



**Australian Government**  

---

**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

---

SRI LANKA  
IAA reference: IAA19/06494

Date and time of decision: 21 May 2019 15:33:00  
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 Northern Province, Sri Lanka. He arrived in Australia on 12 October 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 10 March 2017. On 22 March 2019 a delegate of the Minister (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).
3. On 17 April 2019 the IAA received submissions and further information from the applicant. The submissions disagree with some of the delegate's findings and identify errors said to have been made by the delegate. To the extent the submissions discuss evidence which was before the delegate and contain argument, I consider this does not constitute new information and I have had regard to it.
4. Attached to the submissions are two documents identified in those submissions as a new statement and a letter from his sister. The applicant provided an English translation of his protection claims contained in his SHEV application (originally hand written in Tamil) to the Department in an email on 8 March 2019. The submissions say the new statement "reflects more precisely the evidence of the applicant", but it is identical to the English translation provided on 8 March 2019 other than some minor differences in layout, for example, the paragraphs about his seeking a government job to avoid problems and his getting a [Occupation 1] job in 2009 appear at different positions in the two statements. Importantly, the information in the statement of 8 March 2019 and the new statement is identical, including spelling mistakes. As the information in the new statement was before the delegate I do not consider it new information and I have had regard to it. The letter from his sister was not before the delegate and it is new information.
5. The letter from his sister is dated 8 April 2019, and contains an endorsement from a Grama Sevaka officer dated 9 April 2019. In the letter his sister discusses her missing husband, she received help from the applicant which made the authorities suspicious of him, she was involved in protests about missing persons and the authorities came afterwards and enquired about her husband and the applicant. The letter is dated after the delegate's decision and the applicant says he did not provide the letter from his sister previously because he received it on 8 April 2019. The applicant has not otherwise addressed why he says there are exceptional circumstances to justify considering the letter from his sister. The incidents discussed in that letter appear to relate to events primarily from 2009 until the applicant left Sri Lanka in 2012, together with some incidents following on from her past, but date unspecified, attendance at processions and protests about missing persons. In the English translation(s) he provided for his protection claims he mentioned his missing brother-in-law and that he was questioned / beaten up when the authorities asked about his missing brother-in-law, however, he made no claim in his translated statement(s) that the authorities made further enquiries about him as the sister's letter now suggests. He was not represented when preparing his SHEV application or at the SHEV interview, but that is not unusual. He was told by the delegate at the SHEV interview that it was his opportunity to put forward his claims and he acknowledged that he had read and understood the information the Department had sent

him about the SHEV interview. He provided other supporting letters and documents to the Department to support his SHEV application, including at the SHEV interview and shortly afterwards. He indicated in his SHEV application that he was in weekly phone contact with his family in Sri Lanka. Nor is there any other information before me that suggests there are exceptional circumstances. Overall, I am not satisfied there are exceptional circumstances to justify considering this new information.

6. The applicant requests in his submissions that he be provided with an opportunity to attend an interview with the IAA if any concern arises in respect of his application before a decision is made. The legislative framework governing the IAA provides for an exhaustive statement of the natural justice hearing rule. The IAA is required, subject to Part 7AA, to review a matter without accepting or requesting new information and without interviewing the applicant (s.473DB). The IAA can obtain new information from an applicant, including at an interview, but can only consider that information in exceptional circumstances. His request is a very broad one. The applicant has not indicated what information he would or could provide in an interview with the IAA that was not provided, or that he was unable to provide, in his SHEV application, translated SHEV statement(s), at the SHEV interview, or in the submissions and new information to the IAA. I have decided not to exercise my discretion to interview the applicant.

#### **Applicant's claims for protection**

---

7. The applicant's claims can be summarised as follows.
  - Owing to the civil war in the past in Sri Lanka he had a fear for his life for a number of reasons;
  - He feared that at some stage he will be seen as a supporter of the Liberation Tigers of Tamil Eelam (LTTE);
  - The Sri Lankan government is still arresting people who are linked to the LTTE; and
  - He therefore seeks protection in Australia.

#### **Factual findings**

---

##### **Receiving country**

8. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from Northern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

##### **Background**

9. The applicant states he was born in [year] in [Village 1], [City 1], Northern Province, Sri Lanka. He lived in , [a] village [near] [City 1], for most of his life in Sri Lanka. He is single and has no children. His parents and three of his four sisters, who have all lost their husbands, live together in [Village 1]. His fourth sister lives with her husband a little away from their family home and her husband is in [Industry 1]. His sisters support his parents with [Industry 1]. He speaks to his family weekly. He attended school in Sri Lanka from [years], completing [certain subjects]. He completed a [course] in 2008 through [an organisation]. He was self-employed

in [Industry 1] (2000 to 2012), worked for a [company] (August to November 2009) and worked as a [Occupation 1] (January 2010 to September 2012), in Sri Lanka. In Australia he works as a [Occupation 2] in a [workplace] (from March 2016).

### Problems in Sri Lanka

10. The applicant claims that owing to the civil war in Sri Lanka he has a fear for his life for the following reasons. There are four sisters in his family. All of his sisters were married and lived in the LTTE controlled areas, including one sister who was in [Town 1] until 2009 and another sister who was in [Town 2] until she and her family were displaced in about 2006. Three of his sisters have lost their husbands. In 1999 [one of his] sister's husband was arrested by the Sri Lankan Army (SLA) and has been missing since that time. [Another] sister was married to 'Y', who was with [an official] in the LTTE. He had a [position] with the LTTE. Y used to come to his home very often and the whole village knew. Y was killed in shelling in 2006 while they were displaced. [Another] sister's husband, 'V', went missing at the end of 2008 in the final stages of the war. Neither he nor his family members were in the LTTE or had contact with the LTTE, except for the brother-in-law who was killed.
11. The applicant claims that in 2008 he was returning to [City 1] on a bus when he was arrested by the SLA, severely tortured and questioned about his missing brother-in-law and whether he had any contact with him or contact with the LTTE. He was held for [an amount of time]. He informed the Sri Lankan Monitoring Mission (SLMM) about the incident. The SLMM told him if he had another issue in the future to complain to them and they would look into the matter. Somehow the SLA found out he had already made a complaint to the SLMM so the SLA again took him and severely beat him. After that incident he didn't live at home but lived at other relatives' houses. He also couldn't go to other places and live there.
12. In May 2009 the war ended and the sisters ended up in displaced persons' camp. When they were released in December 2009 he took responsibility for them and they came to live with him and his parents. They had reported their husbands missing including to the ICRC. After that his problems really began, although he had had problems before from 2008. About once or twice a month he would be asked to come to the SLA camp. The Criminal Investigation Department (CID) would question him and beat or torture him. He was questioned about whether his dead brother-in-law was a LTTE member and had any connections to the LTTE; they also suspected his missing brother-in-law may have escaped overseas and so asked if he was in the LTTE and still working for the LTTE; and because those two brothers-in-law when they lived in the LTTE controlled area had visited him and his parents and kept in contact with them, they questioned the applicant and suspected he may have worked with the LTTE. That is why he left the country.
13. The applicant claims that he thought that if he got a government job he would be able to live without problems. So he joined the local [business] in his village as a [Occupation 1]. He also applied for a number of other government jobs in that time, as the [current] job was a temporary one, but he was not successful. Even while working at the [business] he had problems as the CID and unknown people came and asked about him. About two months before he left Sri Lanka a person who often came to [the business] asked him, saying he previously saw him with them, if he had now joined the government. That is the reason he decided to leave Sri Lanka. He feared that at some stage he will be seen as a supporter of the LTTE. The Sri Lankan government is still arresting people who are linked to the LTTE.
14. The applicant provided supporting documents including identity documents, school records, certificate of residence and character dated April 2012, family registration, SLMM card,

employment card and training certificate, a letter from his father dated 30 October 2012, a letter from a priest dated 12 December 2012, a letter from a Member of Parliament dated 19 December 2012, a letter from a Justice of the Peace dated 27 December 2012, a letter from the ICRC dated [in] March 2013, and police documents, some of which are untranslated.

15. The Department of Foreign Affairs and Trade (DFAT) reports that incidents of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, and assesses that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war.<sup>1</sup> The UN High Commissioner for Refugees (UNHCR) confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.<sup>2</sup> 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.<sup>3</sup> Country information confirms that in areas they controlled the LTTE had an extensive administrative structure and people were required to interact with the LTTE's military and civil administration as a matter of course.<sup>4</sup>
16. In assessing the applicant's evidence I have taken into account the difficulties of recall over time, the scope for misunderstanding in interpreted material, cross cultural communication issues, and the problems a person who has suffered trauma may have in providing a cohesive narrative. The applicant was generally consistent about his residential, education, work and family history and I accept that history as set out in his SHEV application. The applicant was also largely consistent in his claims provided in the English translations of his SHEV application statement and the claims he made at the SHEV interview about the adverse attention he received from the authorities in Sri Lanka and that his deceased brother-in-law was in the LTTE and that two of his other brothers-in-law went missing. Although there were some differences in some of the dates provided as to whether they occurred in 2006 or 2008, as they all occurred during the final phase of the war in Sri Lanka I do not attach any particular significance to those variations. His claims are also generally consistent with the country information and the supporting documents he provided, such as the SLMM card and the letters, also corroborate some of his claims. I accept the applicant's claims about the adverse attention he received in Sri Lanka and his claims about his brothers-in-law, except as discussed below.
17. In the English translations of his SHEV application statement he indicated that about two months before he left Sri Lanka a man came into the [business] and after saying he previously saw the applicant with 'them', asked if the applicant had now joined the government, and for that reason he left Sri Lanka. I do not consider this claim to be credible for a number of reasons. First, in his SHEV interview he suggested that he left Sri Lanka because of the ongoing questioning and beatings by the CID that occurred from 2008/2009, which was also

---

<sup>1</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

<sup>2</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

<sup>3</sup> Danish Immigration Service (DIS), "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; and US Department of State (USDOS), "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>4</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; and DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

consistent with his claim in his Entry Interview that he left because of threats and intimidation faced from the military. Secondly, as he said the man often came to the [business], and the applicant worked there from the beginning of 2010, I do not consider it credible that, if true, the man would wait around two and a half years until July 2012 to ask the applicant such a question. Thirdly, the applicant suggested for the first time at the SHEV interview that the CID and unknown persons came when he was working at the [business] and asked about him. If true, this is a significant claim to have omitted from his SHEV statement. Additionally, none of the supporting letters he provided mention that the applicant suffered any problems at, or because he worked for, the [business].

18. These issues go well beyond minor discrepancies that could be attributed to factors such as misunderstandings in interpreted material, cultural communication issues, lack of cohesive narration due to trauma, or recall problems and demonstrate not insignificant credibility problems with his evidence. Overall, I am satisfied that the applicant has exaggerated this part of his evidence in order to boost his claims for protection. I reject his claims that a man came into the [business] and after saying he previously saw the applicant with 'them', asked if the applicant had now joined the government; and that the CID and unknown persons came and asked about the applicant while he was working at the [business].

#### **Returned Asylum seeker**

19. The applicant claims he departed Sri Lanka in September 2012 to travel to Australia as a passenger in a boat organised by a smuggler. I find that, if the applicant was to return to Sri Lanka, he may be considered a returned asylum seeker who departed illegally by the Sri Lankan authorities.

#### **Refugee assessment**

---

20. 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**

21. 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.

*Tamil male from the north, LTTE links and imputed political opinions*

22. 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.<sup>5</sup> However, there have been a number of significant changes since the 2015 election of the Sirisena government. The new government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms to restrict executive powers, and took steps to restore the independence of the judiciary. In contrast to the approach of the previous Rajapaksa government, it also initiated a new, more open dialogue with the international community, including human rights organisations, and signalled its willingness to address long-standing allegations of past human rights abuses and violations.<sup>6</sup>
23. The Sirisena government has implemented a number of confidence-building measures to address grievances of the Tamil community. It has replaced military governors with civilians in the Northern and Eastern Provinces. The Office of National Unity and Reconciliation continues to coordinate government reconciliation efforts, promoting social integration, securing language rights for all Sri Lankans and supporting a healing process through a proposed Commission. During 2017 the Tamil National Alliance and the Defence Ministry initiated a formal dialogue on returning military held lands, and the army chief publicly committed to the military prosecuting personnel who committed criminal acts during and after the war. The President legally established the Office of Missing Persons in September 2017, which is tasked with searching and tracing missing persons.<sup>7</sup> The United Nations High Commissioner for Human Rights observed in February 2016 that one of the most important long-term achievements in the past year had been the restoration of the legitimacy and independence of the Sri Lanka's Human Rights Commission (HRCSL). The UN noted in 2016 that the Sirisena government has created a political environment conducive to reforms, significant momentum had been achieved in the process of constitutional reform and it had taken important symbolic steps towards reconciliation and changing the majoritarian political culture.<sup>8</sup> The US Department of State (USDOS) notes in its recent report that the HRCSL generally operated independently of, and with a lack of interference from, the Sri Lankan government.<sup>9</sup>
24. The UK Home Office's (UKHO) fact finding visit to Sri Lanka in July 2016 identified a number of ongoing concerns for the Tamil population in relation to human rights and other issues, but a number of the sources they consulted conceded that there had been improvements for Tamils since the change of government in 2015.<sup>10</sup> DFAT has indicated in its two most recent reports that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, 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 a result of a number of factors including disrupted education because of the war and language constraints. DFAT states that Tamils have a substantial level of political

<sup>5</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>6</sup> UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

<sup>7</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>8</sup> UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

<sup>9</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>10</sup> UKHO, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112.

influence and their inclusion in the political dialogue has increased under the Sirisena government. 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 Tamil political participation. As discussed above, many Tamils in the north and east reported being monitored, harassed, arrested or detained by security forces under the Rajapaksa government. Members of the Tamil community in the north and east continue to claim the authorities monitor public gatherings and protests, and practise targeted surveillance and questioning of individuals and groups. DFAT assesses that the monitoring of Tamils in day to day life has decreased significantly under the Sirisena government, but surveillance of Tamils in the north and east continues, particularly for those associated with politically sensitive issues.<sup>11</sup>

25. The applicant does not claim he or his family suffered any incidents of, or harm from, societal discrimination while in Sri Lanka. Similarly, the applicant is Hindu but he has not claimed that he experienced any discrimination or harm in Sri Lanka, and makes no protection claims, on that account. The country information indicates that although some monitoring still occurs, overall the monitoring and harassment of Tamils in the north and east 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.
26. I am not satisfied that any fear of harm the applicant may hold on account of his Tamil ethnicity, his LTTE links or any imputed political opinions is well-founded. DFAT confirms<sup>12</sup> 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 2017 report 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 person's past LTTE membership/connection.<sup>13</sup>
27. As discussed above, country information indicates that Tamils were routinely subjected to monitoring and harassment during the war and under the Rajapaksa government, there are credible reports of torture being carried out by the Sri Lankan authorities during the war and its immediate aftermath, but there has been a marked improvement in the general situation and country conditions for Tamils in Sri Lanka since the change of government in 2015.
28. There are still reports of torture occurring in Sri Lanka since the change of government, including from the UN Special Rapporteur on Torture, the HRCSL, and other sources,<sup>14</sup> although DFAT is unable to verify allegations of torture in Sri Lanka in 2016 and 2017.<sup>15</sup> The risk of torture has decreased since the war, the number of torture complaints has greatly reduced, white van abductions are seldom reported, arbitrary arrests have reduced and although there are reports of the use of excessive force against civilians by the police and security forces, such incidents are rare and the civilian authorities generally maintain

---

<sup>11</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>12</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>13</sup> UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

<sup>14</sup> United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>15</sup> DFAT, "UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.



effective control over the military.<sup>16</sup> DFAT assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture.<sup>17</sup>

29. I accept that the applicant's family lived in areas that were controlled by the LTTE at times during the war. I accept that the applicant's brother-in-law Y was in the LTTE, in a [position] working with [an official]; that Y often visited the applicant's home and was known in the village to do so; and that Y was killed in shelling in about 2006. I accept that that his brothers-in-law from the LTTE controlled areas at that time visited and stayed in contact with him and his parents and that two of his brothers-in-law went missing during the war, one in 1999 and V in about 2008. I accept that his three husbandless sisters moved in with the applicant and his parents after their release from an IDP camp in late 2009 and they continued to look for the two missing husbands including approaching the ICRC. I also accept that the applicant was arrested and held for [an amount of time] by the SLA in 2008, during which he was questioned and tortured/beaten; he complained to the SLMM about that incident and the SLA subsequently took him and beat him for approaching the SLMM; for a time after those 2008 incidents he lived at relatives' homes; and that the SLA/CID on a regular basis asked the applicant to report to the SLA camp where he was questioned by the CID, and beaten/tortured, including about Y, his missing brothers-in-law and if he was involved with the LTTE, until he left Sri Lanka.
30. Having regard to the information before me, I am not satisfied the applicant faces a real chance of harm now or in the reasonably foreseeable future, for a number of reasons. First, as reports note, residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection. All those who lived in LTTE controlled areas had to interact with the LTTE on a daily basis, and the Sri Lankan authorities would be well aware that was the case. Other than Y, no one on the applicant's family was in the LTTE and Y himself died in shelling over a dozen years ago during the war. The two missing brothers-in-law have been missing since 1999 and 2008 respectively, and the authorities' interest in, or suspicions about, them will have dissipated over that time. Secondly, although the applicant was held, including being questioned and mistreated, by the SLA for [an amount of time] in 2008, was taken and beaten by the SLA afterwards for complaining to the SLMM, and then regularly called to the SLA camp where he was questioned and mistreated by the CID, he was always released. Country information confirms that Tamils in the north and east faced a high level of monitoring and harassment, including arrests and detentions, questioning and mistreatment, during the war and in its aftermath under the Rajapaksa government. Given the Sri Lankan authorities' widely used powers to detain under the emergency regulations and PTA at the time, that he was never charged, taken to court, imprisoned, sent to rehabilitation, or subject to prolonged detention, and that his experiences with the SLA and the CID were, unfortunately, common ones experienced by many other Tamils at the time, I am not satisfied that he was of any particular interest to the Sri Lankan authorities, except as another Tamil who was subjected to routine monitoring. Thirdly, it has been more than six years since the applicant left Sri Lanka and during that time the Sirisena government came to power, the general situation and country conditions for Tamils in Sri Lanka have improved substantially and the authorities have not questioned his family about his whereabouts or shown any other interest in him. Additionally, as the UKHO 2017 report notes, a person's past LTTE membership or connection no longer generally gives rise to a need for protection.

---

<sup>16</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; and UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

<sup>17</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

31. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE.<sup>18</sup> The UKHO 2017 report indicates that 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 not in itself evidence that a person will attract interest from the Sri Lankan authorities.<sup>19</sup> DFAT states that high profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and assesses that the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile and that returnees may be subject to surveillance. A UNHCR survey from 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. However the UNHCR also interviewed refugee returnees in 2016 and only 0.3 per cent indicated they had any security concerns following their return. DFAT's 2018 report also notes that although the Sri Lankan government has reportedly decreased systematic surveillance of returnees, it is aware of anecdotal evidence of regular visits or phone calls by the CID to failed asylum seekers in the north as recently as 2017.<sup>20</sup>
32. The applicant does not claim he has had any involvement, significant or otherwise, in any activities that might be considered as, or perceived to be, pro-Tamil separatist or pro-LTTE diaspora activities in Australia. I am not satisfied that the applicant's profile, which as discussed is not one that places him at a real chance of suffering harm, will be increased by the fact that the applicant has spent more than six years outside of Sri Lanka and claimed asylum in Australia. The authorities may become aware on his return to Sri Lanka (when they contact his home area when making enquiries at the airport as discussed below) that he was previously regularly asked to attend the SLA camp. However, given that such monitoring and harassment was not uncommon at the time, the authorities have not enquired about his whereabouts or shown any further interest in him since he left Sri Lanka, and his profile, I am not satisfied there is a real chance that he will be monitored or subject to surveillance because of his former monitoring, his absence from Sri Lanka, as a returned Tamil asylum seeker from Australia, or for any other reason, if returned.
33. The applicant does not have a profile that country information suggests he has a real chance of suffering harm, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political views and/or as a Tamil male from the north. I do not consider that the Sri Lankan authorities had any adverse interest in the applicant other than as part of the former Rajapaksa government's then general harassment and monitoring of Tamils in the north and east around the time he left Sri Lanka, nor, given that the Sri Lankan authorities have not made any further enquiries about the applicant's whereabouts since he left Sri Lanka in September 2012, and the harassment and monitoring of Tamils has significantly decreased under the Sirisena government, together with a person's past LTTE involvement no longer generally being of interest, that he would be of any adverse interest to the Sri Lankan authorities, or that he faces a real chance of suffering harm, if he returned to Sri Lanka. I am not satisfied he faces a real chance of harm for reason of his ethnicity, background and links to the LTTE.
34. I am satisfied that the applicant will not face a real chance of persecution on the basis of any links to the LTTE, for any imputed political opinions, and/or as a Tamil male from the north, if returned to Sri Lanka, now or in the reasonably foreseeable future.

---

<sup>18</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>19</sup> UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

<sup>20</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

*Returning asylum seeker and illegal departure from Sri Lanka*

35. 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.
36. 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 Sri Lankan rupees. DFAT has been advised by the Sri Lankan government, but cannot verify, that no mere 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, the returnees may have to wait for the guarantor to come to court. Anecdotally, most passengers may spend years on bail and most are free to go after paying a fine. Although fines are often low, the cumulative costs of attending court over a protected period of time can be high.<sup>21</sup>
37. 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 Terrorism Investigation Department, who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed as a group and individuals have to remain until all returnees are processed.<sup>22</sup> 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.<sup>23</sup>
38. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted, photographed and have a statement taken by the police. If former LTTE members, the police will further enquire about their activities abroad. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours after arrival and should a magistrate not be available before this time, for example because of a weekend or public holiday, those charged may be detained for up to two days in an airport holding cell.<sup>24</sup>
39. I accept that the applicant may be considered a failed asylum seeker from Australia on his return. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport. There is country information containing reports of some returnees being tortured.<sup>25</sup> DFAT does not suggest that there is no risk and

---

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Including 'LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)', Immigration and Refugee Board of Canada, 10 November 2017, OG020B81694; UKHO, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have

those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport. However, as discussed above, on my findings, the applicant is not such a person.

40. Taking into account my findings about his profile and the country information, I do not accept that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether at the airport or on his return home.
41. 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 risk of harm. The applicant is from [Village 1], [City 1] in the Northern Province, where his parents and three of his sisters live together in the family home and his fourth sister, with her husband, only a little distance away. I am satisfied that this is the area to which the applicant will return. As discussed above, I am not satisfied, given his profile, there is a real chance that he will be monitored or subject to surveillance because of his absence from Sri Lanka, or as a failed Tamil asylum seeker from Australia if returned.
42. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many face difficulty in finding suitable employment and reliable housing, and refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees may face some societal discrimination upon return to their communities, and that continued surveillance of returnees contributes to a sense of mistrust.<sup>26</sup>
43. The applicant has experience working in a number of jobs in Sri Lanka, including [in Industry 1], and as a [Occupation 2] in a [workplace] in Australia. He completed school education up to his A-levels and completed a [course]. He has shown himself to be resourceful and resilient by adapting to life in Australia. The applicant will be returning to the area of Sri Lanka where he lived for most of his life and where his parents and sisters still reside. He has remained in weekly contact with his family and, although his father's letter from 2012 indicates the family initially struggled after the applicant left Sri Lanka, the sisters are now able to support themselves and his parents in Sri Lanka. Given those factors, I am satisfied that the applicant will be able to re-establish himself in [Village 1] without suffering harm in relation to any housing and employment difficulties that he may encounter. I accept that he may face some social stigma on his return as a failed asylum seeker. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
44. I am not satisfied that there is a real chance that the applicant would face serious harm on his return as a failed Tamil asylum seeker from Australia. 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. Case law states

---

a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112; "Unstopped: 2016/17 Torture in Sri Lanka", International Truth & Justice Project (ITJP), 14 July 2017, CISED50AD4849; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881; and "TID arrests another Tamil man on return from abroad – VIDEO", Ceylon News, 19 May 2016, CX6A26A6E4702.

<sup>26</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.<sup>27</sup> In this case, the evidence 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 would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

45. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a returned Tamil asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
46. 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**

47. 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**

---

48. 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**

49. 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.
50. I accept that, if he returns to Sri Lanka, while re-integrating the applicant may face some level of societal discrimination as a failed asylum seeker from Australia, in the form of social stigma. As acknowledged above social stigma may at times be hurtful, however, I am not satisfied on the evidence that any hurt 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 or harassing 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

---

<sup>27</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

the applicant as a failed asylum seeker from Australia amounts to significant harm as defined in ss.36(2A) and 5 of the Act.

51. I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political opinions, as a Tamil male from the north, or a combination of these. As 'real chance' and 'real risk' involve the same standard,<sup>28</sup> it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.
52. 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. 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 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 relative to attend court. If on bail the applicant may have to attend court on a number of 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, and understands they are not subject to mistreatment during processing at the airport and assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a 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 are intended to inflict pain or suffering, severe pain or suffering, or are intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. 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 failed asylum seeker from Australia.
53. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk the applicant would face being arbitrarily deprived of life or tortured for any reason as a returned Tamil asylum seeker from Australia, for any links to the LTTE, for any imputed political opinions, as a Tamil male from the north, or any combination of these. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.
54. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied he faces a real risk of significant harm.

#### **Complementary protection: conclusion**

55. 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).

---

<sup>28</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

## **Decision**

---

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

## Applicable law

---

### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

#### **5H Meaning of refugee**

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

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

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



...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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