



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07419

Date and time of decision: 10 December 2019 15:35:00  
J Maclean, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil of the Hindu faith from the Eastern Province of Sri Lanka. He lodged a valid application for a Safe Haven Enterprise Visa (SHEV) in April 2017. On 25 October 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

### 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. I note the IAA advised the applicant by letter dated 30 October 2019 that the delegate had refused to grant his visa, and the matter had been referred to the IAA (the Acknowledgement of Referral). On 11 November 2019 the IAA received a written request from the applicant, seeking an extension of time. The applicant indicated his lawyer is currently overseas and he needs '3 weeks time to get my lawyer'. On 12 November 2019 the IAA sent an email to the applicant, advising his request for an extension was not granted, and noting that as his case was referred to the IAA on 30 October 2019 the 21 day period for the provision of new information and submissions ends on 20 November 2019.
4. By way of background I note, the applicant had the assistance of a legal practitioner to prepare his SHEV application, however a representative was not present during the SHEV interview. At the start of the SHEV interview the delegate stated that the purpose of the interview was for the applicant to provide further information in support of his application for a protection visa. The delegate then referred to an information sheet provided to the applicant along with the invitation to attend the SHEV interview, titled 'Important information about your Protection visa interview', in English and Tamil, and which contains an explanation of Australia's protection obligations. The applicant was asked if he had read and understood the information in the sheet, and he said 'Yes'. Copies of the information sheet, in Tamil and English, are included in the referred materials. The document outlines the purpose of the interview, and specifies the extreme importance of presenting all claims for protection during the interview, and providing all information in support, and that there may not be another opportunity to raise new claims if the application is refused. The delegate warned the applicant of the importance of telling the truth and providing the Department with complete and accurate personal protection claims as early as possible, including during the interview, and noted all the information provided would be considered as part of his protection visa application. At the end of the interview the delegate gave the applicant a number of opportunities to provide any further information, including asking whether there are "any other reasons" why he fears returning to Sri Lanka, or whether he had any further comments, or if there was anything else he wished to say in regard to his protection visa application, or any further documents to submit. The applicant confirmed he had 'nothing else' to say, and that he did not have any documents to submit. The applicant was also given the opportunity to take some time to reflect before responding to the concerns expressed by the delegate, however the applicant provided an oral response immediately.
5. In all the circumstances, including that the applicant had legal assistance to prepare his protection visa application; the lack of detail regarding any engagement with a legal

representative, including who the person is he seeks to engage, and the reason why he could not have engaged a different representative who is available in the requisite timeframe; the lack of any explanation about what information he might wish to provide, or what aspect of the delegate's decision he takes issue with; and that at the time his request was refused the applicant still had more than a week to provide information to the IAA; I am satisfied the applicant has had a reasonable opportunity to present his case and respond to the delegate's decision, and I do not consider the timeframe for provision of information to the IAA was unfair to the applicant or unreasonable.

6. I have considered a new report on Sri Lanka by the Department of Foreign Affairs and Trade (DFAT) published on 4 November 2019.<sup>1</sup> This report contains up to date information on the situation for people in Sri Lanka with a profile similar to the applicant's. It updates the DFAT report on Sri Lanka, published on 23 May 2018, which was before the delegate, and on which the delegate relied. The report has been specifically prepared for the purpose of assisting with determination of protection obligations in Australia. I am satisfied there are exceptional circumstances to justify considering this information.
7. I have also considered a media article dated 18 November 2019, which reports the result of the recent Presidential election in Sri Lanka.<sup>2</sup> At the conclusion of the SHEV interview, which was conducted on 17 October 2019, the applicant referred to an upcoming Presidential election in Sri Lanka and the impact it will have on conditions in Sri Lanka, particularly for Tamils. The article reports on the result of the election, and I am satisfied there are exceptional circumstances to justify considering the information.

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

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8. The applicant's claims can be summarised as follows:
  - He is a Sri Lankan citizen, an ethnic Tamil of Hindu faith, born in [year] in Batticaloa, Eastern Province of Sri Lanka.
  - He supported a Tamil National Alliance (TNA) candidate in the Provincial Council elections in 2012. After the election he was targeted by Sri Lankan authorities and armed groups/paramilitaries who collaborated with them, and due to threats from these groups he left Sri Lanka.
  - Since he has been in Australia an unknown armed group visited his home and made enquiries about him on two occasions. [In] January 2013 they beat his brother and attempted to abduct him. [In] June 2016 an armed group again assaulted his brother and threatened if they find him [the applicant] they will not spare him. The police visited his house and accused him of being associated with the LTTE, and told his father to produce him to the nearest police station when he returns.
  - He fears if returned to Sri Lanka he will be seriously harmed and possibly killed by Sri Lankan authorities and the armed groups collaborating with them.

### **Refugee assessment**

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9. 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-

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<sup>1</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>2</sup> New York Times, The, 'Gotabaya Rajapaksa Wins Sri Lanka Presidential Election', 18 November 2019, 20191119105229

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**

10. 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.

11. The applicant claims he is a Tamil who was born in Batticaloa in the Eastern Province of Sri Lanka in [year]. Documentary evidence has been provided to support his identity. I accept his identity is as claimed, that he is a national of Sri Lanka, and that Sri Lanka is the receiving country for the purposes of the Act. I also accept he is of Tamil ethnicity.

12. As set out in his SHEV application, with the exception of a period of about two years when he was in [Country], he always lived in the Batticaloa area of Sri Lanka. He and his family lost almost everything during the civil war in Sri Lanka, and were displaced on many occasions. His parents [and siblings] continue to live in Sri Lanka. While in Sri Lanka he was self-employed in a small [shop] in Batticaloa, from July 2006 until April 2007, but otherwise reports he was unemployed. He worked in [Country] in construction as [an Occupation], from February 2010 until June 2012. In Australia he has also worked as [an Occupation], from February 2016 until December 2016 he worked with a company [performing a job task], and from January 2017 with a different company. At the SHEV interview the applicant indicated that work is not full-time, but that he gets work once in a while. I accept the applicant’s evidence on these issues.

13. The applicant claims to be a Hindu. DFAT reports Hinduism is one of Sri Lanka’s four major religions, and that the 12.6 per cent of the population who practise Hinduism are mostly Tamils from the Northern and Eastern Provinces.<sup>3</sup> I accept that the applicant is Hindu, as claimed. The applicant has not claimed he was ever prevented from practising his religion in Sri Lanka, that he was harmed for doing so, or that he has any fear of harm on return to Sri Lanka for that reason.

14. The SHEV application indicates the applicant attended Primary school from January 1995 until December 1999, but that he withdrew from Secondary school. In his statement of claims the applicant notes he could not continue his studies after Year [level] due to threats of forcible

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<sup>3</sup> DFAT, ‘DFAT Country Information Report: Sri Lanka’, 23 May 2018, CIS7B839411064

conscription by the Karuna group. In December 2004 while cycling home from a class he was intercepted and taken by the Karuna group to their hideout. He was kept there for three hours, after which he freed himself and fled the area. He decided to discontinue his studies and remain at home. In May 2006 the family home was destroyed when a shell fell on the roof, and he moved with his family to another location about three kilometres away. In July 2006 he ran a small [shop] selling [a product]. In April 2007 a Liberation Tigers of Tamil Eelam (LTTE) cadre attended the shop and fired his weapon at nearby Police and Sri Lankan Army (SLA) personnel. The applicant ran inside the house and heard gun shots for 15 minutes. He was interrogated by the police and SLA at his home, and beaten at that time. They told him they would come back again if needed. As a result of the incident he was scared, and went to live with relatives for the next few months. One night in June 2009 two men came to his house on motorbikes and called his name. He went outside and they threatened him with weapons and attempted to abduct him. His mother intervened and he was able to free himself and fled on foot to a relative's house in [Town 1] area. He stayed there for seven months until a friend who was working in [Country] helped him get a work visa to [Country].

15. The applicant provided a number documents regarding these events, including: a diagnosis ticket from [Town 2] Hospital, indicating his father was admitted [in] May 2006 for treatment related to bomb blast injuries; and an untranslated extract from the Information Book of [Town 2] Police Station, dated [later in] May 2006, presumably related to the same bombing.
16. Country information reports that as a result of Tamils in Sri Lanka having a sense of marginalisation there have been calls since the 1950s for an independent Tamil state, in the predominantly Tamil-populated north and east of the country. The Liberation Tigers of Tamil Eelam (LTTE) was formed in the 1970s and conflict broke out in 1983 between the Sri Lankan military and the separatist LTTE. In May 2009, the Sri Lankan government announced its military victory over the LTTE and complete territorial control over Sri Lanka. The long civil conflict displaced hundreds of thousands of people and killed tens of thousands of people on both sides. During the conflict, and in the period shortly afterwards, there were frequent occurrences of extrajudicial killings, disappearances and kidnappings for ransom, particularly in the north and east, and which were attributed to Sri Lankan security forces, the LTTE and paramilitary groups, such as the Karuna Group.<sup>4</sup> In the context of the country information at the time, the applicant's account of his early life in Sri Lanka, as described in his statement of claims is plausible, and I accept the incidents described above occurred. I accept the applicant may have been scared after being interrogated and beaten by authorities in 2007, and that he went to live with relatives for a time, however there is nothing in the information before me to indicate the applicant was of ongoing interest to authorities at that time, and I do not accept he was. Although few details have been provided about the incident in June 2009, I can accept the incident occurred, and that it may have formed part of the reason the applicant sought work in [Country].
17. The applicant's SHEV application indicates he left for [Country] in February 2010 and worked there until June 2012, returning to Sri Lanka because his work visa was about to expire, and because he was homesick. He claims he was treated with an eye of suspicion by the Immigration Officers at the airport, but was allowed to leave. His parents were at the airport and he went home with them. During the SHEV interview the delegate questioned the applicant about whether he had any difficulties departing Sri Lanka in February 2010. He said his passport was checked twice or thrice, he was questioned about why he was going to [Country], and he said 'to get employment', and that the officers were talking amongst

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<sup>4</sup> DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

themselves in Sinhalese, and then it was time to go to the flight. On return from [Country] he said he was expecting some issues, his passport was checked and the officers were talking amongst themselves, and he was asked to sit down for 10 minutes, and allowed to leave after the officers confirmed family members were present at the airport to take him home. Criminal Investigation Department (CID) officers followed to see if there was someone to pick him up, and he was allowed to leave the airport.

18. I consider the applicant's evidence that he was able to depart Sri Lanka in 2010 on his own passport, and return in 2012, after what appear to be no more than routine checks being made, is indicative he was not of adverse interest to Sri Lankan authorities, or considered a security risk at those times, or he would not have been allowed to transit the airport.
19. In 2012 the applicant supported the candidacy of Mr [A], who ran for the 2012 Provincial Council election. He felt Tamils were discriminated against and it was a just cause to support. The applicant's father was well-known to Mr [A], a former parliamentarian, and who has been a Minister in the Eastern Provincial Council for a long time. In the past his father canvassed for Mr [A] in the Parliamentary election. Mr [A] ran on a TNA ticket and was elected to the Council, however the TNA was narrowly defeated by the ruling party. After the election the applicant was targeted by Sri Lankan authorities and armed groups collaborating with them. At night [in] September 2012 armed men came in a white van and apprehended him. They beat him and banged his head on the wall, stomped on him when he fell to the ground, and went to attack his father. He escaped through the back door of the house and went to a relative's house for a few days. He was afraid to stay in Batticaloa and went to Colombo for a period of time, but returned to Batticaloa and stayed at another relative's house for one week. His father made arrangements with a smuggler for him to depart Sri Lanka by boat [later in] September 2012.
20. During the SHEV interview the applicant said there were no jobs for Tamils when he returned from [Country], but he thought he would be able to apply for a job after the election. He supported himself using money earned in [Country], and his parents also supported him. At election time he was involved in canvassing by putting up posters, building stages for meetings, and handing out leaflets, and supporting Mr [A], and he did those jobs 10 to 15 times in the two months prior to the election on 8 September 2012. When asked to confirm the activities he had been involved with the applicant went on to say he did the activities mentioned above, but that he was always with the candidate in the vehicle, wherever he went, and whatever activities he was involved with he was with him. I agree with the delegate's assessment of the applicant's evidence on this issue, that the applicant exaggerated his involvement with and proximity to Mr [A] to enhance his protection claims. With regard to the applicant being attacked in September 2012, the delegate asked the applicant if he knew who the people were, and the applicant said his brother later identified them as Karuna Group by the way they speak and the way they behave, but that Pillayan Group was also present at the time.
21. In support of his activities during the election and the threats against him, the applicant provided a letter from Mr [A], Eastern Provincial Council Member, dated [September] 2012. The letter indicates the applicant and his family are very familiar to the writer and are strong supporters of the TNA, and during the last Provincial Council election the applicant joined his election campaign and worked hard for his party's victory. He states that after the election some Government party supporters threatened the applicant over the phone continuously, followed him suspiciously, and sent 'horrible messages through their messengers' and made him feel his life was in danger. As a result he went to Colombo, however the perpetrators sent their people to threaten him, and he left for Australia. The letter contains no details regarding when he first met the applicant, the type of work the applicant did with the election campaign, or the period of time he did this work, or the number of times. The writer also gives no

information about how he became aware of the threats against the applicant. Moreover, the writer refers to people as threatening the applicant continuously over the phone, following him, and sending messages, and they also did so whilst the applicant was in Colombo, which is inconsistent with the applicant's own account of a single incident when he was beaten at his home, but managed to escape. It is not apparent to me the writer has any direct knowledge about the applicant's involvement with the campaign, or regarding the threats against the applicant. The lack of detail regarding the activities the applicant was involved with, and the inconsistency with the applicant's own evidence, leads me to afford the letter little weight in my assessment.

22. Country information reports that the Tamil Eela Makkal Viduthalai Pulikal (TMVP) is the political wing of the paramilitary group formerly known as the Karuna group. The Karuna group was formed by the breakaway LTTE leader, known as Colonel Karuna, who led a split in the LTTE in 2004, and were active in the Eastern Province of Sri Lanka fighting together with the Sri Lankan armed forces against the LTTE. In 2007 the TMVP was registered as a political party and the government installed Tamil paramilitary leader Pillayan as the chief minister of the Eastern Province following elections in May 2008. Karuna and Pillayan coexisted uneasily under a nominally united TMVP, the two factions controlling different parts of the east. Credible sources report the TMVP no longer operates as a paramilitary group, having conducted a handing in of their weapons in March 2009, which was supervised by police. Despite this, it remains questionable if the TMVP's arsenal was surrendered in its entirety, and clashes continued between factions loyal to Karuna and Pillayan in 2011.<sup>5</sup>
23. Considering all the information before me, I accept the applicant supported Mr [A]'s election on 10 to 15 occasions over a two month period prior to 8 September 2012, by putting up posters, handing out leaflets and building stages for meetings. The applicant did not indicate he was ever a member of the TNA, or any other political party, and I do not accept he had any close association with the TNA candidate, or a prominent political profile as a result of the activities in support of the TNA, but rather consider he was a low-profile supporter. Although I agree with the delegate, that the applicant's evidence regarding being attacked by the Karuna or Pillayan group is scant and circumstantial at best, taking into account the country information at the relevant time, regarding election-related violence, and also suggesting some members of those groups may not have surrendered their weapons, I can accept the applicant was assaulted as claimed in September 2012, that it is possible the people who assaulted him were part of the TMVP, Karuna or Pillayan groups, and that they did so because of the assistance provided during the election. I also accept the applicant may have feared for his safety after the assault, and that formed part of the reason he left Sri Lanka. While the country information supports that paramilitary groups such as the TMVP and Karuna group fought with Sri Lankan authorities during the conflict, I am satisfied those groups ceased operating as paramilitaries in 2009, and at the time the applicant was assaulted in 2012 they were not operating in cooperation with the government, as claimed by the applicant.
24. The applicant claims that since he has been in Australia, there have been two further incidents. [In] January 2013, an unknown armed group visited his home and made enquiries about him. They beat his brother and attempted to abduct him, however the group left when neighbours intervened. His brother reported the incident to the local police, however they did not investigate and filed an action against his brother. [In] 26 June 2016 an armed group came to his home and again assaulted his brother, and he was hospitalised. The attackers told his brother if they find the applicant they will not spare him. The police visited his house and accused the applicant of being associated with the LTTE, and told his father to produce him to

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<sup>5</sup> UK Home Office, 'Sri Lanka March 2012', 7 March 2012, 3523

the nearest police station when he returns. During the SHEV interview the applicant said his brother resembles him, and they were searching for him, but they attacked his brother.

25. To support these claims the applicant provided two 'Diagnosis tickets' for the applicant's brother, AV: one from [Town 3] Hospital, indicating he was admitted during [a] period [in] January 2013 for injuries related to an assault by an unknown group of persons (armed); the other from [Town 2] Hospital, indicating he was admitted during [a] period [in] June 2016 for injuries related to an assault by an unknown group. He also provided a letter from [an] Attorney-at-Law, dated [September] 2016, indicating there is a case in [Town 2] Circuit Magistrate Court regarding AV being assaulted by unidentified people at his residence [in] January 2013, and that the case was initiated by Police Officers at [Town 2] Police Station.
26. During the SHEV interview the applicant said AV resembles him, indicating that the people who assaulted AV were searching for the applicant, but attacked AV. He said AV was living in the family home until one and a half years ago, but now he is in a different place for safety reasons, some 25 kilometres from Batticaloa. He also confirmed AV married one and a half years ago, and his wife is from the same town some 25 kilometres from Batticaloa, but AV does not live in the same house as his wife, AV is supported by his father-in-law, and because AV has been threatened twice by the unknown people he is not coming out, presumably meaning he is in hiding. I consider it more than merely a coincidence that the applicant's brother married at about the same time the applicant claims he moved from the family home, allegedly because of his fears resulting from enquiries about the applicant. I found the applicant's evidence on this issue was vague and unconvincing. I consider the most plausible explanation AV moved was to live with his wife after marriage. I also note the documentary evidence from the Attorney-at-law indicates the AV's 2013 complaint to police was taken seriously and a court case was initiated, which directly contradicts the applicant's statement of claims which indicates a case was brought against AV. I also consider it implausible that the applicant's father was not targeted in a similar manner, or that any group seriously searching for the applicant would have waited over three years from January 2013 until June 2016 to make a follow up visit. Although I can accept AV was assaulted on the two occasions claimed, I consider it speculation as to the identity of the persons who did so, and that the applicant has fabricated the claim regarding those assaults being connected with him to bolster his protection visa application. I do not accept the assaults are related to the applicant in any way, or his involvement with election activities in 2012.
27. In his statement of claims the applicant refers to police visiting his family home in Sri Lanka and accusing him of being associated with the LTTE, and telling his father to produce him to the nearest police station when he returns. No information is provided about exactly when this occurred, however it is referred to in the same paragraph as the [June] 2016 assault on his brother, so presumably it was around that time. The applicant has not claimed he or any family member had any association with the LTTE, and other than being interrogated and beaten by the police and SLA in April 2007 when there was an incident involving an LTTE cadre outside the applicant's shop, and during which I consider the applicant would have been questioned about LTTE involvement, the applicant did not indicate he or his family were ever questioned about, or suspected of involvement with the LTTE. Although the delegate did not specifically question the applicant about this claim, the applicant was given a number of opportunities to detail his claims for protection, including towards the end of the interview asking 'Are there any other reasons why you fear return to Sri Lanka?', 'Who do you think would harm you', 'Do you fear harm from anyone else?', and 'Have you said everything you would like to say today?'. The applicant made no mention of the visit by police, and confirmed he fears harm from the unidentified people who may be from the Karuna or Pillayan groups, and not for any other reason. Country information supports that towards the end of the conflict, government



security forces arrested and detained a large number of LTTE members, and many civilians were questioned or monitored for possible LTTE activity, and that Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE. Taking into account the length of time since the end of the conflict in May 2009, and that the applicant had a number of interactions with Sri Lankan authorities after that time, including being able to leave from the airport in 2010 and return via the airport in 2012, and was not of adverse interest at those times, and his complete failure to mention this claim during the SHEV interview, I do not accept the police made the alleged visit in 2016, or that the applicant was ever seriously suspected of being associated with the LTTE. Considering all the information before me, I do not accept the applicant was of adverse interest to Sri Lankan authorities for any reason at the time he departed Sri Lanka.

28. It is now over eight years since the applicant departed Sri Lanka, and over ten years since the war between the Sri Lankan government and the LTTE ended in May 2009, and the LTTE was defeated. During the civil conflict more Tamils were detained under emergency regulations and the *Prevention of Terrorism Act (PTA)* than any other ethnic group. Incidents of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka at that time, particularly in the north and east, and 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 and/or detained by security forces during the conflict and for several years afterwards. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity.<sup>6</sup>
29. Country information reports that the situation for Tamils in Sri Lanka has changed significantly since the applicant left in 2012. In particular, since the election of President Sirisena in 2015 there have been positive developments, and the overall situation for Tamils in Sri Lanka has improved. DFAT assesses the security situation in Sri Lanka is greatly improved since the conflict ended in May 2009, in particular in the north and east, and the Sri Lankan government exercises effective control throughout the country. Military involvement in civilian life has diminished, and monitoring and harassment of Tamils in day-to-day life has decreased significantly, however surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Although the Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds', ethnicity is a sensitive issue in Sri Lanka, and is a fundamental consideration in the reconciliation process to which the Sri Lankan government has committed.<sup>7</sup>
30. The political landscape in Sri Lanka has significantly changes in Sri Lanka since the applicant's departure. DFAT assesses there are no barriers to Tamil political participation, and political parties in Sri Lanka are able to operate freely within the same legal framework, and to contest elections. There are no laws or official policies that discriminate on the basis of political opinion, nor is there systemic political discrimination against any particular group. Tamils have a substantial level of political influence, and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the TNA. The Presidential and parliamentary elections held in 2015 were generally considered by international and domestic

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<sup>6</sup> DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>7</sup> DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

observers to be credible, free and fair.<sup>8</sup> Although the Centre for Monitoring Election Violence (CMEV) reported a number of violent incidents in the Batticaloa and Jaffna Polling Division during the 2015 Presidential election, the incidents of violence are relatively low scale and intensity compared to the past. Of note, the CMEV report does not suggest TNA supporters or politicians were disproportionately targeted.<sup>9</sup> DFAT also reports that Tamils faced less harassment during the 2015 presidential and parliamentary elections than in the 2010 elections. The most recent Presidential election in November 2019 was reported as largely peaceful. There were some reports of violence, including an attack on buses carrying Muslims to polling stations in northwest Sri Lanka, however there were no reports of injuries.<sup>10</sup> DFAT understands Tamils do not receive unwarranted attention from authorities because of their political involvement, including with the TNA.<sup>11</sup>

31. There is no information in the review material to indicate the applicant has participated in any political activities whilst in Australia, including activities in support of the TNA, however, given he engaged in activities in the past in Sri Lanka, I accept the applicant may continue the low-profile support of the TNA he previously engaged in, such as handing out leaflets and performing manual labour, if he returns to Sri Lanka. Considering the country information, I am not satisfied the applicant would be harmed for doing so, now or in the reasonably foreseeable future.
32. I have accepted the applicant was assaulted by the Karuna group in 2012 after he assisted in a TNA candidate's election campaign. The applicant claims he would similarly be at risk of harm if returned to Sri Lanka. DFAT confirms that former Tamil paramilitary groups who were aligned with the previous government during the war, such as the TMVP (formerly the Karuna group), remain active, but have disarmed and are now engaged in politics. DFAT understands the influence of the TMVP waned considerably after the Sirisena government took office in 2015, and they no longer maintain armed wings. Local sources reported that although some Tamils continued to fear the TMVP, particularly those with past links to the LTTE, the group no longer poses a major concern. DFAT assesses such groups present a low threat of violence and intimidation to members of the Tamil community.<sup>12</sup> There is no information before me to support the situation has changed since the election of the new Rajapaksa government, and I do not accept there is a real chance of the applicant being harmed by any group or person, including the Karuna group, for any reason on return to Sri Lanka.
33. I have rejected the applicant's evidence that Sri Lankan authorities visited his home in 2016 and accused him of being associated with the LTTE. Nevertheless, I have considered whether the applicant would face a real chance of harm on return to Sri Lanka as a result of his Tamil ethnicity, and whether his background and experiences could result in him being imputed as being a supporter of the LTTE.
34. DFAT and the UK Home Office report, that although the LTTE no longer exists as an organised force in Sri Lanka, Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country.<sup>13</sup> For a number of years DFAT and the UK Home Office have reported that, in contrast to their prior focus on identifying anyone with real or perceived LTTE

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<sup>8</sup> DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064

<sup>9</sup> Centre for Monitoring Election Violence, 'Parliamentary General Election 2015 – Final Report on Election Related Violence', 11 February 2016, CIS38A8012508

<sup>10</sup> New York Times, The, 'Gotabaya Rajapaksa Wins Sri Lanka Presidential Election', 18 November 2019, 20191119105229

<sup>11</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>12</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>13</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0', 15 June 2017; DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

links, the Sri Lankan government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil Diaspora. Former LTTE leaders and former members suspected of committing serious criminal acts during the conflict are most at risk. The UK Home Office and DFAT have also confirmed the UNHCR position that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control (such as the Eastern Province), no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.<sup>14</sup>

35. For a number of years DFAT have confirmed that Sri Lankan authorities are likely to maintain intelligence on former LTTE members and supporters, and that high-profile former LTTE members would continue to be of interest to the authorities and subject to monitoring. Further, DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring.<sup>15</sup> However, the country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, or that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age or place of origin. The applicant does not claim to have had any involvement with the LTTE. Similarly he does not claim to have been involved in any separatist activities, either in Sri Lanka or in the diaspora. Other than the applicant possibly being questioned in 2007 about LTTE involvement, the applicant has not claimed that he or any of his relatives had, or were suspected of, any LTTE involvement. I am not satisfied there is a real chance the applicant would be imputed with being an LTTE member or supporter, or that he would be of any interest to Sri Lankan authorities for that reason on his return to Sri Lanka.
36. For a number of years DFAT have reported on there have been significant improvements in the security situation since the applicant departed Sri Lanka, including in the Eastern province. The number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, has significantly reduced since the end of the war and DFAT understands that white van abductions and disappearances are no longer common. DFAT assesses that wealthy Sri Lankans face a low risk of extortion or kidnapping for ransom and that Sri Lankans face a low risk of mistreatment on a day-to-day basis.<sup>16</sup>
37. Several local and international organisations have alleged torture by Sri Lankan military, intelligence and police forces, mostly from the period immediately following the war and involving people with imputed links to the LTTE. The 2015 OISL report found that 'victims of war-related torture perpetrated by Government forces...were generally Tamil, often arrested and detained in Government controlled areas...under the PTA and the Emergency Regulations'. The OISL documented 'particularly brutal use of torture by the Sri Lankan security forces' in the immediate post-war period, following the LTTE's surrender. Local sources told DFAT the police routinely mistreat suspects during criminal investigations, including as a way of extracting confessions. Sources also told DFAT that mistreatment was common in prisons, ranging from a slap to the face to severe beatings, and, in some cases, may amount to torture. According to

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<sup>14</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0', 15 June 2017, OIG6E7028826; DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>15</sup> DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>16</sup> DFAT, 'DFAT Country Information Report: Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

sources, mistreatment in prison, where it occurs, does not discriminate on ethnicity. While there are some reports of mistreatment of people in detention in certain circumstances, DFAT assesses that Sri Lankans face a low risk of torture overall.<sup>17</sup> I do not accept the applicant is wanted for any outstanding criminal activity or is suspected of having links to the LTTE such that he is at risk of detention and torture.

38. More generally for Tamils, the country information before me indicates that the risk of official or societal discrimination for Tamils is low, and that being of Tamil ethnicity, in itself, is not sufficient to warrant international protection. DFAT advises there are no official laws or policies that discriminate on the basis of ethnicity or language in Sri Lanka, which includes education, employment or access to housing, and laws and policies are generally implemented without discrimination. Although some members of the Tamil community report discrimination in employment, particularly in relation to government jobs, such Tamil under-representation is largely the result of language constraints and disrupted education because of the war.<sup>18</sup> There is no evidence before me indicating the applicant has or will experience any barriers to accessing education, employment or any government services in Sri Lanka.
39. Towards the end of the SHEV interview the delegate invited the applicant to comment on a number of issues, including the significant improvements in the security situation in Sri Lanka since he departed. The applicant said that the 'outside world thinks Sri Lanka is OK', but that is not the case. He then referred to the recent suicide bombings that took place in churches, that the government 'could not find out about these things and nobody knows what is happening inside, there is no solution for these things'.
40. The most recent DFAT country information report for Sri Lanka refers to the coordinated suicide bomb terrorist attacks, perpetrated by Islamic extremist groups in April 2019 against Christian churches and hotels in Colombo, Negombo and Batticaloa, and which killed over 250 people. DFAT reports the attacks were the first known terrorist attacks in Sri Lanka since the end of the civil war, and that there was an increase in anti-Muslim sentiment across Sri Lanka, and low-level reprisal attacks occurred against Muslims. The Muslim community has come under increased scrutiny as part of the government's counter terrorism efforts following the attacks. Countrywide Emergency Regulations were introduced on 22 April 2019, however those lapsed on 22 August 2019. DFAT assesses that in the current environment Muslims face a moderate risk of violence, and that further attacks against the Christian community by homegrown Islamic extremists are possible, however such threat is low.<sup>19</sup> The applicant provided no information to support that anyone from his family had been affected by the April 2019 attacks, or to support that people with a profile similar to his were at risk of harm as a result of the events. It is now over seven months since the attacks occurred, and the Sri Lankan government took decisive action to stabilise the security situation. There is nothing in the country information before me to support a person with the applicant's profile is at risk of harm from those events. Although I can accept the applicant may have some subjective fears for his safety as a result of these relatively recent events in Sri Lanka, taking the country information into account, and that the applicant is a Tamil Hindu, I consider there is not a real chance he will suffer any harm for any reason related to those attacks, now or in the reasonably foreseeable future.
41. At the conclusion of the SHEV interview the applicant also referred to the Presidential election that was to take place shortly in Sri Lanka, and that the same government who were

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<sup>17</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>18</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0', 31 March 2017, OG6E7028822

<sup>19</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

responsible for genocide of Tamils would come back, and this would 'give problems for us', and nothing good is going to happen. On 17 November 2019 Gotabaya Rajapaksa declared victory in Sri Lanka's Presidential election. Mr Rajapaksa was formerly a wartime defence chief in Sri Lanka. In 2009, he and his brother Mahinda Rajapaksa, Sri Lanka's President at the time, were credited with ending the country's long civil war through brutal means, and stand accused of crimes against humanity. A New York Times article suggests Gotabaya's election signals the return to power of a divisive family.<sup>20</sup> I appreciate the applicant may have some concerns about the change of government in Sri Lanka. However, there is no information before me to indicate there has been, or will be, a significant change to the government's policies and practices, such that Tamils, or people with the applicant's background and profile, will be targeted. I consider it entirely speculative to suggest the recent election of Gotabaya Rajapaksa has led to a change or deterioration to conditions in Sri Lanka. I am not satisfied there has been an increase in risk in Sri Lanka for people having a profile similar to the applicant's, or for Tamils in general.

42. Overall, I accept that serious mistreatment of some Tamils with certain links is an ongoing concern in Sri Lanka, however the weight of evidence indicates this has reduced significantly. I consider there is not more than a remote chance of the applicant experiencing such treatment for being a Tamil male with his background and experiences, including that: he is a Tamil male originating from a former LTTE-controlled area; neither he or any family member were involved with the LTTE; he engaged in activities in low-level support of the TNA in 2012, and may engage in similar activities on his return; he was assaulted by armed people soon after the 2012 election; he is a person who has resided outside Sri Lanka for an extended period of time and made an application for protection in Australia; he has not participated in Tamil diaspora activities in Australia, or in any activities in Sri Lanka that would be considered to constitute post-conflict Tamil separatism on return to Sri Lanka, or indicated that he would do so on return to Sri Lanka; and given I have not accepted he had a security profile of interest to Sri Lankan authorities when he departed Sri Lanka. Considering the country information along with the applicant's profile, I am satisfied there have been significant improvements for Tamils in Sri Lanka since the end of the conflict, and since the applicant departed, and the overall security situation for Tamils has improved, including in the east. I am not satisfied the applicant has a profile that would be of interest to Sri Lankan authorities, or any other group or person, or that he would face harm on his return in the reasonably foreseeable future for any of the reasons discussed above, or any combination of those reasons.
43. I accept the applicant's evidence that he left Sri Lanka illegally by boat in September 2012 with the assistance of a smuggler, and if returned to Sri Lanka he would do so as a failed asylum seeker who has lived abroad for several years. Given the manner in which the applicant will be returned to Sri Lanka, as an involuntary returnee, I accept Sri Lankan authorities are likely to be aware the applicant applied for asylum in Australia.
44. Country information before me indicates that on return to Sri Lanka the applicant is very likely to be questioned at the airport, that enquiries will be undertaken, and he will be charged with an offence under the Immigrants and Emigrants Act (*I&E Act*). Although DFAT indicates further enquiries may be made about activities while abroad if returnees are former LTTE members, given my findings, I am not satisfied such enquiries will be made about the applicant. The applicant arrived in Australia by boat as an unauthorised maritime arrival, and there is no information before me to suggest the applicant was other than a passenger on that journey. DFAT reports that passengers on people smuggling ventures, such as the applicant, are subject to a fine and not a custodial sentence. As a part of the process at the airport the applicant may

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<sup>20</sup> New York Times, The, 'Gotabaya Rajapaksa Wins Sri Lanka Presidential Election', 18 November 2019, 20191119105229

be held in an airport holding cell for a period of up to two days if a magistrate is not available. The information before me does not indicate returnees are subject to mistreatment at the airport, and all returnees are treated according to standard procedures irrespective of ethnicity. Returnees who plead guilty to the offence receive a fine, which may be paid by instalments, and they are free to go. If they plead not guilty they are usually granted bail on the basis of a personal surety or guarantee of a family member. In addition, there may be ongoing costs associated with appearance at court.

45. There is nothing in the information before me to suggest the applicant would plead not guilty, and I find he will plead guilty. I accept it is highly likely he will be subject to questioning, a relatively brief period of detention at the airport, and a fine on his return to Sri Lanka. I am satisfied the I&E Act provisions relating to illegal departure are not discriminatory on their face, and they are not discriminatory in intent or implemented in a discriminatory manner. The applicant has a number of relatives remaining in Sri Lanka, including his parents and siblings. During the SHEV interview he confirmed he is in regular contact with family members. The applicant has had some recent casual work in Australia, and there is nothing in the information before me to support he would be unable to pay a fine, or that a member of his family would not be able to act as guarantor for his release (if required), or any information regarding the impact a relatively brief loss of liberty would have on the applicant, a relatively young man, I am not satisfied on the evidence before me the treatment amounts to serious harm for this applicant. On that basis, I am not satisfied there is a real chance of persecution on account of the applicant having departed Sri Lanka illegally. Overall, I am not satisfied the treatment the applicant will encounter on return to Sri Lanka, including the processes and penalty described, amounts to serious harm for this applicant.
46. I consider it highly likely the applicant would return to the Eastern Province of Sri Lanka, where he originates from, and where a number of family members continue to reside. As a returning asylum seeker I accept he may face practical challenges in re-establishing himself and re-integrating in Sri Lanka after being in Australia for several years. The country information supports that the government has decreased systematic surveillance of returnees. However, failed asylum seekers have reported some social stigma from community members as failed asylum seekers and people who have not lived in Sri Lanka for a long time,<sup>21</sup> and I accept that may occur. There is nothing in the information before me to support the applicant would be of interest to authorities simply because he has spent time in Australia, a Western country with a large Tamil diaspora, or for having applied for asylum in Australia, nor that he would be imputed with a political opinion of being opposed to the Sri Lankan government as a result of having sought asylum. Overall, I am not satisfied any challenges the applicant may face in re-establishing himself in Sri Lanka, and finding employment or accommodation, or any social stigma or surveillance he may experience as a returning asylum seeker from Australia amounts to serious harm for this applicant, now or in the reasonably foreseeable future, whether considered separately or together.
47. Considering the applicant's circumstances and profile, individually as well as cumulatively, I am not satisfied there is a real chance he will suffer serious harm if returned to Sri Lanka, for any of the reasons discussed, now or in the reasonably foreseeable future. I am not satisfied the applicant have a well-founded fear of persecution.

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<sup>21</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

## Refugee: conclusion

48. 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

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49. 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

50. 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.

51. I accept on return to Sri Lanka the applicant may face some social stigma and surveillance as a returning asylum seeker, and as a person who has not lived in Sri Lanka for a period of time, he may face some challenges in re-establishing himself and finding work. It is also likely he will be subject to a series of administrative processes at the airport on return, during which he may be detained for a period of time, and receive a fine (as outlined above). Although experiencing social stigma may be hurtful, and the processes associated with returning to Sri Lanka after an extended period of time abroad may be stressful, I am not satisfied such treatment on return would amount to significant harm for this applicant. There is no evidence to indicate the applicant faces a real risk of the death penalty for any reason, and I do not accept there is a real risk the applicant will be arbitrarily deprived of his life or tortured during or as a result of his treatment on return. I am also not satisfied that the processes, any brief period of detention or fine, social stigma or surveillance, the applicant may be subject to amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment, as set out in the Act, whether considered separately or together.

52. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka for the reasons claim, and for the same reasons, I am also not satisfied there is a real risk of any harm, including significant harm, should he be returned to Sri Lanka.

**Complementary protection: conclusion**

53. 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**

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



## Applicable law

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### ***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.