



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10354

Date and time of decision: 26 October 2022 10:34:00
P Tyson, 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 Christian from Sri Lanka. On 7 June 2016 he lodged an application for a Safe Haven Enterprise visa, a type of protection visa.
2. That application was refused by a delegate of the Minister for Immigration in a decision dated 28 February 2017. The delegate accepted the applicant's claims regarding his personal experiences in Sri Lanka, which included his lack of schooling and authorities' interest in family members on suspicion of involvement with the Liberation Tigers of Tamil Eelam (LTTE) at various times. However, the delegate found there was not a real chance or real risk of the applicant suffering persecution or significant harm on account of his personal profile, imputed support for the LTTE, as a young Tamil male, or as a failed asylum seeker who departed Sri Lanka illegally.
3. On 16 May 2017 a different IAA reviewer affirmed the decision of the delegate. By order of the Federal Circuit and Family Court [in] June 2022, the earlier IAA decision was quashed and the matter remitted to the IAA for reconsideration.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. I have obtained a number of new country information reports.¹ These are recent, relevant reports from authoritative sources, some of which supersede earlier reports relied on by the delegate. Taking into account the age of the delegate's decision and the information on which it relies, and that (as indicated in the reports) there have been considerable political and other developments in Sri Lanka since that time, I am satisfied there are exceptional circumstances to justify considering this new information.
6. In a letter dated 16 September 2022 the applicant was invited to provide new information in response to the new reports obtained by the IAA. The applicant, through his representative, provided a submission in response on 29 September 2022. The submission contains the following new information:
 - The submission refers to information from a 2019 DFAT report about discrimination and harassment faced by Tamils from the north, monitoring of Tamils with LTTE association, and of events, and the use of the Sri Lankan Prevention of Terrorism Act (PTA). The information from the 2019 DFAT report is not credible personal information in the relevant sense, but I accept it post-dates the delegate's decision and could not have been given to the delegate. However, I have obtained a more recent DFAT report which replaces the report cited by the applicant, and provides a similar but more recent assessment in relation to these matters. Other new country information before me also

¹ Department of Foreign Affairs and Trade (DFAT), 'Country Information Report Sri Lanka', 23 December 2021; United Kingdom Home Office (UKHO), 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020; United Nations Human Rights Council (UNHRC), 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 6 September 2022; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Sri Lanka Multi-Dimensional Crisis Situation Report No.4', 2 September 2022; United States Department of State, 'Country Reports on Human Rights Practices for 2021 Sri Lanka', 12 April 2022; World Food Programme, 'WFP Sri Lanka Situation Report', 30 July 2022.

refers to these issues. The applicant has not identified any reason that he relies on these aspects of the 2019 report specifically over the 2021 report. While I take into account that the applicant could not have provided this particular information earlier and that it was provided in response to the IAA's invitation, considering it has been superseded by more recent information before me, I am not satisfied there are exceptional circumstances to justify considering it.

- The submission makes new claims about the consequences of the applicant not having a national identity card (NIC), including that it could lead to suspicion of LTTE membership, that he will be unable to prove his identity or right to remain in Sri Lanka or reside in the community, which may lead to an extended period of detention, or to a continued risk of questioning. The applicant had earlier claimed that he did not have a national identity card, but did not raise a claim to fear harm for this reason. The applicant was represented before the Department and the claim is not said to arise specifically from the new information put to him by the IAA. In my view, the applicant could have made this claim to the delegate. However, I am satisfied that the new claim to fear harm because of his lack of NIC is credible personal information that was not previously known and, had it been known, may have affected consideration of the claims. I also take into account his relatively young age at the time of the proceedings before the delegate, his lack of education, and the fact that the claimed fear is based on factual circumstances that he had disclosed earlier. Considering all of these matters, I am satisfied there are exceptional circumstances to justify considering the new claim.
- In support of the claims about the NIC, the applicant refers to 'a Report by the BBC released in 2012' which 'states that those without a card in northern Sri Lanka have been arrested on suspicion of being involved with the LTTE'. No further detail is provided about this report that would allow me to verify its content, the context of those arrests or their relevance to the applicant's circumstances. Even assuming this is an accurate summary, the report is now some ten years old. I am not satisfied that the report is credible personal information, that it could not have been provided to the delegate or, considering all of these matters, that there are any exceptional circumstances to justify considering it.
- The submission contains new information about the applicant's religious practice and his fears of persecution for that reason. The applicant indicated in his application that he had converted to Christianity but did not expressly claim to fear harm on account of his religion and was not questioned about it by the delegate. As referenced in the submission, there were high profile terrorist incidents targeting churches in Sri Lanka in 2019 and I am willing to accept that the applicant's fears on account of his religion may post-date the delegate's decision. I am satisfied that the applicant could not have made these claims to the delegate prior to the decision being made. I am also satisfied that the information he now provides about his religious practice and fears is credible personal information that was not previously known and, if known, may have affected consideration of the claims. Considering both these factors, I am satisfied there are exceptional circumstances to justify considering the applicant's new claims to fear harm on the basis of his religion.
- In support of the religious claims, the submissions refer to and extracts a report about the Bodu Bala Sena (BBS) Buddhist Movement, dated 2 March 2017. The report does not satisfy s.473DD(b)(ii) as it does not contain personal information in the relevant sense, but as it was published after the delegate's decision, I accept that it could not have been provided prior to the decision being made and so satisfies s.473DD(b)(i). The report is said to 'highlight the problems faced by Christians in Sri Lanka' and while it does refer to opposition to Christian conversions and the focus of the BBS on protecting

Buddhist culture, much of the report is focused on anti-Muslim sentiment. There is no clear explanation of how the report supports the applicant's claims that he will be persecuted by Buddhist militants. Further, the report is now over five years old. In light of all of these matters, while I take into account that the new information satisfies s.473DD(b)(i), and that it is provided in response to the IAA's invitation, I am not satisfied there are exceptional circumstances to justify considering it.

- The submission refers to and extracts parts of a decision of the UK Upper Tribunal dated 27 May 2021, said to supersede the 20 January 2020 UK Home Office report (I assume this to be a reference to the Fact-Finding Mission report obtained by the IAA). The tribunal decision is not credible personal information in the relevance sense, but could not have been provided to the delegate prior to the decision being made, has been provided in response to the IAA's invitation and is recent information from a credible source about circumstances in Sri Lanka. I am satisfied there are exceptional circumstances to justify considering it.
7. The submission otherwise includes restatement of the applicant's claims and makes argument in response to the new information put to him by the IAA, and I have considered it.
8. The applicant wrote to the IAA on 15 March 2017, shortly after the original referral of his case, explaining that he was not able to provide a submission to the IAA for various reasons relating to the short timeframe provided, his inability to obtain legal assistance in that period and the complexity of the Department's decision. He also raised concerns with the IAA process and requested access to documents. The IAA responded to this correspondence in 2017, including by releasing documents and advising the applicant that he could apply for an extension of time in which to make submissions. He does not appear to have done so. The applicant also requested an oral hearing so that he would have the opportunity to present his claims in person. The IAA does not hold oral hearings but can invite an applicant to give new information at an interview. The applicant did not specify any particular claims or evidence that he would give beyond those presented to the Department. The applicant has now had the opportunity to provide new information in response to the IAA's invitation. The IAA's letter of 2 August 2022 regarding the remittal of his case also alerted him to the possibility of providing new information or submissions for the reconsideration, albeit advising that he must act quickly in doing so. Taking all of this into account, I have decided to proceed to a decision without inviting the applicant to an interview or allowing any additional time for the applicant to provide further submissions or new information.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
- The applicant was born in Puttalam District. He was Hindu but converted to Christianity in Australia.
 - The applicant did not attend school as a child in Sri Lanka, due to safety concerns.
 - The applicant's father and uncle were often rounded up by police and the Army, taken away and beaten. The applicant's mother would go to the camps and plead for his father to be released. As far as he is aware his father was not a member of the LTTE but Tamils were rounded up on suspicion of their connections or actual membership. On one occasion the applicant was with his father and they tried to accuse and hit him too.

- The applicant's father died of natural causes in [Year] and the applicant was sent to live with his [uncle] in Vavuniya District. The applicant worked with his uncle who would travel to sell and deliver [items].
- A relative of the applicant's uncle had been kidnapped in a white van and never returned. The applicant does not know if that relative was an LTTE member.
- As there were a lot of Tamils in Vavuniya there were many problems. Because of the relative, they would question his uncle all the time. The applicant's uncle had a lot of problems with authorities as a suspected LTTE member. The CID or people in white vans would often come and knock on the door and his uncle was often summoned to the 4th floor but would never go in fear he would not be allowed to leave. The applicant's uncle often stayed in other places to avoid authorities.
- The applicant's older brother remained in Puttalam with his mother and sisters. He used to be arrested, interrogated and beaten by police and the Army and was always facing difficulties. On one occasion authorities tried to grab the applicant's sister.
- Due to his problems, the applicant's uncle decided to leave the country and asked if the applicant wanted to go. The applicant originally said no but his mother encouraged him to go, as he was an uneducated Tamil and it would be difficult to build a safe and secure life in Sri Lanka.
- The applicant can speak and read English but cannot read or write in Tamil or Sinhalese. He can speak only a little Sinhalese. The applicant will not be able to obtain reasonable work. He will not receive assistance from the government and cannot study because he has no previous education. He cannot relocate and does not have relatives who could support him.
- The applicant fears harm on account of Tamil ethnicity and as a young Tamil male, imputed anti-Government and pro-LTTE stance, as a member of a family imputed as LTTE supporters, illegal departure from Sri Lanka and status as a failed asylum seeker.

Refugee assessment

10. 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

11. 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.
12. The applicant has consistently said he is a national of Sri Lanka, of Tamil ethnicity. He has given evidence in the Tamil language and provided his Sri Lankan birth certificate and translation, along with evidence of a Sri Lankan bank account. I accept the applicant's nationality, identity and ethnicity as claimed.
 13. The applicant's evidence at the protection visa interview was forthcoming and unexaggerated. To the extent that he provided little detail and there were gaps in his knowledge on some matters, I am satisfied that was on account of his relatively young age at the time of the events he was describing, and I also take into account his limited education. The claimed experiences of the applicant and his family members during the war and in the years prior to his departure from Sri Lanka are consistent with country information set out in the delegate's decision regarding circumstances in Sri Lanka at that time. I accept the applicant's claims regarding his and his family members' experiences in Sri Lanka.
 14. On the applicant's evidence, he grew up in a village about [Distance]km from Puttalam city populated by Tamils and Tamil-speaking Muslims. His parents were uneducated and did farming and labouring work on other people's land. The applicant explained that there had been incidents of children being kidnapped on the way to school for their organs, and of the LTTE recruiting children, and so his mother kept him home for safety. His younger sisters had later been enrolled in school at the suggestion of another villager, but by that time he was too old to attend a nearby school. There was some confusion in the evidence as to whether the applicant ever attended school in Sri Lanka. His statement indicates that he was eventually sent to a school that was far away from his home, but attended for less than a year. At the interview he said that he had never been to school at all, that he was enrolled in private tuition classes when he was around 12 or 13 but that he did not actually attend these or any other schooling, because he was afraid, it was expensive, and he did not understand the importance of education at that time. I am willing to accept that the statement is inaccurate and that the applicant did not in fact attend any schooling (private or otherwise) in Sri Lanka. He has had the benefit of some education since he has been in Australia, but I accept the submissions that he still faces challenges with English language reading, spelling and grammar. I also accept that he cannot read or write Tamil.
 15. The applicant said that because they were Tamil, his father and uncles had been arrested a number of times on suspicion of being part of or supporting the LTTE, and had been beaten. His mother and older brother would go to plead for their release. He said the CID and army had come to his house numerous times. He thought these incidents had occurred towards the end of the war, and that his father and uncles had been detained four or five times. On one occasion, he had been with his father when the authorities accused his father of being LTTE and were about to hit him, and they tried to do this to the applicant too.
 16. After the death of his father in [Year] the applicant was sent to live with his father's brother and his wife in Vavuniya. A relative of this family (the wife's sister's husband) had been abducted in a white van and never returned. The CID would come to the uncle's house and want to question the uncle, including about that incident and, on the claims in the statement,

as a suspected LTTE member. They would also request that he attend their office on the 4th floor. The family would not open the door to the CID and would say the uncle was not home (even when he was), and he never attended their office as requested, because they feared he would not return, as was the risk for males. These visits were the reason the uncle left Sri Lanka. On one occasion when the applicant returned to visit his mother, his older brother, who had remained living with their mother, was arrested and interrogated by the police and army on accusation of being LTTE, because he was Tamil. The applicant also described an incident at the interview where his brother had been hiding in the jungle because people came looking for him after he had protected their sister when someone tried to grab her, and he was bitten by a snake.

17. The applicant lived the majority of his life with his mother, only residing with his uncle for around three years before his departure from Sri Lanka. The applicant's evidence was that he was sent to live with his uncle because his mother was unable to support [number] children following the death of her husband, but he visited his mother during that time and remains in contact with her. The uncle and family with whom the applicant lived prior to his departure left Vavuniya and travelled to Australia. I find on the evidence that if the applicant were to go back to Sri Lanka he would return to live in his home village near Puttalam where his mother resides, in the North Western Province.
18. The applicant's submissions to the delegate and to the IAA argue that he comes from a family imputed as being LTTE supporters and will himself be imputed with an anti-government and pro-LTTE stance, and points to reports of ongoing persecution of Tamils, including because of suspected LTTE links, political or Tamil separatist activism. He has also made claims based on his ethnicity, religion, lack of education, and the fact of him having departing Sri Lanka illegally and returning as a failed asylum seeker.
19. There have been considerable political developments since the applicant left Sri Lanka. At the time of his departure, Mahinda Rajapaksa, who had presided over Sri Lanka during the civil war that ended in 2009, remained as President. In 2015 new President Sirisena was elected on a platform that included reconciliation with the Tamil minority, although his government's subsequent progress on that issue was not without criticism. However, in November 2019 Sirisena was replaced by Gotabaya Rajapaksa who then chose his brother Mahinda, former President, as Prime Minister. As highlighted in the extracts from the UK Tribunal decision submitted by the applicant, under the new Rajapaksa government some of the measures towards transparency and accountability introduced by the previous government were reversed. There was a focus on strong state security (including highlighting their role in the defeat of the LTTE), increased militarisation, centralisation of power and use of the PTA, and human rights improvements were said to reverse. Since that time, Sri Lanka has fallen into economic crisis, facing severe shortages of fuel, electricity, food, medicines and other essential items. Following months of mass protests (which were violently suppressed at times), Mahinda Rajapaksa resigned as Prime Minister in May 2022 and Ranil Wickremesinghe, a former Prime Minister under Sirisena, was appointed Prime Minister. Countrywide demonstrations continued and in July protesters stormed and occupied the offices and residence of President Gotabaya Rajapaksa. President Rajapaksa resigned, and Wickremesinghe was elected by Parliament as the new President on 20 July 2022. According to the UN High Commissioner for Human Rights (UNHCHR), Wickremesinghe's first speech to parliament appealed for unity across all ethnic communities and affirmed the place of all religions, languages and traditions, along with recognising the transformative power of the protest movement. The new government has flagged constitutional amendment to strengthen the separation of powers and devolution of political authority which had been undermined by amendments under the Rajapaksa government. However, the government

has sent mixed signals and there remains a significant deficit in confidence and trust between the government, protest movement and broader civil society. Many of the same officials remain in place, particularly in security positions, and the new administration has pursued a tougher security approach to the protests which has involved the use of excessive force, arrests and detention.²

20. The applicant has consistently said that while in Australia he has converted from Hinduism to Christianity, and has made new claims to the IAA that he fears harm for reasons of his religion. The IAA submission states that he is a practising Catholic, attends church on a regular basis and embraces Catholicism as a way of life. He is fearful of being persecuted by Buddhist militants such as BBS and militant Muslims, and says there is no guarantee the current Wickremesinghe government will protect his rights. According to DFAT, Christians - 80% of which are Catholic - account for seven per cent of the Sri Lankan population, and include both Tamils and Sinhalese. Christian churches were among the targets of coordinated terrorist attacks carried out in Colombo, Negombo and Batticaloa by local Islamic groups on Easter Sunday in April 2019, killing over 250 people and injuring 490. The government claims that all those directly involved with the attacks have been either killed or apprehended. The Sri Lankan Constitution provides for freedom of religion, but grants Buddhism a 'foremost place' which is protected and fostered. While attacks on places of worship or religious objects (of all religions) is punishable under the law, there are claims that religious minorities are restricted in constructing new places of worship, and that predominantly Buddhist local police and government authorities are not always responsive to reports of religiously-motivated attacks.³ The Rajapaksa government promoted a Sinhala Buddhist ideology and was supportive of extremist Buddhist groups such as BBS which have engaged in acts of violence and hate speech against religious minorities, particularly Muslims in the wake of the 2019 attacks. The new president has thus far distanced himself from this approach.⁴ DFAT reports that there have been documented incidents including violence and intimidation such as verbal threats, disruption of services, demands for closure of churches and legal challenges, of complaints not being investigated by authorities and of Christians particularly in rural areas being apprehensive of being open about their faith, although it seems from DFAT's reporting that this is targeted largely at Evangelical groups. The information does not suggest that conversion from Hinduism is of itself something that attracts adverse treatment. While the 2019 attacks would understandably cause the applicant fear as a practicing Christian, they have not been repeated and it appears the government has been zealous in taking steps to identify the perpetrators and suppress future attacks. DFAT assesses overall that Catholic Christians face only a low risk of official or societal discrimination and generally a low threat of violence from Islamic extremist groups based on those groups' current profiles.⁵ Considering the country information and the evidence which suggests the applicant is an ordinary practicing Catholic and not engaged in any form of evangelism, I am not satisfied on the evidence that there is any more than a remote chance of the applicant being harmed for reasons of his religion in the reasonably foreseeable future.
21. Turning to the applicant's claims based on suspicion of being pro LTTE, although the LTTE was comprehensively defeated in 2009, more recent country information confirms that Sri Lankan authorities have remained concerned over its potential re-emergence and sensitive to separatist tendencies in general, including continuing to collect intelligence on former

² DFAT, 'Country Information Report Sri Lanka', 23 December 2021; UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 6 September 2022.

³ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

⁴ Ibid; UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 6 September 2022

⁵ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

members and maintaining 'stop' and 'watch' lists of those of interest. The UK Tribunal decision submitted by the applicant identifies the ongoing seriousness with which the (then) Rajapaksa government viewed the threat of separatism. There are reports of continued harassment, discrimination and monitoring of former LTTE cadres, and continued arrests under the PTA for alleged LTTE-supportive or other separatist behaviour. DFAT has assessed that while they may be monitored, Tamils with former links to the LTTE but who are not politically active are generally able to lead their lives without concern for their security. Family members of high profile former LTTE members wanted by authorities may be subject to monitoring and there are claims such persons have been subject to harassment and detention. There is also harassment, surveillance and intimidation of families of the disappeared, particularly when they are involved in protest or memorialisation activities.⁶

22. Submissions to the delegate cite country information indicating monitoring of and incidents of human rights abuses of Tamils in the years prior to 2017. The more recent information before me indicates continued monitoring of the Tamil community in the north and east and that a significant military presence remains, particularly in the north of the country. The armed forces have been continuously deployed to ensure public security by ongoing monthly orders following an initial state of emergency put in place after the Easter 2019 bomb attacks.⁷ However, the information suggests that monitoring and harassment (which does not commonly include physical violence) is targeted at activists associated with politically-sensitive issues including the war, missing persons, human rights violations, land release and memorialisation events, journalists, persons with real or perceived LTTE links and persons linked to foreign diaspora groups.⁸ DFAT has indicated that while some returnees with LTTE links have been the subject of monitoring, most returnees and failed asylum seekers are not actively monitored on an ongoing or long term basis. The 2021 DFAT report indicates that detention under the PTA has increased since the return of the Rajapaksas to government. Current detainees at the time of the DFAT report were largely Muslims detained in the wake of the 2019 attacks, although there are also Tamil detainees.⁹ While the government made amendments to the PTA in March 2022, some of its more problematic provisions remain, and despite the government declaring a moratorium on its use, three student leaders were detained under the PTA in August 2022.¹⁰ The PTA has been used against Tamils who agitate on sensitive issues - including the mayor of Jaffna because choice of uniforms for municipal authorities were said to resemble those of the LTTE - and authorities have arrested or harassed Tamils who have attempted to commemorate the war. Nonetheless, DFAT indicates that it is not aware of returnees from Australia being charged under the PTA.¹¹ The recent country information suggests that the systematic 'white van' abductions which often led to enforced disappearances during and after the war are no longer occurring, although information cited by DFAT suggests the government may instead be using legal mechanisms to suppress dissent.¹² Overall, DFAT assesses that 'ordinary' Tamils living in the north and east

⁶ Ibid; UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 6 September 2022; US Department of State, 'Country Reports on Human Rights Practices for 2021 Sri Lanka', 12 April 2022.

⁷ US Department of State, 'Country Reports on Human Rights Practices for 2021 Sri Lanka', 12 April 2022.

⁸ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818; US Department of State, 'Country Reports on Human Rights Practices for 2021 Sri Lanka', 12 April 2022; UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 6 September 2022.

⁹ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

¹⁰ UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 6 September 2022

¹¹ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

¹² Ibid; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

are at low risk of official harassment and does not refer to Tamils living elsewhere facing greater risk.¹³

23. There is evidence of a risk of torture or other harm for Tamils (and others) who are detained by Sri Lankan authorities. DFAT and other sources¹⁴ indicate that the use of torture by Sri Lankan police during investigations to extract confessions is endemic and routine, although perhaps involving less brutality than in the past, and not targeted against any specific group. DFAT has also said that torture is common in prisons. DFAT concludes that the risk of torture has decreased since the end of the war but is still used, including as a routine tool of policing. DFAT assesses that Sri Lankans face a low risk of torture overall but those detained by the authorities face a moderate risk; this is especially the case for the poor, criminals or those perceived to challenge the government.¹⁵ However, DFAT has specifically indicated that it is not aware of returnees from Australia being subjected to mistreatment while in police custody at the airport on return to Sri Lanka.¹⁶
24. The applicant has said he is not aware of his father or uncles, or the uncle's relative, being in the LTTE. It seems from the applicant's evidence that the experiences of his father and uncles being detained occurred during the war, when round ups of Tamils on suspicion of LTTE activity frequently occurred. The applicant has also described that while he was living with his uncle after [Year], authorities and people in white vans (which were often linked to government-aligned paramilitaries) came looking for his uncle on a number of occasions, and made requests for him to attend their offices. This was said to be on suspicion of LTTE membership, although it also seemed from the applicant's evidence at the interview that it was connected to the disappearance of the uncle's wife's relative. The country information before the delegate refers to harassment and surveillance of the Tamil community, in addition to occurrences of white van abduction of Tamil businessmen during that period. It seems that the uncle was able to avoid these requests by spending time away from home, the family not opening the door, saying that the uncle was not home, and by him not attending their offices as requested. It is not apparent from the applicant's evidence that the authorities took further steps to locate and question the uncle, such as entering and searching the house, that might suggest a more serious or urgent interest in finding him and I am not satisfied on the evidence that authorities had any particular interest in the applicant himself. The applicant has said that his brother too has had various encounters with Sri Lankan authorities, including being arrested and interrogated on accusation of being LTTE because of his Tamil ethnicity on one occasion when the applicant returned to visit his mother, and hiding in the jungle on another occasion when people came looking for him. I accept that during the war and the years that followed, the applicant's family members at times came under suspicion and were questioned and detained by Sri Lankan authorities, as was the experience of many Tamils during those years. I also accept that authorities or others in white vans were harassing and wanting to question the applicant's uncle in the period prior to their departure from Sri Lanka. However, in my view the evidence does not suggest any sort of serious or sustained suspicion over or interest in the applicant's relatives potential LTTE connections such that the applicant would be viewed as coming from an LTTE family, imputed with adverse opinions on the basis of his relationships, or be viewed with interest because he had travelled to Australia with his uncle.

¹³ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

¹⁴ Ibid; US Department of State, 'Country Reports on Human Rights Practices for 2021 Sri Lanka', 12 April 2022; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

¹⁵ DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

¹⁶ Ibid.

25. It is also submitted that the applicant will be suspected of LTTE affiliation as a returned asylum seeker and because of his illegal departure. Large numbers of Tamils have returned to Sri Lanka from Australia and other asylum-destination countries.¹⁷ The IOM have told the UK Home Office that when a person who has been absent for a number of years returns to Sri Lanka, they would not be questioned about this, and there are no media reports of returnees being interrogated on such grounds. The IOM, who receive returnees at the airport, contrasted the situation in the past where returnees may have been asked what they had been doing in the UK.¹⁸ While the authorities may take an interest in and monitor some members of the Tamil diaspora, this tends to occur for those who provided funding or other support for the LTTE during the conflict, who continue to advocate for an independent Tamil state, have leadership positions in diaspora groups, or are former LTTE members. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on a long-term or ongoing basis.¹⁹
26. The DFAT report outlines the procedures for the return of asylum seekers from Australia, whether returning voluntarily or not. On arrival, returnees are interviewed by the Chief Immigration Officer and, depending on the circumstances of their departure and their personal history, may also be interviewed by the CID and intelligence agencies. Their identity documents are checked against immigration, intelligence and criminal databases. Police take an investigative process to confirm the identity of those travelling on temporary travel documents, which may include interviewing the return passenger, contacting local police, neighbours and family, and checking criminal and court records. This process would identify anyone trying to conceal a terrorist or criminal background, or avoid court orders or arrest warrants. While I note information cited above regarding torture in police custody, DFAT has specifically indicated that it is not aware of detainees being subjected to mistreatment at the airport.²⁰ A UK report similarly indicates that sources consulted were not aware of targeting or systemic discrimination against Tamil returnees in terms of their treatment at the airport on return²¹ and the extracted UK Tribunal decision in the submissions does not suggest this is no longer correct. The information does not suggest that returning Tamil asylum seekers, including those who have left the country illegally, are imputed with pro-LTTE or other adverse opinion for that reason.
27. The submissions to the IAA claim that the applicant would be suspected of LTTE membership because he does not have an NIC, which is said to be indicative of LTTE association. It is argued that he would be unable to prove his identity and right to remain in Sri Lanka and there is a risk he would face an extended period of detention on return to Sri Lanka because he would be lacking this critical document to enable him to reside in the community. There is no recent evidence before me to suggest that persons without an NIC are imputed with LTTE membership, or that returning Sri Lankans who do not have an NIC are at risk of being detained. DFAT indicates that Sri Lankans use national identity cards as their primary identification document, although other documents such as birth certificates are also frequently used. Sri Lankans are required to register their identity and following registration, persons 16 or over are eligible to apply for a NIC, which is required to access government services including public health and education. It can only be obtained within Sri Lanka. In the north there can be delay in documentation processes due to the lack of Tamil-speaking officials.²² The applicant's evidence at the interview was that he had not applied for one prior

¹⁷ Ibid.

¹⁸ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

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

²⁰ Ibid.

²¹ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

²² DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

to leaving Sri Lanka because of his age at that time. I accept that the applicant will be returning without an NIC, and will be required to undergo identity checks at the airport. I further accept that he will be required to register his identity and then apply for a card on his return, and that he will be without an NIC while waiting for it to be issued. However, the applicant has a birth certificate which he can use should he need to verify his identity either on his arrival in Sri Lanka or subsequently. He also has family members who can confirm his identity if contacted. I do not accept that there is any prospect that his lack of an identity card will lead to suspicion, delay his release or make him more vulnerable to adverse questioning once in the community. The evidence does not support the assertion in the submissions that the applicant would be viewed adversely or imputed with LTTE association because he does not have an NIC. Nor does the evidence support the submission to the delegate that the applicant has such vulnerability, anxiety or fear of authority that he would not be able to answer many of the standard questions on return and so would be subjected to further interrogation.

28. Considering the country information including that set out in submissions to the delegate, I accept that there are continued instances of detention of some Tamils under the PTA, that the Sri Lankan authorities may take an interest in some returned Tamil asylum seekers depending on their activities, and that there continue to be instances of torture, particularly in police custody. However, the weight of information indicates that those targeted by the authorities are persons with real or perceived links to the LTTE or some other profile of interest such as activists or involvement in separatist activity. The applicant was a child at the time of the civil war in Sri Lanka and neither he nor any family members appear to have had any actual connection to or involvement with the LTTE. He has not indicated that he has, or intends to have, any sort of involvement with politically sensitive issues. The submissions refer to the possibility of the applicant being targeted as a person likely to join or be recruited to a separatist movement, but the applicant has indicated no interest in or support of any such activity and the country information does not suggest a risk of forcible recruitment. Although various family members have experienced adverse interest at different times, I am not satisfied on the evidence that this has been of a level that might lead to the applicant himself being imputed with an adverse political opinion such as support for the LTTE or separatism, or being of interest for any information he might possess about his family members. I accept that the applicant will be questioned and processed on return. However, I find that this questioning will very likely quickly identify that the applicant is not a person of any interest, beyond his illegal departure discussed below, and will not entail any harm. I am not satisfied that there is any more than a remote chance of Sri Lankan authorities taking an adverse interest in the applicant either on his immediate return or otherwise in the reasonably foreseeable future on the basis of his ethnicity, profile as a young Tamil male from the north, being a failed asylum seeker, his family relationships or any imputed political views arising from these attributes.
29. Turning to the situation for Tamils more generally, the US Department of State however reports that Tamils maintain that they have suffered longstanding, systematic discrimination in areas including university education, government employment, housing, health services and language laws.²³ Reporting after a fact-finding mission to Sri Lanka, the UK Home Office agreed there remains some discrimination towards Tamils; however assessed that most Tamils do not suffer persecution simply for being Tamil. Informing this assessment, UNHCR advised that historic discrimination towards Tamils persists and minorities in general face a degree of discrimination, although the treatment of Tamils varies depending on the district.²⁴

²³ US Department of State, 'Country Reports on Human Rights Practices for 2021 Sri Lanka, 12 April 2022.

²⁴ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

DFAT makes the assessment that there is no official discrimination on the basis of ethnicity in public sector employment in Sri Lanka, and attributes Tamil under-representation to language constraints and disrupted education because of the war.²⁵ I accept that the applicant may experience a degree of discrimination in accessing government employment and services, although the information does not suggest that he would be denied employment or things such as education (if that is something he chooses to pursue), health services or housing on the basis of his ethnicity. As I have found above, the applicant is not a person of any interest to authorities and I am not satisfied there is a real chance he would be targeted for surveillance or monitoring, although I accept he may experience this as part of general monitoring of the community. I am not satisfied on the evidence that there is a real chance of him experiencing discrimination, monitoring, or other mistreatment to a level that would threaten his capacity to subsist or otherwise amount to serious harm within the meaning of the Act.

30. Recent country information²⁶ indicates that Sri Lanka is currently in economic crisis, with severe shortages of fuel, electricity, food, medicines and other essentials. There is high inflation, with the prices of staple foods hugely increasing. An estimated 5.7 million citizens require immediate humanitarian assistance in 25 districts across the country, and that 6.3 million are food insecure which is likely to continue to deteriorate. An even greater number are not consuming acceptable diets. Although Sri Lanka provides free healthcare, the system is stretched and there are significant shortages in medicines and equipment. Employment and incomes have been affected. The livelihoods of some occupations including farmers and transport workers have been impacted by shortages in fuel, in turn further affecting food supply and while there are indications that government fuel rationing measures have provided some relief, the situation is expected to get worse before it gets better. Vulnerable segments of the population such as the urban poor, daily wage earners, older persons, women-headed households and persons with disabilities are at particular risk. The situation is said to impact almost all aspects of daily life, including people's ability to find and go to work. The country information indicates that the impacts of the current economic crisis are being felt across the country, and government and international organisations are providing emergency food and social assistance programs to vulnerable groups. I accept that if the applicant returns to Sri Lanka, he will very likely be impacted by these difficult economic conditions. Even aside from this, the applicant has raised concerns about his ability to obtain employment and support himself in Sri Lanka. He says that his only options would be basic, casual jobs which have no future security or sustainable income.
31. I accept that the applicant's lack of education and illiteracy in Tamil and Sinhalese will limit the type of work available to him. DFAT also indicates that returnees generally can have difficulty finding suitable employment. However, the applicant speaks Tamil and a level of English, which DFAT indicates is widely spoken in Sri Lanka, and will evidently be able to communicate. While he has said that his brother – who is also uneducated – struggles financially, he has not indicated that he is unable to find work. The applicant has benefited from education in Australia and has some ability to read and write in English. I accept that the applicant's ability to find work and support himself will no doubt be made more difficult by the current economic situation in Sri Lanka. However, I am not satisfied on the evidence that his prospects are so limited that he would be denied the capacity to earn a livelihood of any kind, such that it would threaten his capacity to subsist. Further, while I note that the

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

²⁶ UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 6 September 2022; World Food Programme, 'WFP Sri Lanka Situation Report', 30 July 2022; UN OCHA, 'Sri Lanka Multi-Dimensional Crisis Situation Report No.4', 2 September 2022.

information above refers to discrimination against Tamils in employment, it specifies that this relates to government employment. The applicant has not indicated any intention to seek government employment, and he would be returning to a Tamil majority area. The country information indicates that the current economic conditions in Sri Lanka affect millions of Sri Lankans throughout the country. I am not satisfied that any difficulty the applicant may face in obtaining employment, or harm he may experience as a result of the economic situation would involve systematic or discriminatory conduct, or be for the essential and significant reason of his race, nationality, religion, membership of a particular social group or political opinion.

32. I accept that the applicant departed Sri Lanka illegally. Departing Sri Lanka by boat other than at an approved port of departure and without a valid passport is an offence under the Sri Lankan Immigrants and Emigrants Act 1948 (I&E Act), attracting penalties of up to five years imprisonment and a fine. In practice, DFAT is unaware of prison sentences being imposed for illegal departure alone. A person who has departed Sri Lanka illegally is referred to the CID at the airport on return and charged, then taken to the courts at Negombo where they are bailed and released. According to information in the DFAT report, most are required to reappear in court in Negombo every 3-6 months for bail hearings, regardless of their plea, which involves legal and transport costs. They may also be summonsed as witnesses in related people smuggling cases. Illegal departure cases can take years to resolve (for reasons unclear to DFAT but attributed by sources to the slow workings of the justice system or a requirement that all members of a people smuggling venture are located before a case is progressed), requiring on-going court attendances, a burden described by returnees to DFAT as difficult and stressful. Ultimately, those convicted are typically imposed with a fine of around LKR50,000 - 200,000 (AUD350 - 1400). This can be paid in instalments, although those unable to do so may be imprisoned for 14 days.
33. Submissions to the IAA suggest that the applicant will be unable to secure bail by having a family member act as guarantor, or pay a fine, and claims that he will be detained or imprisoned. DFAT's earlier reporting had indicated that depending on the timing of their arrival and availability of a magistrate, persons charged with illegal departure may be held briefly at the airport or in a nearby prison, and that in some cases if they were not granted bail on personal surety, they may require a family member to act as guarantor for their bail.²⁷ The current updated report makes no mention of this and does not suggest that returnees are transferred to prisons.
34. The applicant does not claim to have been anything other than an ordinary passenger on his journey to Australia, and there is nothing in the evidence to suggest he would be suspected of involvement in people smuggling. Further to my earlier findings, the applicant will undergo investigation at the airport and I accept he will be identified as having departed Sri Lanka illegally. I accept on the country information that the applicant will very likely be charged with an offence, taken to court and bailed. The more recent information does not suggest that bail would be dependent on the attendance of a family member. Even if he were to be detained pending bail, that would only be in the event that a magistrate was not available to hear the case such as due to a weekend or public holiday, and would be at the airport rather than in a prison. I am not satisfied on the evidence that there is any more than a remote chance of the applicant being detained for more than a brief period, of several days at most. I find that ultimately, the applicant will very likely be issued with a fine, but accept he will be required to return to court and face additional costs. Given the applicant's lack of any other profile of interest and the information above indicating no evidence of mistreatment of

²⁷ DFAT, Country Information Report Sri Lanka', 27 January 2017, CISED50AD105.

detainees at the airport, I am not satisfied there is a real chance of the applicant being harmed during this process.

35. The fine with which the applicant will be imposed is payable by instalment. As set out above, I am not satisfied that there is a real chance of the applicant being unable to secure a livelihood. I accept that the fine and ongoing costs and process may be onerous and stressful, but they will be spread out over time. While the country information before me and in the applicants' submissions refer to poor conditions in prison the evidence, including the quite detailed report of the UK Home Office, does not suggest that these same conditions apply to being held at the airport. I have considered together the fine, further costs and processes that may be associated with ongoing court appearances or reporting, and the brief period the applicant may spend in airport detention, but I am not satisfied that this amounts to serious harm. Further and in the alternative, I find that the treatment arises from a non-discriminatory application of Sri Lankan law, rather than being for one of the reasons in s.5J(1)(a) or involving systematic and discriminatory conduct as required by s.5J(4)(c).
36. I have considered the applicant's circumstances including that he is a young Tamil male from the north with family members who have previously come to the attention of the authorities on suspicion of LTTE association, his Catholic religion, that he will be returning to Sri Lanka as a failed asylum seeker who departed illegally, without an NIC card, and his lack of education and literacy. However even taking these matters together, I am not satisfied there is a real chance of the applicant experiencing any harm in the reasonably foreseeable future beyond the questioning and processing at the airport, penalties in respect of his illegal departure, discrimination, monitoring, limited employment options and current difficult living conditions in Sri Lanka identified above. I am not satisfied this treatment amounts to persecution either individually or cumulatively. The applicant does not have a well-founded fear of being persecuted.

Refugee: conclusion

37. 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

38. 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

39. 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.
40. 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.
 41. I have accepted that the applicant may experience some monitoring and discrimination, that he will be questioned and processed at the airport and very likely be investigated, charged with illegal departure and fined, and he may be briefly held at the airport during this process and have to return to court on future occasions. I have also accepted the applicant may face limitations in finding employment due to his lack of education and literacy, and will likely be impacted by current economic circumstances in Sri Lanka. I have otherwise found there is not a real chance of harm to the applicant.
 42. I am not satisfied that any of the treatment or harm I accept the applicant may experience amounts to arbitrary deprivation of life or the death penalty. Considering the definitions of significant harm in the Act, I am not satisfied on the evidence that the processes or penalties associated with return to Sri Lanka and illegal departure would entail the level of pain, suffering or humiliation or the requisite intention such as to amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. In respect of the discrimination and monitoring referred to earlier that the applicant may face, on the above information and considering his particular circumstances I am not satisfied that there is a real risk that he would experience any such treatment to a level that would reach the relevant thresholds of pain, suffering or humiliation so as to amount to significant harm as defined. I am also not satisfied that the limitations in employment the applicant may experience would meet the threshold of pain, suffering or humiliation or requisite intention described in the definitions of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.
 43. The country information indicates that the conditions and hardship currently being felt across Sri Lanka arise from the economic crisis impacting the country, rather than an act or omission intended to cause pain, suffering or humiliation. I am not satisfied on the evidence that any harm the applicant may experience due to these conditions would amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. Further, I find that any risk of harm to the applicant as a result of the country's economic crisis is a risk faced by the population of the country generally, and is not faced by the applicant personally.
 44. I have otherwise found there is not a real chance of the applicant being harmed in Sri Lanka. Real chance and real risk involve the same standard.²⁸ Relying on the reasoning and country information I have set out above, I am similarly not satisfied there is a real risk of the applicant suffering significant harm in Sri Lanka.

Complementary protection: conclusion

45. 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).

²⁸ *MIAC v SZQRB* (2013) 210 FCR 505.

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.