is able to intervene immediately, provide protection, and raise concerns which has provided a degree of relief to people⁷.
52. DFAT reported in 2019 that the Sri Lankan authorities were not actively looking for non-rehabilitated former LTTE members⁸. The applicant has not provided evidence that since the election of G Rajapaksa as President, this situation has changed or that the new President has issued orders to kill former LTTE militants still at large. Nor is there any reference to such an order by the President in the most recent country information before me which post-dates his election. In any case, the applicant is not a former member of the LTTE, nor is he associated with politically-sensitive issues related to the war, or involved in post-conflict Tamil separatism which can result in possible monitoring by the authorities⁹.
53. I accept that some concerns have been raised about media freedom post the G Rajapaksa election. The European Union Election Observation Mission reported that journalists at three online outlets were questioned for lengthy periods by police in the immediate post-election period; there are also reports that social media is monitored¹⁰. However, the country information does not support that the President uses his powers to control publication so that incidents of persecution of Tamils go unreported. Nor do I accept that if abductions, harassment and intimidation against Tamils were continuing that these matters would go unreported in the international community. The UK Home Office (the most recent source of credible, authoritative country information before me) uses multiple, reliable, in-country sources in compiling its reports to ensure that the information is accurate, balanced and corroborative so that a complete and up-to-date picture is provided as at the date of publication¹¹. Its 2020 report does

⁶ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

⁷ UK Home Office "Report of a Home Office Fact-finding mission to Sri Lanka" 20 January 2020 20200123162928

⁸ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

⁹ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244; UK Home Office "Country Policy and Information Note Sri Lanka: Tamil Separatism" Version 6, May 2020, 20200527172009

¹⁰ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil Separatism" Version 6, May 2020, 20200527172009

¹¹ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil Separatism" Version 6, May 2020, 20200527172009

not indicate that persecution against Tamils continues and the applicant has not provided any evidence to support his assertion that it does.

54. It is the case that the PTA remains in force despite commitments to abolish it; it was, however used only sporadically¹² between 2016 and April 2019¹³ and the country information before me does not support its recent use against Tamils generally. The secrecy that previously surrounded the PTA is no longer the case; places of detention must be published and there are no longer secret places of detention. Where someone is arrested under PTA it is a mandatory requirement that the Human Rights Commission is informed; family members would also be notified¹⁴. Commenting on the Sri Lankan government's failure to repeal the PTA, the Office of the High Commissioner for Human Rights (OHCHR) notes that the Tamil community remains stigmatised and disenfranchised¹⁵. The most recent country information does not, however, support that the PTA is still used to arrest, intimidate and kill Tamils to prevent the LTTE regrouping, the applicant has not provided evidence of this, and I do not accept that this is happening.
55. The UK Home Office¹⁶ reported that following the new president's election, there were renewed fears in Sri Lanka in relation to a number of matters including the robustness of its democracy (amidst fears of a reversal of constitutional amendments), a potential crackdown on critics of the Rajapaksa dynasty, the cessation of investigations into war crimes (some implicating the Rajapaksas), and an end to the limited democratic reforms and limited reconciliation measures with the ethnic Tamil community that occurred under the former president. International observers assess that the 2019 election of G Rajapaksa reflects a deeply polarised country¹⁷ and it has been reported that minority groups were worried about the return of the Rajapaksa brothers¹⁸. Nonetheless, in the absence of evidence of changes to official government policies and practices, I am not satisfied it is other than speculative that the election of G Rajapaksa and the appointment of his brother, former president M Rajapaksa as Prime Minister, will result in a deterioration of conditions in Sri Lanka, particularly for Tamils.
56. On my findings, the applicant did not have an adverse profile with the authorities at the time he left Sri Lanka. Overall, having regard to the country information before me and those of his claims and experiences which I have accepted, I am not satisfied the applicant faces a real chance of harm as a Tamil or because of the debt if he returns to Sri Lanka now or in the reasonably foreseeable future.
57. The applicant's SHEV application form indicates he did not use documents to leave Sri Lanka and in his written SHEV statement he states he left illegally and has never held a passport. I accept his evidence in this regard. As he does not possess a valid passport, he will require a temporary travel document in order to return to Sri Lanka; on the information before me this, in turn, means that it is likely he will be subject to some investigation at the airport when he returns. I accept that as part of this process, the applicant may be identified by the authorities as an asylum seeker who departed Sri Lanka illegally. I have not accepted that he made two attempts

¹² Office of the High Commissioner for Human Rights (OHCHR), "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka", 23 July 2018, CIS7B839411830

¹³ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

¹⁴ UK Home Office "Report of a Home Office Fact-finding mission to Sri Lanka" 20 January 2020 20200123162928

¹⁵ Office of the High Commissioner for Human Rights (OHCHR), "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka", 23 July 2018, CIS7B839411830

¹⁶ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil Separatism" Version 6, May 2020, 20200527172009

¹⁷ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil Separatism" Version 6, May 2020, 20200527172009

¹⁸ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil Separatism" Version 6, May 2020, 20200527172009

previously to illegally depart Sri Lanka and I am not satisfied that he would be identified and treated as somebody who had previously attempted to leave Sri Lanka illegally.

58. Leaving Sri Lanka from an unauthorised port of departure is an offence under the *Immigrants and Emigrants Act* (the I&E Act) and returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under the I&E Act¹⁹. Returnees are routinely questioned at the airport and where an illegal departure is suspected, they can be charged. Returnees will be photographed, fingerprinted and asked to provide a statement; on completion of investigations individuals charged with illegal departure will be taken to the closest Magistrate's Court²⁰. Apprehended individuals can remain in police custody at the CID airport office for up to 24 hours after arrival while enquiries are completed, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held for up to two days in an airport holding cell. DFAT is not aware of mistreatment of returnees during this process²¹. DFAT understands from the Sri Lankan Attorney General's Department, which is responsible for the conduct of prosecutions, that no returnee who was a fare-paying passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued as a deterrent against future illegal departures, usually in the region of LKR15,000 and LKR 20,000 (AUD 122-163). A guilty plea attracts a fine, which can be paid by instalments and the person is free to go. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court²².
59. Based on this information, I find that the applicant will very likely be investigated at the airport on his return and may be detained for a short period (up to two days) in an airport holding cell before being taken before a magistrate. If he pleads guilty he will be fined and released and if he pleads not guilty, he will be granted bail and required to return to court at a later time where, if he is found guilty, he will also be fined. Like the delegate I have not accepted that the applicant has previously been arrested and imprisoned for previous attempted illegal departures and on my findings, at the time he left Sri Lanka, he was not personally of adverse interest to the authorities for any reason. I am not satisfied he is at a real risk of being jailed or detained for any longer than it will take for his matter to come before a magistrate. DFAT states it is not aware of mistreatment of returnees in this process²³ and I am not satisfied he is at a real risk of being harmed when in custody. I am not satisfied that any of the treatment to which he will be subject at the airport and subsequently, by itself or altogether, amounts to serious harm. Moreover, the information before me does not indicate that the law is discriminatory on its face, is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant for illegal departure under the I&E Act would not be the result of systematic and discriminatory conduct and does not amount to persecution within the meaning of s.5J(4).
60. Nor am I satisfied that the applicant is at risk of harm because he has sought asylum in Australia. Returnees travelling on temporary travel documents are investigated on arrival to confirm their identity and identify someone who was trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. The process may involve interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion; as noted above, detainees are

¹⁹ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

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

²¹ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

²² DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

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

not subject to mistreatment during processing at the airport²⁴. I have not accepted that the applicant is subject to an arrest warrant and I am not satisfied that in the return process he will be identified by the authorities on this basis or subject to anything more than routine checks to confirm his identity.

61. Since 2010-2011, thousands of Sri Lankan nationals have been returned from Australia and other western countries; most returnees are Tamil²⁵. The country information before me does not support that the mere fact of having sought asylum overseas means that returnees are at risk of harm. Claiming asylum aboard is not an offence and the International Organisation for Migration (IOM) reports that when someone returns to Sri Lanka who has been absent for a number of years or has an expired visa, they would not be questioned on this; there were no media reports of returnees being interrogated on such grounds²⁶. The IOM hasn't witnessed the intense questioning of the past where returnees may have been asked what they had been doing outside Sri Lanka; the police would only be interested in an individual if there were outstanding criminal offences²⁷. Like the delegate I have not accepted that the applicant has previously been arrested and imprisoned for previous attempted illegal departures and on my findings, at the time he left Sri Lanka, he was not the subject of court procedures or personally of interest to the authorities for any reason nor do I accept that he would be of interest to them on return, whether as a failed asylum seeker or for any other reason.
62. DFAT assesses that returnees can face practical challenges on return to Sri Lanka. Reintegration assistance is limited and many returnees have difficulty finding suitable employment and reliable housing on return. Some failed asylum seekers reported social stigma on return to their communities but DFAT understands that societal discrimination is not a major concern for returnees including failed asylum seekers²⁸. While some monitoring of returnees can occur, DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis; DFAT states it is not aware of returnees, including failed asylum seekers, being treated in such a way that it endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits²⁹.
63. The applicant said towards the end of his SHEV interview that his work as [an Occupation 1] had dried up and he has no other skills; no-one in his family helped him, he has no-one to trust, and no-one in the family will support him. His marriage was an elopement and his family was against it so he's not on good terms with them. This is not consistent with other evidence he provided during his protection interview and I do not accept this. The applicant frequently referred in his SHEV interview to the financial assistance his mother provided him in relation to paying his debt. I also note his entry interview evidence that his sister paid for his travel to Australia. He told the delegate his wife has her own home in Sri Lanka, he speaks to her every day, and he also said earlier in his SHEV interview that he stays in contact with his mother and sister as well as exchanging text messages with his brothers. He has provided no evidence that his work as [an Occupation 1] had dried up and I note his SHEV application form indicates that he was working at a [Workplace] until he left Sri Lanka in 2013. I accept that it may take some time for the applicant to successfully re-establish himself on return. He has a skilled trade and has developed a range of other skills in Australia where he is currently working as [an Occupation 2]. He is a

²⁴ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

²⁵ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

²⁶ UK Home Office "Report of a Home Office Fact-finding mission to Sri Lanka" 20 January 2020 20200123162928

²⁷ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

²⁸ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

²⁹ DFAT "DFAT Country Information Report Sri Lanka" 4 November 2019 20191104135244

relatively young man and has accumulated savings in Australia, although his evidence about how much money he had saved varied over the course of his SHEV interview. His family (wife, mother and siblings) continue to live in Sri Lanka and on the evidence before me, I am not satisfied that his family would be unwilling or unable to support him at least initially while he re-adjusts to life there. I am not satisfied there is a real chance that his circumstances on return would be such that his capacity to subsist would be threatened. It is possible he may be monitored for a period and may experience some stigma as a returning asylum seeker. However, I am not satisfied that this treatment alone or in combination would amount to serious harm.

64. I am not satisfied that there is a real chance that if he returns to Sri Lanka he would suffer persecution.

Refugee: conclusion

65. 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

66. 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

67. 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.

68. 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.

69. I accept that that when he returns, the applicant will very likely be subjected to some investigation at the airport and that he faces possible action under the I&E Act for his illegal departure. However, I am not satisfied that the scrutiny and resulting action to which he is likely to be subjected (investigation, short detention, possible fine) amounts to significant harm. I do not accept that the applicant had a profile at the time he left Sri Lanka that means he would be a person of interest for any reason or that there is a real risk he will be mistreated while being processed at the airport, or face a possible period of detention of longer than a few days while his case is processed. I am not satisfied that the conduct of the Sri Lankan officials in this process, the procedures he may face, and any possible penalty are intended to cause pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or

cause extreme humiliation as is required by the definitions of torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. Nor does the information before me support that there is a real risk of arbitrary deprivation of life or the death penalty being carried out. I do not accept that the applicant would be a person of interest to the authorities for any reason or that there is a real risk he will be mistreated while being processed at the airport or face a possible period of detention of longer than two days while awaiting an appearance before a magistrate. I am not satisfied that the conduct of the Sri Lankan officials in this process, and the penalties and procedures he may face amount to significant harm within the meaning of s.36(2A) of the Act.

70. I accept that while re-integrating, the applicant may face some social stigma because he is a returned asylum seeker, possible monitoring for a period, and some initial practical challenges. However, I am not satisfied that any of this, by itself or cumulatively, would amount to significant harm. It does not amount to the death penalty, arbitrary deprivation of life or torture, and I am not satisfied that it amounts to pain or suffering that can reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment, or degrading treatment or punishment. I am not satisfied on the evidence that this treatment on arrival or afterwards, either singularly or cumulatively amounts to significant harm within the meaning of s.5(1) and s.36(2A) of the Act.
71. I have otherwise found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future for any other reason. As 'real chance' and 'real risk' involve the same standard, it follows that I am also not satisfied that there is a real risk that he would suffer significant harm for any of the reasons he claims if he is returned to Sri Lanka.
72. I am not satisfied the applicant faces a real risk of significant harm for any reason should he return to Sri Lanka now or in the reasonably foreseeable future.

Complementary protection: conclusion

73. 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.