



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08840

Date and time of decision: 10 February 2021 10:34:00
K Juttner, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from [Town 1] in Sri Lanka. He arrived in Australia [in] October 2012 and on 17 July 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 8 January 2021, a delegate of the Minister for Immigration (the delegate) refused to grant the visa on the grounds that Australia did not owe protection obligations to the applicant.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 27 January 2021, the applicant provided written submissions about why the delegate made incorrect findings and failed to properly reflect the material. He also reiterated his claims that he made to the delegate. I have had regard to those submissions. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Tamil male from [Location 1] in the North Western Province of Sri Lanka.
 - He worked as a fisherman for fifteen years around [Location 1] and [Location 2].
 - His uncle was also a fisherman, and was involved in supplying arms to the Liberation Tigers of Tamil Eelam (LTTE). His uncle's boat was involved in the trade of weapons. The applicant used his uncle's boat to fish after his uncle went into hiding. He was interrogated by the CID (Criminal Investigation Department) about his uncle's whereabouts.
 - He decided to leave Sri Lanka to stop the harassment and interrogation by the CID.
 - He fears that if he returns to Sri Lanka he would be seriously harmed by the police, CID and navy, as well as tortured, arrested and detained because he was captain of a boat which transported himself and other people to Australia illegally. He was asked to drive the boat by the people smuggler ("S"), and in exchange, he did not have to pay for his journey to Australia. He fears he will be harmed and subjected to cruel and inhumane treatment when he is in gaol and may be detained indefinitely.
 - He left [Location 2] legally by using a navy pass to get through the navy checkpoint. He met up with another boat containing [people] who he transported to Australia on his boat.
 - He left Sri Lanka without a passport and has never obtained one.
 - He also fears harm because his personal details were disclosed on the Department of Immigration's website in early 2014, and that Sri Lankan authorities would be able to infer he has sought protection in Australia and was the person driving the boat. They will

be suspicious of his history and the information he may have provided to Australian authorities.

6. In his arrival interview on 27 January 2013, the applicant stated that he had problems with the navy at sea when he was fishing during the war in 1995. The navy would shine lights at them which made it hard to fish.

Factual findings

Citizenship and ethnicity

7. The applicant has consistently claimed that he is of Tamil ethnicity, and that he was born and lived in [Location 1] in Puttalam District in the North Western Province of Sri Lanka for his whole life before he came to Australia. He is Catholic. The applicant speaks Tamil and can speak, read and write Sinhalese. I note that his entry interview on 27 January 2013 and SHEV interview on 9 December 2020 were conducted in Tamil. He appeared to have difficulty understanding the first Tamil interpreter at his SHEV interview, who was an Indian Tamil, but appeared to understand the second Tamil interpreter who was subsequently obtained to assist with interpreting services. The applicant provided a copy of his Sri Lankan birth certificate in English which specified that he was born in [Location 1] and his parents were of Tamil ethnicity. The applicant's son's Sri Lankan birth certificate from [year] indicated that the applicant and his wife were Sri Lankan Tamils. He also provided a copy of the "English translation" (but not the original document) of the Registrar's certificate relating to the applicant's intention to marry [in] May 2007, which specified that the applicant and his now-wife were of Sinhala race. He has not provided any explanation about this document. Notwithstanding this, the other evidence before me indicates that he is of Tamil ethnicity. I accept that the applicant is a Tamil from the Puttalam District. I am satisfied that he is a Sri Lankan national and Sri Lanka is his receiving country.

Work as a fisherman and problems in Sri Lanka

8. Since his arrival in Australia, the applicant has claimed that he worked as a fisherman in Sri Lanka. According to information about his employment history in his SHEV application, he started working as a fisherman in 1995 (when he was around [age]). In his statutory declaration provided with his SHEV application, he stated that he worked as a [Occupation 1] when he left school after grade [number] and started working as a fisherman when he was around [age] (ie in around 1998). He told the delegate he worked as a fisherman for fifteen years. At his arrival interview, he said that when he started fishing he threw the nets, and that he later started to drive the boat. He had five crew members. He told the delegate he was Captain of a fishing boat and fished in the areas around [Town 1] and [Location 2]. I found the applicant's evidence about being a fisherman credible. I also note that the Registrar's certificate relating to the applicant's marriage specified that his occupation was fisherman. I am satisfied that the applicant was a fisherman in Sri Lanka for around fifteen years.
9. At his arrival interview, the applicant claimed that he had problems with the Sri Lankan navy at sea during the war, in 1995. The navy would shine lights at them which made it hard to fish. DFAT reports¹ that the civil war in Sri Lanka took place between 1983 and 2009. The applicant did not pursue this claim in his SHEV application or at his SHEV interview, where he raised other claims about problems with the Sri Lankan authorities. At his SHEV interview, he said he would

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

give more details about the claims in his SHEV application, and when asked at the end of his interview if he had put forward all his claims, he indicated that he had. I accept that the applicant was working as a fisherman during the war, and that he may have had problems with the navy shining lights in the 1990s during the war. However, I do not accept that they happened in 1995, as on the evidence in his statutory declaration, he did not start fishing until around 1998.

10. The applicant claimed that he decided to leave Sri Lanka because of the harassment and interrogation he faced from the CID about his uncle. He claimed he was interrogated by the CID about his uncle's whereabouts because he was using his uncle's fishing boat, which his uncle had earlier used to supply arms to the LTTE.
11. According to the applicant's SHEV application, his [uncle] was also a fisherman, and was involved in supplying arms to the LTTE. In or around 2008, his uncle's boat was noted by the Navy as one that was involved in the trade of weapons, which the applicant thinks was in [District 1]. His uncle subsequently changed the name of the fishing boat and brought it to [Town 1], after which the applicant took it to sea to fish on many occasions over the course of one year. During this time, the CID realised what the boat had been used for in [District 1] and came to investigate the applicant because he was using the boat which was still under his uncle's name. His uncle had gone into hiding by this time and the applicant did not have any further contact with him.
12. The applicant gave further information about his uncle's activities during the war at his SHEV interview, where it became apparent that he did not know about these matters himself and it was the CID who told him his uncle was involved with the LTTE. At his SHEV interview, the applicant initially reiterated his claims that his uncle was helping the LTTE with armaments and weapons and using his boat for this purpose. Later in the interview, he said that his uncle was not a member of the LTTE and was helping civilians and other people. When the delegate referred to the applicant's earlier evidence that his uncle helped the LTTE by supplying arms and weapons, he said this was what "they" had alleged. He did not know what his uncle was doing. Later, the delegate put to the applicant that he was now saying he was not sure if his uncle was involved in the LTTE. He responded that he only knew what he was told by CID and did not know about it himself.
13. According to his SHEV application, CID came to investigate him in or around 2010. At his SHEV interview, he gave varying evidence about this. When asked how long after he acquired the boat he was harassed by the authorities, he said it was "maybe about three years", although he also said he was not sure when his uncle went into hiding and he got the boat. Later in his interview, he said he did not remember the year when he was interrogated. He did claim that he used his uncle's boat for three years (rather than just one) and agreed with the delegate that as he left Sri Lanka in 2012, he got the boat in 2009.
14. When asked by the delegate about the nature of the interrogation, the applicant said that they were interrogating him to find out about his uncle's whereabouts. They said that as he was using his uncle's boat, he should know about his uncle and where he was hiding. He described the interrogation as frequent and constant, and said that he could not bear it and it was what made him decide to leave Sri Lanka. It took place at [Location 2] (which is in the Eastern province) and [Location 1] (in the North Western province). He told the delegate he was not assaulted and only interrogated. The applicant did not claim that he was taken anywhere or detained by the CID. He did say that he came to Australia because of the torture, but when asked about what torture he had experienced, he claimed that they were frightening him and if he did not

inform them of his uncle's whereabouts, they would "do something to him". He knew that they would blindfold and shoot him, and that this is why he decided to come to Australia.

15. On the applicant's evidence at his SHEV interview, he did not have any personal knowledge that his uncle was involved in helping the LTTE, and only knew what CID had told him. DFAT reports² that the majority of LTTE members and supporters were Tamil, and that security forces also imputed LTTE support based on Tamil ethnicity. DFAT also reports that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during and after the war. I am not satisfied on the evidence before me that the applicant's uncle was a LTTE member or involved in supplying arms to the LTTE. However, I am willing to accept that his uncle may have been perceived by the authorities to be a LTTE supporter during the war. I also accept that his uncle may have gone into hiding and that the applicant used his uncle's boat to fish in his absence.
16. On the applicant's evidence, he was simply asked about his uncle's whereabouts at [Location 2] and [Location 1]. He had no contact with his uncle and did not know where he was. He appeared to know very little about his uncle's activities. The applicant was not assaulted or detained and no further action was taken against him by CID. I do have some concerns about whether the questioning described by the applicant amounted to interrogation. His accounts varied as to whether CID came to investigate him in or around 2010 or whether it happened constantly and frequently and continued up until his departure from Sri Lanka. I accept that the applicant was questioned about his uncle's whereabouts in or around 2010. I did not find the applicant's evidence that it happened frequently or constantly convincing, and I am not satisfied that it continued after 2010. I also do not accept that the applicant was tortured. He stated he was not assaulted or detained by CID, and did not say that he was actually threatened by them. I am not satisfied that the CID tortured the applicant or that they threatened to do so if he did not say where his uncle was. The applicant also told the delegate on several occasions that he was not a LTTE supporter or associated with the LTTE himself. Other than potentially his uncle, no other family members had any LTTE affiliation. The applicant also said he did not do anything himself to bring him to the adverse attention of the authorities. His wife and son still live in the family home in Sri Lanka and have not had any problems with the authorities since the applicant left. I am not satisfied that the authorities had anything other than a passing interest in the applicant in relation to his uncle's whereabouts, or that they perceived he was a member of the LTTE because his uncle was suspected of being a LTTE member or because he came from a former LTTE-controlled area. I do not accept that the authorities had any ongoing interest in the applicant on account of his uncle, or for any other reason, at the time he left Sri Lanka.

Departure from Sri Lanka and involvement in a people smuggling enterprise

17. The applicant has consistently claimed that he will be seriously harmed and tortured by the Sri Lankan authorities (navy, police and CID) on his return to Sri Lanka because he was the captain of a boat which transported [passengers] from Sri Lanka to Australia as part of a people smuggling enterprise. He is not a people smuggler but fears that the Sri Lankan authorities will think that he organised the journey himself. He claimed that he left Sri Lanka legally via [Location 2] with a navy pass, and illegally loaded the passengers onto his boat after he had passed through the navy checkpoint. He did not have a Sri Lankan passport. He fears he will be seriously harmed because he left legally but the navy and authorities will know that he did not return with his boat and lied when he went through the navy checkpoint.

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

18. The applicant claimed that he was the captain and main driver of the boat when he first arrived in Australia. He provided detailed information at his arrival interview about the arrangements made to depart Sri Lanka by boat, and the circumstances of leaving [Location 2] Harbour and collecting the other passengers. In particular, he said that he was asked by his friend 'S', who he had met at [Location 2] and known for three years, if he would take the boat with [passengers] to Australia because he knew how to drive. S provided the boat for the journey. The applicant initially said the boat belonged to a person he did not know, and then said it belonged to S. S knew that the applicant did not have any money and it was a free chance for him to come to Australia.
19. The boat left from [Location 2] [in] October 2012. The day before, the boat was ready with a navy pass as if they were going fishing. S came to the harbour with the boat and the navy pass required to get through the navy checkpoint and the applicant set off with three other people on board (who came for the navy pass and for their jobs) and went through the navy checkpoint. He drove the boat 30 miles out to sea where met up with a small boat or boats containing the other passengers at 2.30am. The three other people on board got onto a small boat and returned to the harbour. S drove the boat most of the time on the way to Australia, and also checked the oil. Five of the other passengers took turns driving the boat when the applicant needed to sleep.
20. The applicant was probed with some rigour at his arrival interview about the nature of his friendship with S, and gave credible information about how he met S, his visits to S's house [in] [Location 2] and where it was located, and S's appearance.
21. The applicant's evidence about these matters was largely consistent with his later accounts in his SHEV application and SHEV interview. At his SHEV interview in particular, he talked at length, in a compelling and convincing way, about his experiences of leaving the harbour and collecting the other passengers. He said that he gave the pass to the navy who cleared the boat to leave the harbour. He also showed his national identification card at the navy checkpoint, which he brought to Australia and provided with his SHEV application. He told the delegate that nothing else happened at the navy checkpoint and he had no problems. On his evidence, the pass he used was provided by S with the boat used to depart from [Location 2]. It was not the pass that the applicant used when he went fishing in the past. There is no indication that the applicant's name was on the navy pass. The applicant has not provided a copy of the navy pass used to depart [Location 2]. Notwithstanding this, after considering the applicant's evidence, I accept that he used a pass provided by S to leave [Location 2].
22. I note that the delegate raised with the applicant some discrepancies between his evidence in his SHEV application (and also at his arrival interview) and his later evidence at his SHEV interview about the respective sizes of the boat the applicant drove out of [Location 2] and that containing the [passengers], and whether he drove the boat from [Location 2] Harbour. According to his SHEV application he drove the boat from [Location 2] and met up with a smaller boat containing the [people]. At his earlier arrival interview, he said that someone drove the people on a small boat who got onto the big one that he drove to [Australia]. At his SHEV interview, he initially said that he came in a small boat and got into a bigger boat and did not know who drove the smaller boat to the bigger one. When the delegate pointed to the discrepancies with his SHEV application, which also included a reference to leaving legally through a naval checkpoint and asked if he wanted to comment, the applicant focussed on the information about leaving legally through the navy checkpoint rather than commenting on the anomalies about the different size of boat. Later in his interview, he said that the other passengers were brought in a small boat to his boat. After considering the applicant's evidence overall, I consider that the anomalies are minor and not material. I note that despite raising

some concerns about the evidence, the delegate accepted that the applicant was captain of the boat.

23. Documentation from the Australian Federal Police (AFP) also corroborates the applicant's claim that he drove the boat to Australia. [In] November 2012, the AFP issued the applicant with an official warning for offenders not prosecuted with people smuggling offences. It stated that the applicant had been identified as a crew member on a suspected illegal entry vessel carrying [non-citizens] from Sri Lanka which was intercepted by Australian authorities in October 2012, and that this conduct constituted an offence under section 233A of the *Migration Act 1958*. It also stated that the applicant would not be charged with people smuggling on this occasion.
24. On the applicant's evidence, he did not organise the people smuggling enterprise, or play any part in the planning or logistics of gathering of passengers. He knew S, who was a friend and fisherman as well as a people smuggler, but did not know the name of the other person who was involved in the people smuggling enterprise. He had nothing to do with the second agent. S provided him with the boat and the navy pass he used to depart through the navy checkpoint in [Location 2]. He did not know who drove the small boat carrying the passengers out to the bigger boat he was on. He did not have to pay any money for his journey. He did not receive any money for driving the boat.
25. I accept that the applicant worked as a fisherman in Sri Lanka and that he met S, who was involved in people smuggling, at [Location 2]. I am satisfied that as a fisherman with fifteen years' experience, the applicant was able to drive the fishing boat out of the harbour and pass through the navy checkpoint legitimately using the pass. I am also satisfied that he had the necessary experience to drive a boat from Sri Lanka to [Australia].
26. I accept that the applicant left [Location 2] on a boat provided by S and passed through a navy checkpoint with a fishing pass also provided by S. I am satisfied that the applicant left through an authorised port with a lawful pass but accept that he did not have a Sri Lankan passport at this time. I also accept that the applicant was captain of a boat that brought [Sri Lankans] to Australia. To the extent that he was the captain and main driver of the boat, I am satisfied that the applicant was involved in a people smuggling enterprise. On the applicant's own evidence, he was not an organiser of the people smuggling venture and I am not satisfied that he was.

Data Breach

27. The applicant also claimed that he is very worried that his personal details were made publicly available on the Immigration Department's website in February 2014, and the Sri Lankan authorities have accessed this information. According to the letter from the Department of Immigration and Border Protection to the applicant on 12 March 2014, personal information about persons in immigration detention on 31 January 2014 was unintentionally able to be accessed on the department's website for a short period of time in February 2014. As the letter advised, the accessible information was the applicant's name, date of birth, nationality, gender, and details of his detention and of other family members in detention. It did not include contact details, health information, or any information about the applicant's protection claims. The applicant was in immigration detention at this time, and I accept that his personal information was accessible for a short period. There is no evidence that the Sri Lankan authorities were aware of the data breach or were able to access the applicant's personal information, and I am not satisfied that they were.

Refugee assessment

28. 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

29. 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.
30. I accept that the applicant was questioned by the CID about his uncle’s whereabouts in about 2010. I also accept that the applicant’s uncle may have been perceived by the authorities to be a LTTE supporter during the war, although I am not satisfied that his uncle was, or was suspected of being, a LTTE member or involved in supplying arms to the LTTE. Moreover, I do not accept that the applicant was perceived by the Sri Lankan authorities to be a LTTE member on account of his uncle’s suspected involvement with the LTTE. I also do not accept that the authorities had any adverse interest in the applicant when he departed Sri Lanka.
31. I accept that the applicant is a Tamil male from the North Western Province. DFAT³ indicates that Tamils in Sri Lanka have historically faced discrimination and mistreatment, and that many Tamils reported being mistreated by security forces during the war. DFAT also refers to an UN OISL report relating to 2002 to 2011 which stated there were frequent occurrences of extrajudicial killings, disappearances and kidnappings for ransom during the war. Country information before me⁴ also reports that torture and extra-judicial killings continued after the war under previous governments, with allegations of torture being made by Tamils and people suspected of LTTE involvement that were said to have taken place between 2005 and 2018.

³ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244.

⁴ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244; US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 11 March 2020, 20200312151418; UK Home Office, “Tamil Separatism”, May 2020, 20200527172009.

32. The US State Department (USSD)⁵ reports that Tamils maintained they have suffered longstanding, systemic discrimination in university education, government employment, housing, health services, language laws and procedures for the naturalisation of noncitizens. Country information⁶ also indicates reports regular monitoring and harassment by the security forces of members of the Tamil community, particularly in the north and east, although it especially takes place in relation to activists, journalists, people who are involved in politically sensitive issues and former LTTE members. DFAT⁷ also reports that the Sri Lankan government remains sensitive to the political re-emergence of the LTTE, and that some Tamils with imputed LTTE links continue to report harassment and monitoring by police, although DFAT assessed that they were generally able to live their lives without security concerns under the Siresena government.
33. Although there are reports that torture and human rights abuses continued after the war, neither DFAT nor the UK Home Office report on torture in recent years⁸. DFAT⁹ states that in relation to International Truth and Justice Project (ITJP) reports about 76 alleged cases of torture between 2015 and 2017 of persons suspected of LTTE involvement and 73 individuals who claimed to have experienced torture by the Terrorism Investigation Division between 2008 and 2017, local sources (including in the north) were not aware of these alleged incidents of torture and were unable to verify them. DFAT is unable to verify allegations of torture since 2016. The UK Home Office¹⁰ (UKHO) also reports that there have been a few unverified reports of the occurrence of torture post 2016 but that country sources, including the independent Human Rights Commission, advised its fact-finding team they were unable to verify these reports with their contacts in the north and east. According to DFAT, there were some general reports of torture in police detention, although this was not directed at any particular group and was not endorsed by senior police and was described as being better than it had been in the past. Local sources also told DFAT they were not aware of recent cases of former LTTE members being subjected to torture. In addition, DFAT reported that Tamils, including those with imputed links to the LTTE, are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links.
34. Notwithstanding the complaints of discrimination cited above, USSD¹¹ also reports that the government had taken steps to support the Tamil minority, such as setting up a variety of ministries and presidentially appointed bodies designed to address their social and development needs, and also implemented confidence-boosting measures to address Tamil grievances. DFAT¹² also reports that the Sri Lankan Constitution contains prohibitions on discrimination, and the Tamil language has been regarded as an official language since 1987. Tamils make up 15.3 per cent of the population and are the second largest ethnic group. DFAT concludes that Tamils face a low risk of official societal discrimination based on ethnicity, including in their ability to access education, employment and housing. According to the

⁵ US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418.

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418; OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652

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

⁸ UK Home Office, "Tamil Separatism", May 2020, 20200527172009; DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁰ UK Home Office, "Tamil Separatism", May 2020, 20200527172009.

¹¹ US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418.

¹² DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

UKHO¹³, there remains some discrimination against Tamils, noting that there had been historic discrimination which does not disappear overnight and still persists, although it did not elaborate. The source noted that minorities in general suffer a certain degree of discrimination, which was also borne out by the rise of very nationalistic elements that have targeted Tamils and Muslims recently. UKHO also reported that Tamils' perception of equality depended on the district they were from. Overall, the information indicates that there is some discrimination against Tamils in certain circumstances, but that the risk is low.

35. DFAT¹⁴ also reports that the security situation has improved considerably in the years following the end of the civil war. The government exercises effective control over the entire country, including in the Tamil populated areas. Travel to the north and east is not restricted as it was, and while the military maintains a significant presence in the north, it is mainly confined to the Jaffna Peninsula in the north. DFAT reports that military involvement in civilian life has also decreased and the day-to-day monitoring of people has decreased significantly in recent years. UKHO¹⁵ reports that Tamils are not specifically targeted or suffer persecution for being a Tamil. According to DFAT, Tamils have been free to hold public ceremonies marking Maaveerar Naal (Great Heroes' Day) and returns of land appropriated by the military during the conflict have taken place. Shortly after the DFAT report was published, presidential elections were held in Sri Lanka, and as reported by the UKHO¹⁶, the election was won by former wartime defence chief Gotabaya Rajapaksa. UKHO refers to some concerns and changes following the election, including concerns about a return to a nepotistic and authoritarian style government and that the new government had dropped the singing of the national anthem in Tamil during Sri Lankan Independence Day. Other reporting¹⁷ indicates that there has been increased militarisation and securitisation under Rajapaksa. It also reports that the focus on the clampdown by police, army and intelligence services has been on journalists and human rights activists.
36. The reporting clearly indicates that there has been a substantial improvement in the political and security situation since the applicant left Sri Lanka, and particularly for Tamils. As noted by the delegate, and in the country information cited by her about these issues, there have been concerns among Sri Lanka's ethnic minorities since the decisive win by the SLPP party in August 2020, and the consolidation of power by the Rajapaksa family¹⁸. Following Gotabaya Rajapaksa's election as President in November 2019 elections, there were fears about monitoring of human rights defenders, journalists and trade union activists, and of the appointment of many of his former war time cronies in the military to key posts in state institutions¹⁹. Further concerns following the August election include constitutional reform and the further centralisation of power by the Rajapaksa family, suppression of dissent, and changes to reconciliation measures. However, while changes have occurred, the weight of the evidence does not support that Tamils with a background like the applicant have been harassed and targeted. There have been reports of some monitoring and harassment in relation to certain persons, such as activists, journalists, former LTTE members and those involved in

¹³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁵ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹⁶ UK Home Office, "Tamil Separatism", May 2020, 20200527172009.

¹⁷ International Truth and Justice Project, "Sri Lanka: and the crackdown begins", Journalists for Democracy in Sri Lanka, January 2020, 20200114142534; Country of Origin Information Service Section (COISS), "Situation update: Sri Lanka parliamentary elections - August 2020", 28 August 2020, 20200829083915.

¹⁸ Country of Origin Information Service Section (COISS), "Situation update: Sri Lanka parliamentary elections - August 2020", 28 August 2020, 20200829083915; Aljazeera, "Sri Lanka: Economy, human rights key challenges facing Rajapaksas", 19 August 2020, 20200819205836; Daily Mirror (Sri Lanka), "With power comes great responsibility – EDITORIAL", 19 August 2020, 20200819210347.

¹⁹ International Truth and Justice Project, "Sri Lanka: and the crackdown begins", Journalists for Democracy in Sri Lanka, January 2020, 20200114142534.

politically sensitive issues, but the applicant does not fall into that category of persons. I accept that the applicant was questioned about his uncle's whereabouts in about 2010, but I do not accept that the applicant was of any ongoing adverse interest to the Sri Lankan authorities in relation to his uncle. He continued to live in Sri Lanka for several years without being targeted. I do not accept that the applicant was perceived to be a LTTE member, or a person of interest, on account of his uncle. Having regard to the applicant's history and profile, and the country information, I am not satisfied that he would face a real chance of harm as a Tamil from the North Western province with his familial connections.

37. I accept that the applicant was captain of a boat that transported [passengers] from Sri Lanka to Australia as part of a people smuggling enterprise and that he departed by boat through [Location 2] using a lawful fishing pass, and that he did not have a passport. DFAT reports²⁰ that under the *Immigrants and Emigrants Act (1948)* (I&E Act), it is an offence to depart Sri Lanka other than via an approved port of departure, such as a seaport or airport (which would include [Location 2]), or without a valid passport. While I accept that the applicant used a fishing pass to leave [Location 2], he did not use a passport to leave Sri Lanka and as such I am satisfied that he left Sri Lanka illegally. Returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under the I&E Act. Under s.45(c) of the I&E Act, it is an offence to organise or to aid and abet any other person who organises for persons to leave Sri Lanka in contravention of the Act, and "organise" includes the transportation of persons by sea without obtaining valid travel documents²¹. Facilitators or organisers of people smuggling ventures (including the captain and crew) may be charged under s.45(c) of the I&E Act.
38. Most Sri Lankan returnees are questioned upon return at the airport and can be charged under the I&E Act where an illegal departure is suspected. DFAT²² assesses that the Sri Lankan authorities differentiate between fare-paying passengers and the facilitators and organisers of irregular migration. The authorities are more likely to pursue those suspected of being facilitators or organisers of people smuggling ventures (generally those individuals who arranged the finances for the venture and recruited the crew, as well as the crew themselves) than the fare-paying passengers. Bail is normally granted to fare-paying passengers, whereas facilitators or organisers of people smuggling ventures (including the captain and crew) are usually refused bail and taken into custody. Persons who are convicted under Section 45(c) normally receive prison sentences of between one and three years, depending on the extent of their involvement in the venture, with sentences usually closer to three years. DFAT could not obtain information on the number of facilitators or organisers of people smuggling ventures convicted. In comparison, fare-paying passengers are generally issued with a fine, which can vary between LKR3,000 (AUD25) and LKR200,000 (AUD1,633).
39. The applicant claimed that the authorities would know or become aware that he was the captain of the boat in a number of ways. Firstly, he claimed that the [passengers] who travelled on the boat to Australia with him could have gone back to Sri Lanka, and that on their return, they may have given evidence to the authorities that he was the captain of the boat that brought them to Australia. He said the passengers will be interrogated on their return and will accuse and implicate him as the captain in order to save themselves. When asked by the delegate how he knows that the other passengers will behave in this way, he said only that he has been in Sri Lanka and knows how they behave and act, before reiterating his earlier evidence that the people will be interrogated and give the information. The applicant did not say he had any knowledge that the [passengers] had returned to Sri Lanka or if they had, that

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

²¹ Parliament of the Democratic Socialist Republic of Sri Lanka, "Immigrants and Emigrants Act, No. 20 of 1948", 1 November 1949, CISBE8E6BE638.

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

they had provided information to the authorities about him. Nor is it apparent that he has had any contact with the other [passengers] since he arrived in Australia. The applicant's claim that he has been implicated as a people smuggler by his fellow passengers is both speculative and unsubstantiated. Furthermore, I note that the applicant's submissions to the IAA do not contain any information in response to the delegate's finding that this claim was speculative in the absence of any evidence that these passengers had explicitly named the applicant as a people smuggler to the authorities. I am not satisfied that the applicant has been identified by the other passengers as captain of the boat to the Sri Lankan authorities.

40. Secondly, the applicant claimed that because of his mode of departure, the navy and the authorities would know that he did not return with his boat and lied as he went through the navy checkpoint. In her decision, the delegate considered whether the applicant may be able to be identified as the captain of the people smuggling boat on his return because he had left by way of the navy checkpoint. She found it was likely that the applicant's details were recorded by the navy on his departure, and that this may lead to a real chance that the applicant's role as captain of the boat may be discovered. There is no country information before me to indicate that the navy does keep records of departures from navy checkpoints, or that they record return journeys from sea. I accept that it may be possible that the navy keeps information about departures on fishing passes from ports and the subsequent returns from sea. If the navy do keep such records, there is no information about the length of time such records are kept or whether they maintain any centralised databases of such information. There is also no evidence that people who do not return from sea after departure on a fishing pass are placed on an alert list of any type. I accept that the applicant used a lawful fishing pass when he left [Location 2], and that from this, the navy may have known that he did not return to the harbour. Notwithstanding this, the fact that authorities have not made any inquiries following the applicant's departure is significant. According to evidence he gave to the delegate, he speaks to his wife and son in Sri Lanka every day, and they have not had any problems with the authorities since he left. There is no indication the authorities made any enquiries with his family after he failed to return from the fishing trip in 2012, and I am not satisfied that they had any adverse interest in him for this reason. I am not satisfied that he was identified as captain of the boat, or that he was imputed by the authorities as being involved in anything adverse, including captain of a boat involved in a people smuggling enterprise because of his manner of departure.
41. The applicant further claimed that the Sri Lankan authorities would easily be able to infer that he was the person driving the boat to Australia because his personal information was inadvertently published on the department's website. There is no evidence before me to suggest that the Sri Lankan authorities were aware of the data breach or were able to access the applicant's personal information, and I am not satisfied that they have. Moreover, as discussed above, the information that was disclosed did not include details of the applicant's claims for protection, namely his claim that he would be harmed because he was captain of the boat. I am not satisfied that the Sri Lankan authorities are aware of the applicant's role in driving the boat from the data breach.
42. The applicant also claimed that the Sri Lankan authorities will find out he is a people smuggler because they will torture him until he is forced to admit that he is a people smuggler. From this, it appears that the applicant is not suggesting he would readily volunteer that he was captain of the boat and involved in people smuggling on his return to Sri Lanka, and will only provide this information under extreme duress.

43. DFAT²³ indicates that there is a clear investigation and court process for Sri Lankans returning to Sri Lanka who departed illegally. Returnees are questioned (usually at the airport) on return, and where they are charged under the I&E Act because an illegal departure is suspected, the process will involve the Police Airport Criminal Investigations Unit at the international airport taking photographs, fingerprints and statements. The police also make further enquiries about the person's activities abroad if they are suspected to be former LTTE members. The UK Home Office²⁴ reports that CID take a statement about their illegal departure which takes around three hours, but may involve waiting overnight in a waiting room if their flight arrives at night. People charged with departing illegally are transported to the closest Magistrate's Court at the earliest opportunity after investigations are completed. Responsibility then shifts to the courts or prison services, and the magistrate makes a determination on the next steps of each individual. Organisers and facilitators of people smuggling enterprises are usually held in custody and fare-paying passengers are generally released on bail. They may remain in police custody at the CID's airport office for up to 24 hours on arrival, and may be held for up to two days in an airport holding cell if a magistrate is not available. DFAT is not aware of mistreatment of returnees during this process. A 2020 Fact Finding mission to Sri Lanka by the UKHO cited IOM reporting they have not witnessed the intense questioning of returnees that took place in the past, and that the questioning took place in offices opposite the arrivals hall where the doors remained open²⁵.
44. DFAT²⁶ also indicates that the Sri Lankan Attorney-General's Department has directed that all passengers of people smuggling ventures, and not only those suspected of facilitating and organising irregular migration, be charged and appear in court. They are required to appear in court in the location where the offence occurred and generally have to appear in court every three to six months. They may also be required to appear as witnesses in cases against facilitators or organisers of people smuggling ventures, and cases are only taken forward in court when all members of a people smuggling venture have been located, contributing to protracted delays. At the time of the 2019 DFAT, it was aware of about 800 separate court cases still pending.
45. There are reports that torture can take place in Sri Lanka in relation to certain investigations and processes involving the police. Country information before me²⁷ indicates that there are reports that torture and excessive use of force by police in Sri Lanka does take place, particularly to extract confessions, and that it was routine and endemic. DFAT cites a HRCSL report that police use torture during interrogation and arrest regardless of the nature of the suspected offence, although other reporting from the UN Special Rapporteur in July 2017 indicates that torture was used for those arrested and detained on national security grounds and under the *Prevention of Terrorism Act*. According to the UKHO, torture is used to extract information particularly in sensitive cases where there is pressure to make an arrest. DFAT also reported that police routinely mistreat suspects during criminal investigations, which could range from a slap in the face to severe beatings and in some circumstances may amount to torture. The mistreatment, where it occurred, was not confined to a particular region or ethnic group but was a problem across Sri Lanka affecting all communities. Individuals suspected of being involved in the drug trade were identified as particularly susceptible to mistreatment.

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

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

²⁵ Ibid.

²⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418.

Tamils are no longer considered vulnerable to mistreatment and torture because of their ethnicity or LTTE links.

46. While torture is used by police in some circumstances as outlined above, there is no evidence that it is used for returnees. There is also no country information to suggest that returnees involved in people smuggling are subject to mistreatment or torture during the investigation, or to obtain a confession. The information indicates that persons returning illegally are not subject to mistreatment during the investigative and court process. It also specifies that there is a clear and methodical process to investigate and prosecute, which involves distinct steps, including several hours to obtain a written statement, and the court process may take months or years to finalise. Overall, this process appears to me to be far removed from the type of cases where people are tortured to get a confession.
47. On arrival in Australia the applicant did state that he was involved in people smuggling, but I am satisfied that he shared this information because it was his main reason for leaving Sri Lanka. He was also told by the Australian authorities that information about his protection claims would not be disclosed to the Sri Lankan authorities. I am not satisfied that this information would be disclosed to the Sri Lankan authorities by the Australian government. Nor am I satisfied it would be revealed by the applicant himself. I accept that the applicant is very likely to be questioned at the airport on his return and that he may be asked about his departure from Sri Lanka. However, I do not accept that the applicant would be tortured during this process such that he would be forced to admit that he is a people smuggler. On the applicant's evidence, he will not provide this information unless he is forced to reveal his role under torture, which I have not accepted will occur. Furthermore, taking in consideration my findings that the applicant has not been identified as a people smuggler by the other passengers who travelled with him, and that he is not suspected to be involved in people smuggling by the authorities because he left [Location 2] by way of navy checkpoint, I am not satisfied that the authorities would have any adverse interest in him when this questioning occurs. I am not satisfied that the authorities would be aware of the applicant's role as captain of the boat for any of the reasons he has provided. I am not satisfied that there is a real chance that applicant would be identified as the captain of the boat, or a people smuggler, during the investigative process at the airport.
48. Given the fact that the applicant left Sri Lanka by boat and does not have a passport, I find that it is very likely he will present as a fare-paying passenger who departed Sri Lanka illegally by boat. I am satisfied that it is very likely that the applicant will be charged under the I&E Act for illegal departure. DFAT²⁸ reports that information from the Attorney General's Department indicates that no fare-paying passenger of a people smuggling venture has ever been given a custodial sentence for departing illegally, and a guilty plea will attract a fine (generally in the amount of LKR15,000 to LKR20,000 (AUD122 to AUD163) which can be paid in instalments and the person is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member who will be required to come to court. If he pleads guilty, I am satisfied he is likely to be questioned, briefly detained and issued with a fine for leaving Sri Lanka illegally. If he pleads not guilty, I am satisfied that he will be released on bail (which may involve conditions), and accept that he may need to return to court on a number of occasions where he will also be fined if he is found not guilty. I accept he may face additional transport and legal costs before the case is resolved. I am not satisfied the processes and penalties relating to the investigation and prosecution of his case amounts to serious harm. Moreover, the terms of the I&E Act (including as an aside, those relating to people smuggling offences) are not discriminatory on their face, nor does the

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

evidence support that it, or the procedure and penalties associated with it, is applied or enforced in a discriminatory fashion.

49. The applicant also claimed that the authorities would be able to infer from the data breach that he sought protection in Australia and that because of this (and because he drove the boat to Australia which I have not accepted is true), they will be suspicious of his history and the information he may have provided to the Australian authorities as a consequence. I accept that some of the applicant's personal information was inadvertently published on the Department of Immigration and Border Protection website in February 2014, but as the applicant was advised in the letter from the department, the disclosed information did not reveal any information about his protection claims, health information or contact details. There is no evidence that this information was accessed by the Sri Lankan authorities, and I am not satisfied it has. In any event, even if it had, I am not satisfied it would reveal much more than some biographical details, and the fact that he was immigration detention. I accept that it may be inferred from this that he had sought or was seeking asylum but for the reasons explained below, I am not satisfied that gives rise to a real chance of any serious harm.
50. DFAT indicates that thousands of Sri Lankan nationals have returned from Australia in the last ten years²⁹. According to the UKHO³⁰, IOM have advised that claiming asylum abroad is not an offence in Sri Lanka and returning asylum seekers would not be questioned on this. The country information also does not indicate that the authorities are suspicious of persons who have provided information about their protection claims to the authorities in countries overseas, and I am not satisfied that the applicant would be questioned about this or arrested on his return. DFAT³¹ reports that returning asylum seekers may face practical challenges when they return to Sri Lanka, including that they may have difficulties finding suitable employment and housing on their return. In the applicant's case, his wife and son remain in the family home in [Location 1] and he is in daily contact with them. There is no suggestion he would not live with his wife on his return. He worked in Sri Lanka as a fisherman for fifteen years, including on a boat belonging to his uncle. I am not satisfied that the authorities had any adverse interest in the applicant's departure through the navy checkpoint, or that it would impact negatively on his ability to work as a fisherman in the future, should he choose to do so. I note that he has also been able to secure employment in Australia. According to his SHEV application, the applicant has worked as a [Occupation 1] for [a] company. On the information before me, I am not satisfied that the applicant would be unable to access accommodation and employment on his return to Sri Lanka or that his capacity to subsist would be threatened.
51. DFAT³² understands that some returnees have been the subject of monitoring by the authorities. These have included home visits and calls by CID to returnees with suspected LTTE links in the north and east, although it understands that most returnees, including returning asylum seekers, are not actively monitored on an ongoing basis. The UKHO³³ also reports that there may be possible monitoring on return if a person is deemed to have done something against the government. While DFAT cannot verify whether the monitoring that does occur is specific to former LTTE cadres (which would not include the applicant), it is not aware of returnees being treated in a way that endangers their safety and security. Notably, DFAT reports that Tamils who returned to the Northern Province (where the greatest number of Tamils reside) after failing to secure asylum in Australia reported they had not experienced monitoring or harassment and did not have any protection concerns. The Home Office also

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

³⁰ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

³¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³² Ibid.

³³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

cited UNHCR monitoring of a sample of returnees who did not identify security as a major issue in the last few reports. The applicant originates from the North Western Province, an area where the information does not indicate the monitoring of Tamil returnees takes place. I am not satisfied that he is a person of any interest to the authorities or that there is a real chance he would be subject to monitoring on return.

52. DFAT³⁴ also reports that some returning asylum seekers reported social stigma on their return to their communities. It states that returnees do not experience societal discrimination for seeking asylum and that overall, societal discrimination is not a major concern, including for returning asylum seekers. It is possible that the applicant may face some social stigma as a returning asylum seeker, but I am not satisfied that this would amount to serious harm. I am not satisfied that the applicant would face a real chance of serious harm as a returning asylum seeker.
53. The applicant does not have a well-founded fear of persecution.

Refugee: conclusion

54. 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

55. 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

56. 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.
57. 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.
58. I accept that the applicant may be investigated and charged under the I&E Act. I am not satisfied that the processes and penalties he may face amounts to significant harm. I am not satisfied that there is a real risk of the death penalty, an arbitrary deprivation of life or torture or that there is an intention to inflict severe pain and suffering, pain or suffering that could

³⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

reasonably be regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation, such that it would amount to cruel or inhumane treatment or degrading treatment or punishment as defined in the Act.

59. I also accept that the applicant may face social stigma on return. I am not satisfied that this amounts to the arbitrary deprivation of life or the death penalty. I am also not satisfied that it will involve the level of pain, suffering or humiliation contemplated in the definitions of cruel, inhumane or degrading treatment or punishment, or torture or that there is otherwise a real risk of him suffering significant harm. Nor am I satisfied that this, taken together with the processes and penalties he may face a person who departed Sri Lanka unlawfully, amounts to significant harm.
60. Beyond this, I am not satisfied that the applicant would face a real chance of any harm on his return to Sri Lanka. The Federal Court has held that real chance in the refugee context has the same standard as real risk in a complementary protection assessment³⁵. Having regard to the country information and findings above, I find that there is no real risk that the applicant will suffer significant harm.

Complementary protection: conclusion

61. 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.

³⁵ *MIAC v SZQRB* (2013) 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
 - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
 - (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.