



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09477

Date and time of decision: 24 August 2021 11:56:00
M Oakman, 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 of the Hindu faith from Eastern Province, Sri Lanka. He arrived in Australia [in] October 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 22 June 2017. On 8 July 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa.

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). No further information has been obtained or received.
3. On 11 August 2021 the IAA received an email from the applicant requesting further time to submit information to the IAA. The applicant was given until close of business on 20 August 2021 to provide any further information. On 21 August 2021 the applicant sent an email to the IAA requesting a further extension of time. That request was not granted by the IAA as set out in the IAA's email response of 23 August 2021 to the applicant. As at the date of this decision, no further information was received from the applicant.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He fears that if he was forced to return to Sri Lanka, he would be seriously harmed because of his Tamil ethnicity, his imputed political opinion as a Liberation Tigers of Tamil Eelam (LTTE) supporter due to his age and ethnicity as well as his familial connections to the LTTE and his membership of a particular social group as a failed asylum seeker who has strong familial connections to the LTTE.
 - He fears this harm from the Sri Lankan authorities such as the STF, Sri Lankan Army (SLA), Karuna Group and the government.

Factual findings

Receiving country

5. On the basis of the documents provided and the claims made by the applicant, I accept that the applicant is a national of Sri Lanka from the Eastern Province. I find that the applicant's receiving country is Sri Lanka.

Background

6. The applicant was born in Kalmunai, Ampara District, Eastern Province, Sri Lanka in [year]. He has lived at the same address in Kalmunai, except for periods working in [Country 1] (6/2005-10/2008) and [Country 2] (6/2010-1/2012). He is Tamil and Hindu. The applicant is not married and has no children. His mother, father, brother and [number of] sisters live in Sri Lanka, in Kalmunai in the family home. He attended school from about 1991 to 2004, starting but not completing his A-Levels. He has worked as a [Occupation 1] in Sri Lanka, in a

[specified] factory in [Country 1], and as a [Occupation 2] in [Country 2]. He reads, writes, and speaks Tamil and speaks English and Hindi.

Problems in Sri Lanka

7. In summary, he was born in Kalmunai. His village was government controlled. His dad's eldest sister's son (cousin) was in LTTE. The cousin joined the LTTE when he was young. He held a military position in the LTTE. He was a [military rank]. He was called "S". His real name was "U". He was with LTTE in another area. Everybody in the village knew that he was with LTTE.
8. In 1990 the STF visited his home and beat his father with a mallet. From then onwards the STF would come to their house and beat the family - his father, his mother, his brother and the applicant. There was a small spell of peace during the treaty time between LTTE and the SLA. In 1995 the STF arrested his father. S's two younger brothers were also arrested. The STF released his father after about one day. However, his cousins (S's brothers) were imprisoned for about eight or nine years. He does not know why only his father was released. He was only [age] years old at the time.
9. During the peace treaty time in around 2001 he was with S all the time. He was noticed by the SLA and the police with him. He was about [age] years old at the time and S was about [age] years old. No one else in his family was suspected of being with LTTE. Other than his cousin, no one else in his family was a member of the LTTE.
10. The applicant went to [Country 1] in 2005. S used to visit his parents at home. After he left for [Country 1], the Karuna Group used to come to his house and ask for S. His family said they didn't know where S was. Then they asked about the applicant. His family said he had gone to [Country 1]. They demanded that they tell them where S was, or they would shoot them. They also said they must ask the applicant to come home.
11. S had left Sri Lanka and went to [Country 1] in 2007 when the LTTE split into two groups. S stayed there for three months. S returned because his mother had been killed. In 2007, the Karuna group shot S's mother, the applicant's aunty. The applicant's father was with her. She was living very close to their house. The killing appeared in the newspaper and he has the paper cutting. A short time after, in about May 2007, his family received a letter that said the applicant must present himself to Karuna group. He feared that they would have beaten and killed him. S died in the final stages of the war before the applicant had returned from [Country 1].
12. In October 2008 he returned to Sri Lanka as the company he worked for in [Country 1] closed and they sent them back. About one month after his return, he was arrested by the police. They took him to the police station and members of the Karuna Group were there as well. They were wearing civilian clothes. They beat him severely and he still has scars on his body from the beating. They accused him of going around with S. They also said that the LTTE is now over but that he had come back to establish another group. They said if they saw him again, they would kill him. They kept him for about eight hours. They had also taken him because of a case in 2007 when three policemen were shot and killed. They thought he was involved with that killing, that he supplied weapons. But his father brought documents to the police to show he was in [Country 1] in 2007 and not in Sri Lanka. After that they released him. They also let him go because they wanted to observe what he was doing and who he was mixing with.

13. The Karuna Group made allegations about him, so the police knew about him. It was very dangerous, so the applicant went to stay with his mother's younger sister in Colombo to hide from the police. That was in or about March 2009. He stayed with his aunt for about 1 year and 2 months until 2010. Then with the help of his aunt's son he went to [Country 2] to work as a [Occupation 2]. He did that for about 2 years.
14. He returned to Sri Lanka in 2012 because the work was over. He lived in Kalmunai. When he came back to Sri Lanka, he supported the Tamil National Alliance (TNA). He also helped with other tasks such as building houses for people who were impacted by the tsunami in 2004 and still living in makeshift structures. He distributed books and clothes to people who were affected after the tsunami. In 2012, he also attended the propaganda meetings in another village for a TNA candidate. He was also protecting the candidate as a bodyguard with three others. He also put election posters for the candidate. Whenever they put up posters there were clashes with the Karuna Group, a paramilitary group supporting the Sri Lankan government. He was also in a [sports] team and they were in complete support of the TNA candidate. He believes Karuna Group were not happy about this as they did not show them any support or provide them with any assistance. During the election they couldn't do anything to them. After the election, the Karuna group threatened him because he had supported the TNA candidate. They said the election is over - he should not be staying in this village and if they see him or his people, they will kill him for supporting the TNA. Once they came to shoot the candidate who won the election. The police were there so they ran away. Members of the Karuna Group came looking for him at his home twice. He didn't stay in his house he was staying at a friend's house. Then he left for Australia. They already had suspicions about his involvement in LTTE because of his cousin. After he supported TNA, he was in more danger, so he fled in October 2012. He has a genuine support letter from TNA.
15. After coming to Australia, his family told him that about 10-20 times people in civilian clothes have gone to his family and asked where he was and whether he has been recruiting for the LTTE. The men were plain clothed and came with guns. His family was very scared and told them he is in Australia. His parents told him the men asked for his number, but they told them they did not have it. On a number of occasions in 2016, his parents told him the men came to his house. Prior to lodging his SHEV application, the last time they came to his house was on or around 10 January 2017. At the SHEV interview he said that in 2020, the SLA came and asked after his whereabouts and if he had gone back to the LTTE; they beat his brother and brother-in-law.
16. If he is returned to Sri Lanka, he is afraid he will be subjected to serious harm. They have his name. Because they connect him with S, they think he is able to reorganise the LTTE and to recruit. S is dead so they think he will take over from what S was doing. If he is returned to Sri Lanka, he thinks he would be targeted in the future because his family have faced many questions about him. The length of time does not matter.
17. He does not know Sinhala so he cannot live and work in those areas. He does not have relatives in any other place in Sri Lanka apart from Kalmunai. His aunt in Colombo has since gone to [Country 3]. Once he returns, they will shoot him or take him from his parents to an unknown place. While in Australia from 2014 and every year afterwards he has gone to the Heroes' Day commemoration for LTTE on 27 November and to the prayer meeting before it. He also regularly attends the May 18 Remembrance Day events. At the SHEV interview he confirmed he was not involved in political activities in Australia.

18. He is afraid of this harm from the Sri Lankan authorities such as the SLA, STF and paramilitary groups such as Karuna Group. He has already experienced arrest, detention, physical assault and has already been targeted by the authorities.
19. The Department of Foreign Affairs and Trade (DFAT) notes that a UN report covering the period 2002 to 2011 found frequent occurrences of extrajudicial killings, disappearances and kidnappings, particularly in the north and east. The UN report largely attributed these to government forces, the LTTE and paramilitary groups. Many Tamils, particularly in the north and east, also reported being monitored, harassed, arrested or detained by security forces during the war and in its aftermath.¹ The Sri Lankan authorities possessed extensive powers to arbitrarily detain and arrest people under the *Emergency Regulations* (Sri Lanka) and under the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA), and those powers were in wide use by the authorities during the war and in its aftermath.² Country information also confirms that during elections violence and intimidation has occurred, although such incidents have reduced since 2015.³
20. In assessing the applicant's evidence I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin, including factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, or a lack of cohesive narration due to trauma. I have also taken into account the applicant's age at the time some of these events were said to have occurred.
21. The applicant has consistently claimed since his entry interview that his cousin was in the LTTE and that he and his family had several issues with the authorities as a result. His claims are not inconsistent with the country information. However, like the delegate, I have serious concerns about aspects of the applicant's evidence. In particular:
 - I do not consider it credible that, if the applicant was of significant interest to the authorities including the Karuna Group to the extent that they would tell his family that he had to return home from [Country 1], they would not detain him at the airport on his return. I do not consider it credible that, if true that they were significantly interested in the applicant because of his connection to S, when they subsequently arrested, questioned, and mistreated the applicant about a month after he returned from [Country 1], he was released after only about eight hours. I also do not consider it credible that, if they were adversely interested in the applicant and he was living with an aunt in Colombo after his release until he left for [Country 2], the authorities would not be able to locate him at his aunt's place in Colombo. Nor do I consider it credible that in giving his address history in both his entry interview and in his SHEV application, he indicated he was living at the family home in Kalmunai at the time he said in his statement of claims he was hiding in Colombo.
 - I do not consider it credible that, if the authorities including the Karuna Group killed his aunt in about 2007 and they had also demanded the applicant's return, the applicant would chose to return home in 2008 from [Country 1] without apparently making any attempt to flee while still in [Country 1]. Nor do I consider it credible that if S was of

¹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

² US Department of State (USDOS), "Country Reports on Human Rights Practices for 2015 – Sri Lanka", US Department of State, 13 April 2016, OGD95BE926320.

³ Country of Origin Information Services Section (COISS), "Sri Lanka: CI160226081402908 – Karuna Group – TMVP – Batticaloa", 11 March 2016, CR0D9DEFA86; and Austrian Centre for Country of Origin & Asylum Research and Documentation, (ACCORD), "Sri Lanka COI Compilation", December 2016, CIS38A80123251.

significant interest to the authorities including the Karuna Group in Sri Lanka, S would be able to leave Sri Lanka for [Country 1] in 2007 and return some three months later without encountering any apparent difficulties with the Sri Lankan authorities. Although the applicant claimed to have a copy of the Karuna Group's letter he did not provide any translated copy of such a letter. I also note that one of the untranslated letter he supplied indicates in part in English in the letterhead that it was from the TMVP (related to the Karuna Group), but contains dates (from 2009) that do not in any event match his claims. The applicant provided an untranslated media article said to relate to his aunt's death. The delegate indicated that she was unable to locate any information confirming the shooting of the applicant's aunt.⁴

- I do not consider the applicant's ability to legally leave and return to Sri Lanka on his own passport for his trips to work in [Country 1] and [Country 2], to be consistent with his claimed level of adverse interest from the authorities including the Karina Group because of his connection to S. I also do not consider it credible that the police would accuse him of having been involved in the shooting of three police in 2007 when his passport and related entry and departure records would clearly indicate he was in [Country 1] at the time.
 - The applicant claimed for the first time at the SHEV interview that he provided S with information on SLA movements in the area. I do not consider it credible that, if true, the applicant would not have mentioned this active contribution of his own to the LTTE in his entry interview, SHEV application or in his statement of claims.
 - I do not consider it credible that the Sri Lankan authorities would continue to visit the applicant's family to ask unsuccessfully after his whereabouts on, apparently, many occasions from 2012 to 2020. I do not consider it credible that, if such visits were true, the authorities would have for the first time in making enquiries after his whereabouts, resorted to beating the applicant's brother and brother-in-law in 2020. Nor, even taking his claimed involvement with S and the LTTE at its highest, do I consider it credible that the Sri Lankan authorities would be concerned that the applicant was possibly trying to reorganise and recruit for the LTTE.
 - Although I appreciate the limitations of entry interviews, I do not consider it credible that the applicant made no mention at that interview of receiving any adverse interest because of his involvement with the TNA in 2012. Indeed, he made no claim at that interview of having been subject to adverse interest by the authorities including the Karuna Group after 2009. Given he indicated in his statement of claims that the Karuna Group's threats to kill him were effectively the trigger for his fleeing Sri Lanka, I do not consider it credible that he did not at least mention those 2012 death threats in his entry interview. I do not consider it credible that at the SHEV interview the applicant did not repeat his claims of having worked as a body guard for the TNA candidate; or that every time he put up posters there was a clash with the Karuna Group. I also do not consider it credible, given the claimed low level of involvement he had with the election campaign and that once the election was over there would be little if any point of doing so, that the Karuna Group would threaten the applicant only after the election was over. Although the applicant claimed to have a letter from the TNA, nothing of that nature appears in the untranslated documents the applicant provided to the delegate.
22. The matters discussed above in relation to his evidence go beyond minor errors and discrepancies that could be attributed to factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, and/or a lack of cohesive narration

⁴ Protection visa decision record, 8 July 2021, page 6.

due to trauma, the passage of time or the applicant's age. I am not satisfied that the applicant has been completely truthful about the adverse events that occurred in Sri Lanka before or after his departure in about October 2012.

23. Given the consistency of the claim, I am prepared to accept that the applicant's cousin S was a [military rank] in the LTTE and that he served for many years before he was killed in the final stages of the war. As I accept that S was in the LTTE, together with the country information about the monitoring and harassment of Tamils in the north and east, I am also prepared to accept that the applicant's father was detained for a day in 1995 and S's brother's imprisoned; the applicant and his family were occasionally questioned and mistreated during the war about S and S's whereabouts; and that in 2008 after he returned from [Country 1] he was questioned about S and mistreated over the course of about eight hours by the Sri Lankan authorities. Based on the general consistency of his information at the entry interview, in his SHEV application and at the SHEV interview, I am also prepared to accept the address, education, employment and family details he provided and summarised above in his background details. I also accept he has attended Heroes' Days and Remembrance Days events in Australia, but that he is not involved in political activities in Australia.
24. However, based on the credible information before me, I am not satisfied that the applicant was asked to return from [Country 1] or sent a letter to report to the Karuna Group/TMVP; that his aunt was killed by the authorities including the Karuna Group; that the applicant provided information to S about SLA movements; that he was himself of any adverse interest to the authorities including the Karuna Group after he was released from his brief detention in 2008; and that he was in hiding in Colombo before he left for [Country 2]. Similarly, I am not satisfied that the applicant became a TNA supporter after his return from [Country 2]; that he was involved in an election campaign for a TNA candidate in 2012; and that the Sri Lankan authorities including the Karuna Group have made any enquiries about his whereabouts since he left Sri Lanka in about October 2012. It follows from this that I am also not satisfied that after his release in 2008, at the time he left Sri Lanka, and/or at any time since, the applicant was of adverse interest to the Sri Lankan authorities including the Karuna Group. Given the applicant has attended Heroes' Days and Remembrance Days in Australia, but has not been involved in political activities, I am not satisfied he attended those events due to any political views he holds rather than for other reasons such as socialising. As he has not engaged in political activities in Australia, where he is otherwise free to do so if he chose, I am not satisfied that he has any genuine interest in engaging in political activities if he returns to Sri Lanka.
25. The applicant provided some details of a fine, court costs and a licence suspension he received in relation to a drink driving offence in Australia in about 2015. I do not consider that information relevant to the IAA's assessment of his protection claims and I have had no further regard to that information.

Asylum Seeker and return to Sri Lanka

26. The applicant claims to have left Sri Lanka in about October 2012 to travel to Australia in a boat organised by a smuggler. I find that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities.
27. The applicant lived in Kalmunai throughout his life in Sri Lanka. His parents and siblings reside in the family home in Kalmunai. Given those factors, I am satisfied that the applicant will return to Kalmunai, Eastern Province, if he returns to Sri Lanka.

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. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.⁵ Incidences of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath, and many Tamils, in the north and east in particular, reported being monitored, harassed, arrested or detained by security forces during the war and under the previous Rajapaksa government. However, in 2015 there was a change of government with the election of President Sirisena, and a Sri Lankan government focussed on post-conflict reconciliation, transitional justice, democratic renewal and governance and economic reforms.⁶
31. The UK Home Office (UKHO) indicates that under the Sirisena government there were positive developments including: curtailing of executive power; attempts at the reestablishment of independent commissions, including the Human Rights Commission of Sri Lanka (HRCSL); de-proscription of a number of international diaspora organisations; and review of cases held under the PTA and release of some detainees. However, progress was slow and little improvement was reported in 2018 and 2019.⁷ The US Department of State’s (USDOS) report notes that the HRCSL generally operated independently of, and with a lack of interference from, the Sri Lankan government.⁸ A 2020 UN report also noted the HRCSL

⁵ USDOS, “Country Reports on Human Rights Practices for 2020 - Sri Lanka”, 29 March 2021, 20210401122412.

⁶ DFAT, “DFAT Country Information Report: Sri Lanka”, 4 November 2019, 20191104135244.

⁷ UKHO, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020, 20200527172009.

⁸ USDOS, “Country Reports on Human Rights Practices for 2020 - Sri Lanka”, 29 March 2021, 20210401122412.

continued its proactive and outspoken defence of human rights in an independent and professional manner and commended its timely interventions in the aftermath of the attacks of Easter 2019 as playing an important role in preventing resort to excessive or discriminatory measures; but expressed concern that the inability of the Sri Lankan government to deal comprehensively with impunity and to reform institutions may trigger the recurrence of human rights violations.⁹ Similarly, a 2021 UN report noted that from 2015, Sri Lanka took some important steps in strengthening democratic institutions and opening up democratic space, including for civil society and the media; but indicated significant challenges and negative trends emerged over 2020.¹⁰

32. DFAT assesses that Tamils face a low risk of official or societal discrimination based on ethnicity or caste, including in relation to access to education, employment, or housing. Some members of the Tamil community report discrimination in employment, particularly in relation to public sector employment. However, DFAT assesses that the limited Tamil appointments are largely the result of disrupted education because of the war and language constraints. DFAT states that Tamils have a substantial level of political influence and increased inclusion in the political dialogue since 2015. DFAT understands that Tamils do not receive unwarranted attention from the authorities because of their political involvement and assesses that there are no barriers to political participation by Tamils. Members of the Tamil community in the north and east continue to claim the authorities monitor public gatherings and protests, practise targeted surveillance and questioning of individuals and groups, and use more subtle monitoring methods than in the past. DFAT assesses that the monitoring of Tamils in day to day life decreased significantly under the Sirisena government, but surveillance of Tamils in the north and east continues, particularly for those associated with politically sensitive issues, and physical violence against those being monitored is not common.¹¹
33. The UKHO fact finding visit to Sri Lanka in September and October 2019 indicates that all sources they spoke to had identified an improvement in the general situation since 2015, with people in general feeling no threat from the government or security forces. Several sources noted that whilst the situation improved post-2015, following the October political crisis (where President Sirisena sacked Prime Minister Wickremesinghe, replacing him with the former President Mahinda Rajapaksa) and the Easter 2019 bombings, intimidation and monitoring had increased with some civil society actors experiencing increased monitoring of their activities and multiple visits by the intelligence service or military who collected details on their programmes and funding. After the Easter bombings check points were reinstated, although they had all been removed at the time of the UKHO visit.¹²
34. DFAT reports that the security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the war in 2009. There was an increase in security activity, including the use of roadblocks, security checkpoints and increased detention powers for the police and military, following the Easter 2019 bombings. However, those checkpoints have since been removed, the emergency regulations that gave increased

⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report of the OHCHR on Sri Lanka", 18 February 2020, 20200221140652.

¹⁰ OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131.

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

¹² UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

detention powers have lapsed, and the heightened security posture has subsequently eased.¹³

35. The country information indicates that although some monitoring still occurs, the monitoring and harassment of Tamils has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation for Tamils generally has substantially improved in the years since 2015.
36. Several observers have expressed concerns in relation to Gotabaya Rajapaksa's rise to power in Sri Lanka, including concerns about the position of journalists, former LTTE members, the space for civil society and those who have been critical of the Rajapaksa family in the past.¹⁴ However, notwithstanding those expressed concerns, it remains speculative to suggest that the current Rajapaksa government has or will lead to a significant change in attitude by the Sri Lanka government towards the general Tamil population. Although some actions - rolling back investigations and announcing a withdrawal from a UN resolution in relation to post-war accountability, no longer singing the national anthem in Tamil at Independence Day celebrations and preventing Heroes' Day commemorations - are disappointing and a departure from the approach of the former government, it is also speculative to suggest those actions or announcements have or will result in a deterioration in general conditions in Sri Lanka or, more particularly, that it increases risks in Sri Lanka to those with a profile like the applicant or to Tamils more generally. To the extent that there is some suggestion of an increase in monitoring, harassment and intimidation of Tamils since November 2019, country information continues to indicate that Tamils are not specifically targeted based on their ethnicity.¹⁵ In the circumstances, I am satisfied the DFAT 2019 report and its assessments and observations in relation to improvements in conditions for Tamils and the general country conditions in Sri Lanka, despite it being prepared just before Gotabaya Rajapaksa's election as President, remain generally valid.
37. The applicant is Hindu, but he does not claim that he experienced any discrimination or harm in Sri Lanka, and makes no protection claims, on that account.
38. I am not satisfied that the applicant's fear of harm in Sri Lanka, whether on account of his age and Tamil ethnicity, because of imputed political views, for real or perceived LTTE links, or for any other reasons, is well-founded. DFAT confirms¹⁶ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE. While the UKHO also notes that persons with an actual or perceived significant involvement with the LTTE or in post-conflict Tamil separatism may be at risk, in its view simply being a Tamil does not give rise to protection claims nor, in general, does a

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

¹⁴ Including UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; "Abandoned Promises? Preserving Human Rights and Pursuing Accountability in Gota's Sri Lanka", Sri Lanka Campaign for Peace and Justice, February 2020, 20200330123213; International Truth and Justice Project, Journalists for Democracy in Sri Lanka, "SRI LANKA: AND THE CRACKDOWN BEGINS", January 2020, 20200114142534; United Nations Human Rights Council, "Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association", 5 May 2020, 20200622112923; "Sri Lanka: Economy, human rights key challenges facing Rajapaksas", Aljazeera, 18 August 2020, 20200819205836; "Rajapaksa Rule", Foreign Policy, 14 August 2020, 20200817165533; "Sri Lanka is becoming a one-family state", The Economist, 15 August 2020, 20200814111514; "Freedom in the World 2021 - Sri Lanka", Freedom House, 3 March 2021, 20210304102827; and OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131.

¹⁵ "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", INFORM Human Rights Documentation Centre, 29 June 2020, 20200702160949; UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; and UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

person's past membership or connection to the LTTE.¹⁷ DFAT also considers Tamils have a substantial level of political influence; increased inclusion in the political dialogue; do not receive unwarranted attention from the authorities because of their political involvement; and have no barriers to political participation.¹⁸

39. There are still reports of torture occurring in Sri Lanka since the end of the previous Rajapaksa government in 2015, including from UN Special Rapporteurs, the HRCSL, and other sources,¹⁹ although DFAT is unable to verify allegations of torture in Sri Lanka since 2016 and the UKHO expresses a similar view to DFAT.²⁰ There have been a few unverified torture complaints since 2016, white van abductions are no longer common, although the police continue to resort to excessive force particularly to extract confessions, and the civilian authorities generally maintain control over the security forces.²¹ DFAT assesses that Sri Lankans face a low risk of mistreatment that can amount to torture overall. The operation of the PTA was also suspended a few years ago for a couple of years, however, in that time it was still used in response to isolated incidents. The PTA was reinstated following the Easter 2019 bombings in Sri Lanka and action to repeal and replace the PTA has stalled, following the events of Easter 2019.²²
40. I accept that the applicant's cousin S was a [military rank] in the LTTE. I also accept that because of S's LTTE involvement, the applicant's father was detained for a day in 1995 and S's brother's imprisoned; the applicant and his family were occasionally questioned and mistreated during the war about S and S's whereabouts; and that in 2008 after he returned from [Country 1], the applicant was questioned about S and mistreated over the course of about eight hours detention by the Sri Lankan authorities.
41. However, having regard to the information before me, I am not satisfied the applicant faces a real chance of harm in relation to those matters now or in the reasonably foreseeable future. First, as the UKHO report notes, being of Tamil ethnicity would not give rise to a need for protection nor, in general, would past membership or connection to the LTTE. The applicant does not claim that he or any of his immediate family were members of the LTTE. The applicant's LTTE cousin S, and his familial connection to the LTTE, died around 12-13 years ago during the war.
42. Secondly, although S's brothers were imprisoned for eight to nine years, they were both eventually released, and the applicant does not claim they were subsequently subject to adverse attention from the authorities. During the war, because of their connection to S, the applicant and his family were sometimes questioned and mistreated by the Sri Lanka authorities about S, and the applicant and his father were detained for about eight hours and one day, respectively, during such questioning and mistreatment incidents. However, the applicant and his immediate family were never charged, taken to court, imprisoned, subject

¹⁷ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

¹⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁹ Including DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131; and USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

²⁰ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; and UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

²¹ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; and USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

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

to any formal detention under the PTA or sent to rehabilitation, at any time by the authorities including the Karuna Group. While unfortunate, country information indicates the questioning and mistreatment received by the applicant and his family during the war was not uncommon and many Tamils in the north and east faced the same harassment from the authorities at the time.

43. Thirdly, on my findings, the applicant was not of any adverse interest to the Sri Lankan authorities including the Karuna Group after his release in 2008 or at the time of his departure from Sri Lanka in about October 2012. Nor, on my findings, have the authorities including the Karuna Group made any enquiries about the applicant after he left Sri Lanka. In relation to the applicant's scars, DFAT indicates that there are reports that suggest some unidentified people were detained by the Sri Lankan authorities because their scarring was deemed evidence of LTTE membership, it was at the immediate end of the war and DFAT is unaware of more recent evidence of individuals being detained because of scarring; and the UKHO also suggests that scarring is not generally a matter of concern to the authorities.²³
44. It is now over eight years since the applicant was in Sri Lanka and during that time the general situation and country conditions for Tamils in Sri Lanka have substantially improved. Further, as the UKHO report notes, a person's past LTTE connections are not generally seen by the Sri Lankan authorities as posing a risk. The Sri Lankan authorities do remain sensitive to the potential re-emergence of the LTTE.²⁴ Nevertheless, although the Sri Lankan authorities may monitor overseas activities, they are only interested in significant involvement in pro-Tamil separatist diaspora activities and activity such as attending demonstrations overseas is unlikely to attract adverse interest from the Sri Lankan authorities.²⁵ High profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. DFAT understands some returnees have been subject to monitoring, including those with suspected LTTE links, but also states that Tamils who failed to secure asylum in Australia and since returned to the Northern Province told DFAT that they had no protection concerns, had not experienced harassment by the authorities nor received monitoring visits.²⁶
45. The applicant was not of any adverse interest to the Sri Lankan authorities including the Karuna Group since his brief detention, questioning, mistreatment, and release in 2008. Those authorities have not shown any interest in the applicant since he departed Sri Lanka. The applicant said he was not involved in political activities in Australia, but he has attended Heroes' Days and Remembrance Days. Given the country information discussed above, and that he is not involved in politics in Australia, I do not consider the applicant's attendance at Heroes' Days and Remembrance Days here would be viewed as by the Sri Lankan authorities as anything other than low level participation in those events, and neither significant nor high level involvement in diaspora activities. I am not satisfied that the applicant's profile is one that places him at a real chance of harm. I am also not satisfied that it will be increased by the fact that the applicant has attended those events in Australia. Nor am I satisfied, given his profile, there is a real chance that he will be monitored because of his time living outside Sri Lanka, his attending Heroes' Days and Remembrance Days in Australia, and/or as a Tamil asylum seeker, if returned.

²³ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; and UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

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

²⁵ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

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

46. The applicant does not have a profile that country information suggests would lead to a real chance of harm, now or in the reasonably foreseeable future, for any LTTE links or imputed political views, because of his age or Tamil ethnicity, his background, or for any other reason. I do not consider that at the time of his departure the Sri Lankan authorities including the Karuna Group had any adverse interest in the applicant, nor that he would be of any adverse interest to the Sri Lankan authorities, or anyone else, or that he faces a real chance of suffering harm for that reason, if he returned to Sri Lanka. I am not satisfied he faces a real chance of harm for reason of his age and ethnicity, background, for any imputed political views, any links to the LTTE or for any other reasons.
47. I accept that, on his return to Sri Lanka, the applicant may be identified by the authorities as an asylum seeker who departed Sri Lanka illegally.
48. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 LKR. DFAT has been advised by the Sri Lankan government that no fare-paying passenger on a boat has been given a custodial sentence. A guilty plea attracts a fine, which can be paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, a returnee may have to wait for the guarantor to come to court. Bail conditions are discretionary and can involve monthly reporting. Although fines are often low, the cumulative costs of attending court over a protracted period can be high. The Sri Lanka government claims no returnee from Australia has been charged under the PTA but DFAT cannot verify this claim.²⁷
49. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times the Terrorist Investigation Department, who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Processing can take several hours, returnees are processed as a group, and individuals must remain until all returnees are processed. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.²⁸
50. I accept that the applicant may be considered a failed Tamil asylum seeker on his return. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and is not aware of mistreatment of returnees during processing at the airport.²⁹ The UKHO identifies a similar process for returnees at the airport, notes the various facilities available, including that medical facilities are available at the airport if required, and also makes no mention of mistreatment allegations.³⁰
51. Taking into account my findings about his profile, and the country information, I am not satisfied that the applicant will be at risk of adverse attention or that he faces a real chance

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

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

of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether when processed at the airport or on his return to Kalmunai.

52. DFAT advises that, once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed. Returnees may be questioned and in custody for up to 24 hours at the airport and, subject to the unavailability of a Magistrate over a weekend or on a public holiday, may be detained in the airport holding cells for up to two days before they are taken to court. At court he may be subject to a bail surety or the magistrate may require a bail guarantor, in which case he may have to wait for a family member to attend court. If on bail the applicant may have to attend court, and/or report to the police, on numerous occasions over time. A fine may be imposed. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, it is not aware of returnees being mistreated during processing at the airport and assesses that Sri Lankans face a low risk of mistreatment that can amount to torture overall.³¹
53. I am not satisfied that there is a real chance that the applicant would face persecution in these circumstances. I accept that the applicant may be processed under the IE Act at the airport and may face court action and a fine under the IE Act as well. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. In this case, the evidence also does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the processing, investigation, prosecution and punishment of the applicant under the IE Act is not systematic and discriminatory treatment and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
54. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. I have found that the applicant's profile is not one that places him at a real chance of suffering harm. As discussed above, I am not satisfied that with his profile there is a real chance that the applicant will be monitored because of his background, his absences from Sri Lanka, his attendance at Heroes' Days and Remembrance Days in Australia, and/or as a failed Tamil asylum seeker, if returned.
55. DFAT assesses that refugees and returnees may face re-integration issues in relation to employment and accommodation issues. DFAT states some refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities, and that continued surveillance of returnees can contribute to a sense of mistrust.³²
56. The applicant is in [age range], he is not uneducated and has shown himself to be resourceful and resilient by adapting to life outside of Sri Lanka, in [Country 1], [Country 2] and Australia. The applicant's parents and siblings live in the family home in Kalmunai and, as discussed above, this is the area of Sri Lanka to which the applicant will return. He has some work experience and does not claim he is not able bodied. The applicant said at the SHEV interview that he sometimes sends money to his family, but has not claimed his family in Sri Lanka, either before or after he left Sri Lanka, has been unable to support themselves or otherwise been unable to subsist. In addition to his Tamil language skills he also speaks Hindi and English. Given those factors, I am not satisfied that the applicant will be unable to re-establish himself in Kalmunai. I accept that he may face some social stigma on his return as a

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

³² Ibid.

returned/failed asylum seeker who has been away from Sri Lanka for more than eight years since 2012. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful and/or upsetting, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.

57. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka, I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

58. 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

59. 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

60. 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.
61. 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.
62. I accept that, if he returns to Sri Lanka, while re-integrating the applicant may face some level of societal discrimination as a returned asylum seeker, in the form of social stigma. As acknowledged above social stigma may at times be hurtful and/or upsetting, however, I am not satisfied on the evidence that any hurt and upset he may suffer from social stigma will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigma may be hurtful and upsetting but it does not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by the applicant as a returned asylum seeker from Australia amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
63. I accept that the applicant may be subject to investigation and processing under the IE Act at the airport and may also face possible action under the IE Act for his illegal departure. I am

not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture in consequence of his illegal departure. The evidence does not suggest that the treatment and penalties the applicant may be subject to because of his illegal departure is intended to inflict pain or suffering that can reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or that it is intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason. I am not satisfied there is a real risk of significant harm on this basis, or when considered in combination with any treatment he may experience as a returned Tamil asylum seeker.

64. Otherwise I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, based on his profile and history, if he is returned to Sri Lanka. As 'real chance' and 'real risk' involve the same standard,³³ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.
65. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

Complementary protection: conclusion

66. 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.

³³ *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.