



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA16/01600

Date and time of decision: 31 August 2017 10:01:00

Jessica McLeod, 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 an referred applicant, or their relative or other dependant

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. [In] June 2016 he applied for a Safe Haven Enterprise visa (SHEV). The delegate accepted the applicant had suffered four instances of harassment and intimidation from the police and an unidentified group in 2011-2012. However he did not accept the applicant was imputed with an LTTE profile or that he had any significant profile arising from his political involvement. The delegate was not satisfied the applicant was of any ongoing interest to the authorities and found he would not be returning with a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm upon return. The grant of this visa was refused [in] December 2016.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 6 January 2017 the IAA received a submission from the applicant. The submission contains arguments responding to the delegate's decision. I am satisfied this may be described as 'argument' rather than information. In part, the documents also reference country information and claims that were before the Ministerial delegate and are already before me.
4. However the submission also contains new information which was not before the delegate. This includes information from a May 2016 article from the World Socialist Website alleging that arrests of Tamil youths have not decreased and that the President and Prime Minister are falsely claiming that a democratic environment has been established. The submission also provides new information about new terrorist groups such as the 'Awa' which are purportedly linked to the Sri Lankan Army and paramilitary groups, and new information purportedly discussed in a 2016 Parliamentary session about there being 12 000 un-rehabilitated LTTE militants remaining in Sri Lanka. No explanation has been provided as to why the article and other new information could not have been provided prior to the delegate's decision. There is no indication from the article or information provided as to why this is credible personal information and no such explanation has been provided by the applicant. I am not satisfied that either s.473DD(b)(i) or (ii) is met and nor am I satisfied that any exceptional circumstances apply. I have not considered this information.
5. I have obtained new information, specifically information on the treatment of Sri Lankans of Tamil ethnicity and citizens who have departed Sri Lanka illegally and sought asylum abroad from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017.¹ The delegate relied on the then current 18 December 2015 DFAT report for Sri Lanka and the 2017 report was only published after the delegate's decision. I am satisfied that there are exceptional circumstances to justify considering this new information.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:

- He is a Tamil Hindu citizen of Sri Lanka, born in Tamil Nadu, India in [year]. His family had fled to India from Sri Lanka due to the war.
- In 1994, he moved with his family to [Town 1], Sri Lanka because there was peace in 1994 and the war stopped for a while. They lived in UNHCR camps in the [Town 1] area. Following the tsunami in 2006 they moved to [Town 2] which was under army control.
- From 2006 – 2009 they were subject to a strict 6pm curfew. The army would check all houses but they paid extra attention to his family because there were [number] young men (the applicant and his brothers) in the house.
- Although his family received some pressure from other Tamils for he and / or his brothers to join, neither he nor anyone in his family had any involvement with the LTTE. Two of his [relatives] had been killed so his family feared the same for them.
- During 2010 he was studying for [a qualification]. [An Associate] at [his workplace] was standing as a candidate for the Tamil National Alliance (TNA) for the district council. He helped his [Associate] by pasting posters around the area and doing other odd jobs for him. The election was held after he finished his studies and the [Associate] was successful. His [relative 1] also ran as a candidate for the TNA but was not successful.
- After the election, he was targeted. The first time this happened, he was with his friends on the street when two men stopped him. They told his friends to go on and not to look back while they pulled him to the side. The men asked him if he had any drugs or guns. They said he had to hand them over and they would give him money. He does not know why they asked him about drugs and guns, but as they were police, he believes it may have just been an excuse to stop him. They then started asking him questions like: *"Is Prabhakaran alive or dead?"*, *"Is the LITE still in existence?"* and *"The LTTE is powerless now."* He just agreed with them but they became aggressive. They said he must have been involved because he was able to answer the questions they had asked him, but they said he wasn't giving them proper answers. He said he didn't know and they pushed him hard against the concrete wall, splitting his head open making him bleed and fall to the ground. They also broke his nose and kicked him. They then said he should not make a police complaint about what happened and walked away. He does not know why they let him go. He was very scared.
- He went home and then to the hospital. He was questioned about what had happened but he was too scared and just said he had fallen.
- Around two months later, there was a second incident. He was riding his bicycle home from work when he had to cross a checkpoint where IDs were checked and also clothes, which required the removal of clothes. As he approached he saw one of the two men who had beaten him. He was in police uniform and he said the applicant was suspicious and needed to be checked out. He was taken into a room, his National Identity Card (NIC) was checked and he was forced to undress while his clothes were checked over. The officer started insulting him, asking if he remembered the first time they had met when he had beaten him. The applicant was scared and wanted to leave. The officer gave him back his clothes and he left as quickly as possible. He doesn't know why he let him go.
- Around two to three months later there was a third incident. He was riding his bicycle near home with his friends when the same two men stopped them, both wearing police

uniforms. They didn't say anything but just laughed and released the air from the applicant's tyres so he was forced to walk home. They did not touch anyone else's bike. He was scared because they were policemen and they were enjoying targeting him.

- The men would regularly come to his house and interrogate him about LTTE involvement at least [number of] times per week.
- A couple of months later, around July 2012, there was a fourth incident. He was walking home with his [brother] when they were approached by three men the applicant had never seen before. They said they needed to talk to him and sent his brother away. They grabbed his hands and put a gun to his head and gave him the choice of going with them or being shot. They took him to [a playground] where they made him kneel. They said he knew the LTTE and asked him where they were. They also asked him other questions about the LTTE and he just kept telling them he didn't know anything. They slapped and kicked him. They said to him "We have you now. Will the person who helped in the election come and help you now?" He thought it was a throw away comment, to threaten him that no one could help him.
- While this was happening his parents arrived (having been alerted by his brother) in his father's [vehicle]. He was angry and seemed very disturbed by the scene. The men threatened to throw a rock at him and then threw it at his [vehicle] breaking the windscreen instead. His father spoke to them in Sinhalese (which the applicant could not understand). His father was weeping and his brother was on the ground pleading. His father gave the men all the money in his pockets, his ring and his mother's jewellery. The men then said they could all go home. His father told him they had said they were only letting him go because of the money and jewellery but next time they would kill him.
- He and his family did not know why he was targeted, or when the men would come after him again. They decided it was not safe for him in Sri Lanka and so arranged his trip to Australia.
- Since then some of his friends have been asked about his whereabouts, most recently in September 2015. His friends would just say he was working somewhere around the area.
- He fears being harmed upon return by the police, Criminal Investigation Department (CID) or other authorities, especially as they have been asking questions about him since he left.
- There is nowhere he could live in Sri Lanka. The men who abducted him and took him to [a playground] took his NIC and he would need to approach the police to re-apply for another one. This would alert the police to his location and he would also be denied access to any services and restricted from travelling.

Factual findings

Identity

7. The applicant has consistently maintained that before he was born his parents fled Sri Lanka to Tamil Nadu, India due to the war and that he was born in India. However his Sri Lankan birth certificate and passport indicates he was born in [an area in Town 1], Sri Lanka. At the SHEV interview he explained that after his family returned to Sri Lanka in 1994 his parents registered his birthplace as [Town 1] (their home area) in order to obtain documentation showing he was

born in Sri Lanka so he could be enrolled in school and access services. I consider this explanation to be plausible. I accept the applicant's home region and receiving country is [the area in Town 1] district, Sri Lanka. On the evidence I am also satisfied he has no right to re-enter and reside in India.

TNA support

8. I accept the applicant engaged in low-level campaigning activities for his [Associate], a TNA candidate in 2011. From the applicant's evidence I am satisfied this was limited to a few months of putting up posters, distributing campaign material and accompanying the candidate when he was giving speeches. At the SHEV interview the applicant stated he only became involved because as he was only staying at home doing nothing at the time, he could not say no when his [Associate] asked him to help. He confirmed at the SHEV interview he has no interest in politics and knows nothing about the TNA.
9. The delegate questioned the applicant about a letter he had provided which was purportedly from this [Associate], now a councillor in [Town 1] attesting that the applicant has been a strong supporter of the TNA, that he was a dedicated volunteer for the party and was threatened several times by the Sri Lankan armed forces. The delegate put to the applicant that the information in the letter was inconsistent with his claims not to have an interest in politics or any knowledge about the TNA and the applicant responded he had supported the [Associate] strongly but not the party. I find the information in the letter contains conflicting information with the applicant's claims. I also have concerns about its authenticity given it is written in English and is undated. I accept the applicant's response that he only supported the person rather than the party and I give no weight to this letter. I do however, accept he assisted in the campaign by putting up posters, distributing campaign material and accompanying the candidate when he was giving speeches.
10. The applicant has stated his [relative 1] also campaigned for the TNA however he confirmed at the SHEV interview that this was at an earlier time when he was in [specified year] at school and that after losing the respective election his [relative 1] had taken no further part in politics. There is no indication before me from the material referred and subsequently provided that the applicant or any of his family members ever experienced problems on account of the [relative 1]'s TNA involvement. I am satisfied the applicant has not suffered harm on account of this in the past and that he does not fear future harm arising from his [relative 1]'s previous political involvement.

LTTE involvement

11. According to the applicant, two of his [relatives] joined the LTTE during the war and are now missing, presumed dead. On the evidence the [relatives'] involvement has not led the applicant and his immediate family to have problems with the authorities on account of their familial connections to these LTTE member [relatives]. The applicant has consistently claimed that neither he nor any of his immediate family members have ever had LTTE involvement. He states that although there was pressure to join the LTTE, his family avoided involvement as they feared he and his brother would suffer harm like his [relatives] and as they lived in an army controlled area they were able to avoid recruitment. I accept these claims.

Previous harm

12. I accept the applicant experienced discrimination as a Tamil in Sri Lanka, which in addition to the mistreatment discussed above, affected the school he was able to attend.
13. At the SHEV interview the applicant confirmed that in addition to not having had any actual LTTE involvement, neither he nor any other members of his family had ever been arrested or charged in connection with LTTE involvement. However, he claims he has been bullied, harassed and tortured by the police and CID in 2011 and 2012 and he has described four separate incidents of mistreatment. I note the applicant has at times used the word 'torture' to describe his mistreatment. Taking into account all of his evidence, I am satisfied the harm suffered included threats (including at gun point), beatings, intimidation, bullying and harassment. I note in his Arrival interview, the applicant indicated he was 'arrested' and taken to the [play] ground. However I am satisfied he was referring to the fourth incident (discussed below) in which he was abducted by unknown persons and that this was not a formal arrest and nor did it involve being taken into custody by the authorities.
14. In the first incident, the applicant was separated from his friends and beaten by two unknown men in civil dress and although he didn't know it at the time, he later found out they were police officers. He claims they said they knew he had drugs and guns and they wanted to pay him for them. When he denied having them, they asked him if Prabhakaran is still alive and if the LTTE is still around and then suggested that since the applicant was able to answer those questions he must have had some LTTE involvement. In the second incident around two months later, the applicant was stopped at a checkpoint by one of these same men, this time in a police uniform. The officer singled him out as being suspicious and required the applicant to undress and have his body and clothes checked and his NIC checked before being released. The officer made a comment about the earlier beating. In the third incident around two to three months later, the same two officers approached the applicant and his friends and let the air out of the applicant's tyres. I am prepared to accept these incidents occurred. Country information indicates that many Tamils, particularly in the north and east of Sri Lanka reported being monitored, harassed, arrested and detained by security forces under the Rajapaksa government.² I accept the applicant was bullied and harassed through these three incidents as claimed.
15. In the fourth incident the applicant claims he was separated from his brother while they were walking home one day, taken to [a playground] at gunpoint, beaten and interrogated by three other men (different to those who had bullied and harmed him before). He claims they accused him of LTTE involvement and asked if he thought the [Associate] he had helped in the election would come to help him. He claims he was released when his parents bribed the men with money and jewellery but they threatened they would come after him again and would kill him.
16. The applicant claims all the incidents and perpetrators were connected. He believes the two police officers targeted him on suspicion of LTTE links and because he helped his [Associate] in the TNA campaign. He stated they saw him helping the [Associate] and he could see in their eyes they wanted to do something. The delegate put to the applicant that they had never mentioned the [Associate] in the incidents he described and the applicant responded that the men had done so in the last fourth incident. However the applicant then confirmed that these were different men and the police had never actually mentioned the [Associate]. The applicant then stated that in the fourth incident the men had told his father that this was "*not the first time we are doing this to your son*" and that they had beaten him before. However the applicant

² DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

confirmed he had never seen these three men prior to this incident. He claims he no longer has a NIC as his was taken from him during this incident.

17. I am prepared to accept that the fourth incident occurred. However I am not satisfied on the evidence that the incident or the perpetrators involved had any connection to the first three incidents of mistreatment by the two policemen. The applicant gave vague explanations and conflicting information when describing why he believed they were connected. I am not convinced there is any such connection. I find the incidents and the perpetrators were unrelated.
18. The two officers involved in the first three incidents made no mention of the TNA [Associate] and I find they were not targeting the applicant in relation to the election campaign. Rather, I find these incidents to be examples of bullying and harassment by rogue police officers against a young Tamil male in the Eastern Province. I accept the applicant and his brother had been paid extra attention during routine house checks during the war due to there being [number] young Tamil males in the house. The applicant also claims that following the first incident, the officers also used to come to his house and interrogate him over LTTE involvement at least [number of] times per week. It is not implausible that the applicant, as a young Tamil male in the Eastern Province may have been questioned and / or monitored around this time. However on his own evidence, the applicant's most substantial link to the LTTE was through his [relatives] and he knows little about their LTTE service. Country information indicates that in the aftermath of the war Sri Lankan authorities maintained efforts in seeking out and arresting, detaining and remanding in rehabilitation centres both high and low-profile LTTE members as well as non-members they suspected had assisted the LTTE, even if their involvement was purely peripheral.³ Many civilians were also questioned or monitored towards the end of the conflict. However, on the evidence, neither the applicant nor any other member of his immediate family was ever formally arrested, detained or sent for rehabilitation. Even taking into account the references by the officers in the first incident and by the men who abducted him in the fourth incident, I am not satisfied the applicant was suspected to be an LTTE member, supporter or sympathiser. I do not accept these men or any other members of the authorities would have continually interrogated the applicant at his house at least [number of] times per week without ever detaining him overnight, charging, arresting or taking him for rehabilitation, particularly if they considered he was withholding information or protecting LTTE members. On the evidence I am satisfied neither the applicant nor any of his immediate family members have previously been or are currently perceived as having an LTTE member, supporter or sympathiser profile.
19. As for the motivation of the perpetrators in the fourth incident, I have considered the comments made about the TNA candidate [Associate] and the accusations of LTTE involvement. However I note the men were all in civil dress, did not identify themselves at authorities, and did not formally arrest, charge or take him to an official location, nor did they threaten to do any of those things to the applicant. Even taking into account the LTTE questioning and the reference to the TNA [Associate], I am not convinced that these men were members of the authorities. I note also that they released the applicant in exchange for money and jewellery. I consider their motivation to be criminal extortion and that the TNA and LTTE issues were raised to scare the applicant. While I accept they threatened that next time they would kill the applicant, there is no indication in the referred material or information provided that they have come looking for the applicant or have threatened, harmed or even approached his family for any reason in his absence. I find this was an isolated crime and I am not satisfied the applicant is still of interest to these men.

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 18 December 2015 CISEC96CF14143

20. The applicant does claim however that since his departure and as recently as September 2015, the two police officers from the first three incidents have been asking his friends for his whereabouts. The delegate asked what the officers were asking of his friends and he responded *"Where is the tall guy? We don't see him anymore. Where is he now?"* I am prepared to accept that these officers have asked about the applicant including in September 2015. However on the evidence provided, their questioning has been opportunistic and indicate only that they have observed the applicant's absence from the area. On the evidence I am not satisfied it is representative of ongoing interest in the applicant on the part of the authorities, and nor does it indicate these officers have been actively looking for him. On the evidence I am satisfied that no other members of the authorities have been asking after him. I am satisfied the applicant is not of any official adverse interest to any authorities in Sri Lanka and I find the non-official (or personal) interest of the two rogue policemen has decreased and at that most they have only low-level interest in the applicant.

Refugee assessment

21. 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

22. 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.

23. I found above that the fourth incident at [a playground] involved an unknown group of persons motivated by criminal extortion. I found it was an isolated crime and I am satisfied that the feared persecution from these men is not for a s.5J reason. In any case, I am not satisfied they have pursued the applicant or any member of his family since this incident. On the evidence, I am not satisfied these men still have an interest in harming the applicant. I do not accept there is a real chance of the applicant facing serious harm from these men, or in connection with this incident upon return.

24. I am satisfied the applicant has not suffered harm on account of his [relative 1]'s political activities in the past and that he does not fear future harm arising from this. I am satisfied the applicant does not have a well-founded fear of persecution arising from his [relative 1]'s previous political activities.
25. I have accepted the applicant was engaged in low-level activities in support of a TNA candidate in 2011. However I am not satisfied that it resulted in him having a profile of interest such that he was previously targeted in relation to this. I am not satisfied on the evidence that he has engaged in any political activities in Australia that have bestowed on him an identifiable profile as a supporter of any party, or as an opponent to the government in any way. The applicant confirmed at the SHEV interview that he has no interest in politics and knows nothing about the TNA. I am not satisfied that the applicant had, or currently has a political profile that would cause him to be targeted upon return. I am satisfied the applicant would not face a real chance of harm from anyone in relation to his previous political activities.
26. Given the applicant has no interest in politics and there is nothing in the referred material or information provided to indicate he would otherwise need to engage in politics upon return, I find it is unlikely that the applicant would engage in political activities in the reasonably foreseeable future upon return. However, if he did so, I am satisfied it would be of low-level nature only and due only to his personal association with a TNA councillor. I am also satisfied that it would occur in a very different political environment to that which characterised the Eastern Province before the applicant left Sri Lanka. Country information that was before the delegate indicates that the TNA's main political rival in the Eastern Province, the TMVP, has become substantially weaker while the political power of the TNA has exponentially grown. Contesting under the Ilankai Arsu Kachchi (ITAK), the TNA won 16 seats in the August 2015 Parliamentary election and the TNA's profile has been enhanced with the TNA leader, Rajavaothian Sampanthan formally appointed opposition leader.⁴ DFAT also assesses that the Sirisena government has been engaging constructively with the TNA.⁵ The August 2015 elections were described as 'peaceful' with few incidents of alleged violence on election-day and only a small number of serious incidents in the lead-up.⁶ Even if the applicant were to work for or support his [Associate] turned councillor again I find his involvement would likely remain low-level. Having regard to this and the changed country situation indicating the TNA's main rival in the Eastern Province, the TMVP has been weakened, there is greater national support and power for Tamil political parties and about the low rate of election related violence in 2015, I am satisfied the applicant would not face a real chance of harm from anyone in relation to his previous involvement, or if he were to engage in political activities upon return.
27. Since the applicant's departure, the situation for Tamils in Sri Lanka has changed considerably. Information before the delegate indicates that developments in Sri Lanka's political landscape at the national and provincial levels are significant and indicative of a more positive future for Tamils. The Rajapaksa government was defeated in January 2015 and replaced with the Sirisena government. As noted above, political participation for Tamil political parties has increased and the TNA is now formally in opposition. DFAT assesses that Tamils have a substantial level of

4 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

5 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

6 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508

political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015.⁷

28. DFAT assesses that under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life has significantly decreased. Tamil community members reportedly describe a positive shift in the nature of interactions with authorities and feel able to question or object to monitoring or observation activities.⁸ The Sri Lankan government is still sensitive to the potential re-emergence of the LTTE⁹ but country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor when they originate from, or reside in, an area that was previously controlled by the LTTE.¹⁰ It no longer supports a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age or place of origin.¹¹ That is, it does not support that the applicant would be imputed with LTTE membership or support or a pro-LTTE opinion on the basis of his being a young Tamil male from the Eastern province.
29. The applicant has described examples of discrimination he suffered and Tamils in Sri Lanka do still maintain there continues to be systematic discrimination in university education, government employment, other matters controlled by the government, land ownership and surveillance and harassment. Significantly, though, the information before me also refers to a number of positive developments for Tamils in the country politically and socially, as well as government initiatives to address these concerns. While I do accept there remains a degree of discrimination and harassment in the country towards Tamils¹², having regard to the information before me I am satisfied it is low level, continues to reduce, and would not constitute serious harm, whether separately or cumulatively.
30. The UNHCR indicated in its most recent but now dated 2012 guidelines that *'former LTTE combatants or cadres'* and *'former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE'* as well as *'persons with family links or who are dependent on or otherwise closely related to persons with'* those risk profiles may give rise to a need for international protection.¹³ However the UNHCR also advised at that time that this depended on the specifics of the individual case. More recently the UK Home Office advised that there is an onus on Tamils to demonstrate that they will face on return ill-treatment from the current, as opposed to the previous, government. The UK suggests that persons may be at risk if they are

7 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105

8 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105

9 UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

10 UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012 UNB0183EA8; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105; United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

11 UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012 UNB0183EA8; United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105

12 United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

13 DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

perceived to be an LTTE sympathiser, a threat to the integrity of Sri Lanka due to a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, are journalists or human rights activists critical of the government, are individuals who gave evidence to the 'Lessons Learned and Reconciliation Commission' implicating the authorities in alleged war crimes, and / or are persons whose name appears on a computerised "stop" list accessible at the airport.¹⁴

31. While I accept the applicant's [relatives] were in the LTTE I am not satisfied the authorities have ever had, or would have upon return, an interest in the applicant on account of this. While I accepted the applicant's house was given more attention during routine checks during the war (owing to having [number] young Tamil males in the house) and that he was subject to bullying, intimidation, harassment and beatings in 2011-12, I am satisfied the authorities did not suspect him to be an LTTE member, supporter or sympathiser. I am satisfied that at the time he departed Sri Lanka the applicant was of no official interest to the authorities and even taking into account that he departed illegally, I am not satisfied an adverse interest in him would have developed. There is no evidence before me of the applicant having been engaged in (or suspected thereof) Tamil separatism, or activities which would impute him as an LTTE sympathiser, or threat to the state and nor does he fit within the other risk profiles identified by the UK. Even taking into account the previous times the applicant was detained, questioned and that I accept he was subject to low-level monitoring, I am not satisfied that his profile was (and would be upon return) such that he would come to adverse attention for LTTE connections upon return.
32. I have considered the conduct of the police officers who previously bullied, harassed and beat the applicant and that they noticed his absence and asked his friends where he had gone. However taking into account the country information discussed above regarding inter alia, the overall decreased in monitoring and harassment and that Tamils feel able to question or object to such activities that may occur, that I found the officers' interest in him had declined and that they have not harassed his family including his father or brother in the applicant's absence, I am not satisfied the applicant will face a real chance of harm from these officers upon return.
33. I have considered the applicant's evidence as to recent examples of mistreatment against Tamils. However I am not satisfied the examples the applicant raised in the SHEV process or subsequently are indicative of a risk of harm to the applicant, taking into account my findings on his profile and the lack of authorities' interest in him.
34. I accept the applicant may face discrimination as a Tamil upon return but I do not accept it will amount to serious harm. I am not satisfied that the applicant faces a real chance of harm now or in the reasonably foreseeable future on the basis of actual or imputed LTTE links arising from his [relative's] LTTE membership, any interest that the two officers had in him previously, his Tamil race, his origins from the Eastern Province, his gender or age (noting that he is still a relatively young man), even taking into account the previous mistreatment against him, questioning and monitoring and the post-departure enquiries from the two officers. Even when all of these factors are considered cumulatively, I am not satisfied they bestow on the applicant a profile which indicates he will be at risk upon return of being detained under the operation of the Prevention of Terrorism Act (PTA), or that he otherwise has a well-founded fear of persecution from the authorities nor others, on the basis of any imputed LTTE support or links, because he would be considered a threat to the integrity of the Sri Lankan state, or for any other reason.

¹⁴ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

35. I accept that should the applicant be returned to Sri Lanka, he would be identifiable to authorities at the airport as a failed or returning asylum seeker from Australia who departed Sri Lanka illegally.
36. I accept that the applicant will be subject to police investigations to confirm his identity and to address whether he would be trying to conceal his identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. I accept this may involve interviewing him, contacting the police in his home in [Town 1], contacting his claimed neighbours and family and checking criminal and court records. I also accept he will be checked against the authorities' sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases.¹⁵
37. I accept that during the airport processing procedures, the applicant's personal history may be revealed however on the evidence, I am not satisfied the authorities would uncover anything of concern. I am satisfied that through these processes it will be revealed that neither he nor any members of his immediate family were ever formally charged, arrested, detained overnight or taken for rehabilitation. I am satisfied that through these checks it would be determined that he has no LTTE links, no outstanding criminal matters, nor any other adverse profile of interest to the authorities. While I accept he has been subject to bullying, physical and mental harassment, beatings and threats in the past, for the reasons given above I am satisfied on return to the country he would again be assessed as having no adverse profile. I am satisfied on the evidence that he would not be listed in the stop and watch lists, and would not be identified as someone trying to conceal their identity, or who has outstanding court orders/arrest warrants or a criminal/terrorist background.
38. Between 2008 and 2015, over 1,500 asylum seekers were returned from Australia to Sri Lanka as well as thousands from the US, Canada, the UK and other European countries, the majority of which have been Tamil. Of the thousands of returnees who have returned since 2009 there have been allegations of torture or mistreatment.¹⁶ However DFAT assesses the risk of harm for the majority of returnees is low and continues to reduce¹⁷ and I am not satisfied that these reports or allegations are informative of the circumstance that would be faced by the applicant upon return.
39. DFAT and other sources considered by the delegate advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing.¹⁸ Reporting from the UK indicates that as the LTTE is now considered a spent force and there have been no terrorist incidents in Sri Lanka since the war's end, the Sri Lankan government's objective has shifted to identify activists in the Tamil diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state.¹⁹ I

15 DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

16 International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016

17 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

18 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

19 UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

am satisfied that the applicant would not be perceived as an LTTE sympathiser, a journalist or human rights activist critical of the government or a threat to the integrity of the Sri Lankan state. I am not satisfied there is anything in the applicant's profile that would cause concern for the authorities, either during the airport processing procedures or after he has returned to his home region. I do not accept the applicant faces a real chance of harm as a failed / returnee asylum seeker even considering his other profile factors and his history of harassment with the authorities.

40. The applicant has committed an offence under the Immigration and Emigration Act 1988 (I&E Act) in departing Sri Lanka other than via an approved port of departure. According to DFAT, returnees who have been charged under the I&E Act can remain in police custody at the airport for up to 24 hours after arrival and should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be held at a nearby prison. Information from DFAT does not indicate that detention is selectively applied, that returnees are processed in any discriminatory manner or that those who committed an offence under the I&E Act face a higher risk of torture or other mistreatment.²⁰
41. I find that while being questioned and processed at the airport the applicant will face a brief period of detention. The information before me indicates there is a possibility he may be detained more than a day while awaiting an opportunity to appear before a magistrate. While I am satisfied that this would be dependent on the timing of his arrival and that such a period of detention is likely to be remote, I accept that if the applicant's detention did extend to more than a day that it may occur in a Sri Lankan prison. Information that was before the delegate indicates that conditions in Sri Lankan prisons are poor,²¹ however I am satisfied on the information that this is due to economic and resourcing conditions and old infrastructure, not a result of any systematic or intentional conduct by the Sri Lankan authorities. The country information before me indicates that any such detention would only continue until the applicant was given an opportunity to appear before a magistrate, and I find this would likely be brief. I also consider the information about the low risk to returnees is relevant to this period. I note the applicant describes his previous experience as 'mental torture'. There is no information before me (medical or otherwise) as to the applicant's mental condition, and on the evidence I am not satisfied the applicant's mental health is a vulnerability which would elevate the risk of harm. Having regard to all these circumstances, I am not satisfied that the conditions will be such as to rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment or otherwise amount to serious harm for the applicant.
42. Penalties for illegally departing can include imprisonment of up to five years and a fine of up to 200,000 LKR. There is nothing before me to indicate that the applicant would be perceived and treated as anything other than a mere passenger on the people smuggling vessel, who DFAT assesses, the Sri Lankan authorities tend to view as victims.²² According to the Sri Lankan Attorney-General's Department, returnees who were merely passengers on a people smuggling

20 DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

21 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

22 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

venture have not been given custodial sentences for their illegal departure, but rather fined on a discretionary basis, with fines payable by instalment.²³

43. Country information indicates the applicant, if he pleads guilty to departing illegally, will be required to pay a fine (which he can do by instalment) and will subsequently be released. In most cases if a person pleads not guilty, they will be granted bail on their own personal surety immediately by the magistrate, or may be required to have a family member act as guarantor and wait for their family member to collect them.²⁴ The applicant has not claimed and there is no other evidence in the referred material or submission to indicate he would not be granted bail on his own personal surety, or that he would not have a willing family member to act as guarantor if required. I note the applicant's parents are still living in Sri Lanka. If bailed, there are rarely any conditions, and if there are, they are imposed on a discretionary basis. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to Police or Police stations between hearings.²⁵
44. On the evidence before me, I find that the applicant will be issued a fine and released. If the applicant pleads not guilty, he will be released on his own personal surety. If he did need a family member (such as a parent) to act as guarantor and to come collect him, I am satisfied that my findings above regarding his not facing a real chance of serious harm while detained in waiting would also apply in this circumstance.
45. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment. There is no information before me which indicates the applicant will be prevented from obtaining employment or earning a livelihood upon return. I note he has family members in Sri Lanka who may be able to assist. I am not satisfied that the payment of a fine (which he can do by instalment) amounts to hardship which would threaten his capacity to subsist, or otherwise amount to serious or significant harm, or that being held in detention for a short period at the airport, or possibly a nearby prison, cumulatively amounts to serious harm.
46. Information from DFAT does not support that the I&E Act and associated procedures are selectively enforced or that they are applied in a discriminatory manner. I find that the process leading to charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to all Sri Lankans who depart illegally and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
47. I note the applicant's comments as to needing to reapply for a NIC since his was taken from him. However as I have assessed the applicant as having no adverse profile with the authorities upon return I am not satisfied that he will face a real chance of harm when engaging with authorities to obtain a new NIC upon return.
48. I accept the applicant may face discrimination as a Tamil upon return but I do not accept it will amount to serious harm. Overall, even taking into account the applicant's previous problems with members of the authorities and an unknown group of persons, and the post-departure enquiries, I am not satisfied the applicant will face a real chance of serious harm arising from:

23 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

24 DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

25 DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

being a family member of a former LTTE combatant (his [relatives]), real or imputed LTTE links on account of being a young Tamil male from the East who left illegally and sought asylum in Australia, nor from his association with the TNA. Even when I consider all these factors together, in the whole of the applicant's circumstances, I am not satisfied that the applicant's circumstances cumulatively give rise to a well-founded fear of persecution.

Refugee: conclusion

49. 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

50. 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

51. 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.

52. I found above that the fourth incident at the [playground] involved an unknown group of persons motivated by criminal extortion. I found it was an isolated crime and I am not satisfied they have pursued the applicant or any member of his family since this incident. On the evidence, I am not satisfied these men still have an interest in harming the applicant. I do not accept there is a real risk of the applicant facing significant harm from these men, or in connection with this incident upon return.

53. I have found that the applicant would not face a real chance of harm from any organisation, group or individuals on account of his [relative 1]'s previous political activities, nor his own previous political activities helping with his [Associate's] TNA campaign in Sri Lanka, nor if he engaged in such activities upon return. For the same reasons and because 'real chance' equates to 'real risk', I am also not satisfied that the applicant faces a real risk of significant harm in relation to these matters.

54. I have accepted there remains a degree of discrimination and harassment in the country towards Tamils, but having regard to the information before me I am satisfied it is low level, continues to reduce, and would not constitute serious harm, whether separately or cumulatively. The country information cited above also does not support that this manifests in a way that would arbitrarily deprive the applicant of his life or have the death penalty carried out against him. There is also

no evidence to indicate that he will be subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. I do not therefore accept that he will face discrimination in Sri Lanka that would amount to significant harm for the purposes of s.36(2A).

55. I found above that overall, even taking into account the authorities' previous problems with members of the authorities and an unknown group of persons, and the post-departure enquiries, I am not satisfied the applicant will face a real chance of serious harm arising from: being a family member of a former LTTE combatant (his [relatives]), real or imputed LTTE links on account of being a young Tamil male from the East who left illegally and sought asylum in Australia. Even when I consider all these factors together, in the whole of the applicant's circumstances, I am not satisfied that the applicant's circumstances cumulatively give rise to a real risk of significant harm.
56. As to his treatment under the criminal justice system as a person who departed illegally and any questioning and detention he may experience in relation to this, or his return as a failed asylum seeker, as set out above, I find that the applicant will be issued a fine and released, or if he pleads not guilty, he will be released pending his court date. While I have found above that the applicant will not receive a custodial sentence, I have considered the conditions the applicant may face if he is held in a nearby prison while waiting to come before the magistrate, or waiting for his family to act as guarantor and collect him. Information that was before the delegate indicates that in general, prison conditions in Sri Lanka do not meet international standards due to a lack of resources, over-crowding and poor sanitation. However there is no evidence that prisoners subjected to short periods of detention awaiting collection or prosecution under the I&E Act are currently or will be subject to the death penalty or otherwise arbitrarily deprived of their life nor tortured. The evidence also does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I note the applicant describes his previous experience as 'mental torture'. There is no information before me (medical or otherwise) as to the applicant's mental condition, and on the evidence I am not satisfied the applicant's mental health is a vulnerability which would elevate the risk of harm. In light of this and in all the circumstances I am not satisfied that the applicant would be subject to acts or omissions which would constitute significant harm, as defined under s.36(2A) and s.5 of the Act during his time in detention or prison while awaiting his Magistrates Court hearing or collection by a family member.
57. In terms of punishment, I have found above that rather than receiving a custodial sentence, the applicant will likely receive a maximum fine of up to 200 000 rupees. I note that the government allows payments to be made in instalments and I am not satisfied he would be unable to pay the fine. I am not satisfied that questioning and the imposition of such fine would amount to significant harm under the definition in s.36(2A).
58. I have taken all the applicant's circumstances into account and have considered how his various profile factors and claims interact or compound affecting the risk upon return. However even taking into account the applicant's cumulative circumstances and profile, I do not accept he would face a real risk of significant harm. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm

Complementary protection: conclusion

59. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.