



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08359

STATELESS
IAA reference: IAA20/08360

STATELESS
IAA reference: IAA20/08363

STATELESS
IAA reference: IAA20/08362

STATELESS
IAA reference: IAA20/08364

SRI LANKA
IAA reference: IAA20/08361

Date and time of decision: 18 June 2020 17:16:00
K Allen, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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 applicants (the applicants) claim to be a Tamil husband and wife and their four children. The husband claims that he is from [village] in [District 1], and his wife claims to be from [town] and both are located in the Northern Province of Sri Lanka. They claim that their two minor daughters were born in [India]; and their two minor sons were born in Australia. On 29 June 2017 the applicants lodged a combined application for Safe Haven Enterprise Visas (SHEVs).
2. On 4 May 2020 a delegate of the Minister for Immigration (the delegate) made the decision to refuse to grant the SHEVs on the basis that the applicants are not owed protection and the matter was referred to the IAA.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 22 May 2020, the wife provided a submission to the IAA on behalf of the applicants. It contains a reiteration of the applicants' claims and an explanation as to why they cannot return to Sri Lanka. I do not consider that this submission contains any new information and I have had regard to it in making this decision.

Applicants' claims for protection

5. The husband, (the applicant), made claims for protection in his SHEV application and the other applicants are relying on his claims and the family unit criteria.
6. The applicant's claims can be summarised as follows:
 - He and his wife are Tamil Hindus born in the Northern Province of Sri Lanka who moved to India in 1990. They met in India and married in 2007. Their two daughters were born in India and their two sons were born in Australia.
 - His problems in Sri Lanka began in 1986 when the Liberation Tigers of Tamil Eelam (LTTE) were recruiting one member from each family to train with them and to take part in the war. His father was asked to train to be an active fighter but his mother pleaded with them to not take her husband and instead she agreed to provide food for them. She cooked the food and his father then delivered the food to the designated place. The Sri Lankan Army (SLA) came to know his family was providing food to the LTTE and they came to their house and warned them to stop. His parents realized their lives were at risk from the SLA so they stopped cooking for the LTTE.
 - His father was shot and killed by the Indian Army in 1987 in Sri Lanka while he was returning from visiting his sister. His mother had four young children to care for and did not have any family support so she cooked for the LTTE and shops again until 1989.

- Throughout this period his mother was harassed by the SLA for numerous reasons and was also physically assaulted.
 - In 1990 his mother decided to leave Sri Lanka with her young children as she was not able to relocate within Sri Lanka.
 - He lived in a refugee camp in India from the age of [age] until he left to come to Australia by boat in 2013. He faced discrimination all his life in India. The authorities in the camp did not treat him well. They faced restrictions on how they could live their life and he faced verbal abuse.
 - In 2004 his brother [Mr A] returned to Sri Lanka to deal with a land issue. The last they heard from him was when he contacted them to say he reached Sri Lanka safely. They do not know if he is safe or if something has happened to him.
 - His sister [Ms B] went to Sri Lanka in 2006 looking for his brother. She stayed under the protection of a local priest. She found that the family home was ruined from the war and being occupied by the SLA. She went to the local army camp and enquired about their brother. They did not respond to her enquiry as she was female. She was questioned about her family background and about whether she contributed to the LTTE during the war. She managed to evade further questioning as she went to the army camp with the priest. She is currently living as a refugee in [country] with her husband.
 - His wife's sister [Ms C] went to Sri Lanka in 2004 with her family. Her husband was interrogated and called in for enquiry as he was suspected to be assisting the LTTE by sea, as he was a fisherman. They returned to India by boat in 2005.
 - In February 2010, people from his refugee camp organized a fasting protest to condemn the treatment of Tamils after the war in Sri Lanka. He was one of the persons involved in organizing the protest. His job was to spread the news about the event and to make sure people gathered at the event on the day at the ground. The Q-branch noticed this and they called him in for enquiry. After this incident he was of particular interest to the Q-branch officers.
 - The Tamils in the camp normally hold an annual remembrance day in November for the Sri Lankan martyrs who died in the war. At this event people from his camp raised the LTTE flag. The Q-Branch called him in for enquiry and accused him of being involved in actions against the government and beat him. After this incident, the Q-Branch officers regularly went to his house in the camp and asked his wife what he was doing and gave her warnings.
 - He fears returning to Sri Lanka as he could be seriously harmed by the SLA and the Criminal Investigation Division (CID) of the Sri Lankan Police because of his family's association with the LTTE. It is also well known that all failed asylum seekers are jailed and are only released if a family member is willing to pay the bail money. Those with LTTE connections are particularly detained indefinitely.
7. On 18 December 2019 the applicant's legal representative made a submission on his behalf. It stated that:
- The applicant was an active LTTE sympathizer whilst he was residing in the Indian refugee camp and was noted to be person of interest to the Q-branch. It is likely any information about applicant's LTTE activity may have been exchanged with the Sri Lankan government.

- Mistreatment on return would be directed against the applicant for the essential and significant reason of his family's and his political opinion.
- The applicant is fearful for his future in Sri Lanka as he will not have any financial support nor the support of any family member or community support.

Factual findings

Identity

8. The applicant and his wife claim to be Sri Lankan citizens of Tamil ethnicity from the Northern Province of Sri Lanka. They claim that they have not resided in Sri Lanka since they were [age] and [age] years old respectively. In support of their claimed identities they provided their Sri Lankan birth certificates and translations. In support of the claim that they resided in India they provided a translation of their marriage certificate stating that they married in India in 2007, their Sri Lankan refugee ration card from India stating that they arrived in India in 1990 and the applicant's wife's Indian Sri Lankan refugee identity card. I accept that their identities are as claimed, that they are Tamil citizens from the Northern Province of Sri Lanka, an area that was occupied by the LTTE during the Sri Lankan civil war. I accept that they departed Sri Lanka with their respective parents during the war when they were very young and that they resided in India as refugees for most of their lives. I accept that they met and married in India. I also accept that the applicants are Hindu but note that they have not made any claims to fear harm on the basis of their religion so I have not considered that fact further.
9. The applicant claim's that they had two daughters born in India and two sons born in Australia. In support of their identities the applicant provided his two daughters' birth certificates issued in Tamil Nadu and his two sons' birth certificates issued in Queensland and New South Wales. Based on the information that they have provided, I accept that the children are the children of the applicant and his wife, and that they were born in India and Australia as claimed, and that they are not citizens of India or Australia having lived in those countries as the children of Sri Lankan parents.
10. The Sri Lankan Citizenship Act provides that a person born outside Sri Lanka shall have the status of a citizen of Sri Lanka if at the time of his birth either of his parents is or was a citizen of Sri Lanka and if, within one year from the date of birth, or within such further period as the Minister may for good cause allow, the birth is registered in the prescribed manner¹. DFAT reports that children born to Sri Lankan parents in Tamil Nadu can be registered with the Sri Lankan High Commission in Chennai and obtain citizenship². The Sri Lankan Department of Immigration and Emigration indicates that a birth can be registered even if more than a year has passed, but that this will incur a fine³. According to the website of the Sri Lankan High Commission in Canberra, late registration fees for a child are currently set at AUD\$12 per year beyond the first year of birth for applications lodged with them⁴. I am not satisfied that these fees for delaying registration are excessive. I note that the applicant has not submitted that he attempted to register the births of his children with the Sri Lankan authorities in Chennai or Canberra or that registration was refused or that he is unable to pay the fees for

¹ Laws of Sri Lanka, "Excerpt of Citizenship Act", 28 March 2017, CISED50AD3702

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.106

³ Sri Lanka: Department of Immigration and Emigration, "Citizenship Registration of Children born outside Sri Lanka", 16 October 2014, CX1B9ECAB6054

⁴ The High Commission of the Democratic Socialist Republic of Sri Lanka, Canberra, Australia, "Late Registration of Birth outside Sri Lanka", 8 March 2017, CISED50AD488

dealing registration. In all those circumstances I am satisfied that the children are eligible and able to be registered as Sri Lanka citizens prior to their return to Sri Lanka.

11. Overall, I am satisfied that Sri Lanka is the receiving country for the applicants. There is no information before me to suggest that the applicants have a right to enter and reside in any country other than Sri Lanka and I am satisfied they do not.

Family connections to the LTTE

12. The applicant claims to fear harm on his return to Sri Lanka as a result of a pro-LTTE political opinion being imputed to him because of his family's association with the LTTE.
13. The applicants did not raise any claim of having an association with the LTTE with the Department until the SHEV application lodged in June 2017. Prior to that in their interviews in 2013 they denied any links with the LTTE when asked. By contrast, in their SHEV application, the applicant claimed that his mother and father did have an association with the LTTE. He claimed that it started that in 1986 when the LTTE was recruiting one member from each family to train with them and to take part in the war. As his siblings were very young his father was asked to train to be an active fighter. His mother pleaded with the LTTE not to take his father and instead she agreed to provide food for them. He said that the SLA came to know that his family was providing food to the LTTE and they came to their house in 1986 and warned his parents to stop and they did. He claims his father was shot and killed by the Indian Army in 1987 while he was returning from visiting his sister. He claims that after his father died, his mother had four young children to care for and she did not have any family support. She was cooking meals and sold food to shops and she continued to cook for the LTTE until 1989. The applicant claims that throughout this period his mother was harassed by the SLA for numerous reasons and physically assaulted by the SLA so she left the country as she was not able to relocate in Sri Lanka as a single female with four children.
14. At the SHEV interview the delegate asked the applicant why he did not raise his claims about his family's association with the LTTE earlier, including at his interviews with the Department in 2013. He explained that he did not raise this claim earlier because he was not aware of this fact, and only found out much later after arriving in Australia. I do not consider that the applicant's explanation for the delay in providing this information to be particularly plausible. He lived in the refugee camp with his siblings and mother from 1990 until 2013. I do not accept that he would not be aware of the issues his family faced in Sri Lanka, and the reasons his family fled their country. Even if he had not previously discussed these issues with his mother while growing up, I would have expected that as an adult he would have asked why they left Sri Lanka, particularly when his brother went missing in Sri Lanka in 2004 or when he decided to leave India and seek asylum in Australia in 2013. It is not credible to me that he would have waited until after he arrived in Australia to seek out that information and then not provide it to the Department until 2017. I consider that the applicant has exaggerated his claims of his family's involvement with the LTTE and subsequent interest to the SLA in order to enhance his claims for protection and I do not accept that he only recently came to know the extent of his family's involvement with the LTTE.
15. In his SHEV application, the applicant stated that his father was shot and killed by the Indian Army in 1987 while he was returning from visiting his sister. In support of this claim he provided a document in English which he claims is an extract from the report book of the [police]. It records that his mother reported to the police that her husband was shot by the Indian Peace Keeping Force in 1987 and killed. In that document it states that she seeks compensation for her family. It is not apparent from her report how she knew who killed her

husband and it does not state why he was killed. The applicant did not provide a death certificate supporting the death of his father indicating the cause of death. The applicant provided a translation of his marriage certificate which was issued in 2012. It states that he married in 2007. It lists his father as being alive and aged [age] and his mother aged [age] and both as living in the Indian refugee camp. The marriage certificate also lists the wife's parents, aged [age] and [age] as being alive and living in camp too. Given the conflicting evidence it is difficult to know whether or not the applicant's father died in Sri Lanka in 1987 or whether he went to India with the family. However, given that he was living in an area of Sri Lanka that was impacted by the war, I am willing to accept that he may have been killed as a result of the conflict. There is nothing before me, apart from the applicant's assertion, to suggest that the applicant's father's death was in any way connected to his or his wife's association with the LTTE. I do not accept that it was.

16. In his SHEV application the applicant also claimed that his family lost contact with his brother [Mr A] after he travelled to Sri Lanka in 2004 to resolve his land dispute. This was not raised prior to 2017 and in his arrival interview he indicated that his brother was living in India. The applicant later submitted that he did not intentionally provide incorrect information, and it can be regarded as a result of the impact of boat journey and the interview process. As the war in Sri Lanka was ongoing in 2004, I accept as plausible that the applicant's brother, as a young Tamil man, could have gone missing in [District 1] if he returned there during that time. There is no information before me to indicate that [Mr A]'s disappearance had any connection to the family's previous association with the LTTE and I do not accept that it did.
17. In his SHEV application, the applicant also claimed that in 2006, his sister [Ms B] went to a local army camp in Sri Lanka to look for her brother. While she was there she discovered that their childhood home in [District 1] was partly demolished by a bomb blast and occupied by troops and they had lost their title to the property. He claimed that at the army camp [Ms B] was questioned about the family's background and whether she contributed to the LTTE during the war. I find it plausible that if [Ms B] visited an army camp in Sri Lanka during the war, looking for her missing brother who had been residing in India, she would naturally have been questioned about her family's background and any potential links to the LTTE. The fact that the applicant's sister did not appear to encounter any serious problems and was able to leave the country without any issue would support the fact that the family does not have a profile of significance to the Sri Lankan authorities.
18. Having considered the applicant's claims and responses at interview, I do not accept that the applicant has a profile of interest to the Sri Lankan authorities because of any actual or imputed links to the LTTE. It is not claimed, and I do not accept, that any of the other applicants would hold such a profile.

Political activity in India

19. The applicant claimed that he was involved in events supporting Sri Lankan Tamils when he lived in Tamil Nadu, India. He made reference to an event in February 2010 when people from his camp organized a fasting protest to condemn the treatment of Tamils after the war in Sri Lanka. He claimed his role was to spread the news about the event and to make sure people from the camp gathered at the event on the day at the ground. He said that the Q-branch of the Indian police noticed this and questioned him about it. He claimed he told them he was part of the protest and that they wanted to raise awareness to the treatment of the Tamils in Sri Lanka. He claimed that after this incident he was particularly of interest to the Q-branch officers. The applicant also advised that the Tamils in his camp normally hold an annual remembrance day in November for the Sri Lankan martyrs who died in the war and

they raise the LTTE flag. He claims that because of his involvement in this memorial he was accused by Q-branch of involvement in activities against the Sri Lankan government and he was beaten up. He claims that he was also threatened that if he continued he would be detained in a special camp. The applicant's representative submitted that the applicant was an active LTTE sympathizer whilst he was residing in the refugee camp in India and was noted to be person of interest to the Q-branch. The representative said it was likely any information about applicant's LTTE 'proactivity' may have been exchanged with the Sri Lankan government.

20. As I have found that the applicant is a national of Sri Lanka and his receiving country is Sri Lanka, I have not considered the applicant's treatment in India, including both his claims of discrimination and treatment by Q-branch, as part of this review. I have had regard to his claims that Q-branch may have exchanged information about him with the Sri Lankan government.
21. In India, on his own volition, the applicant has explained he was living with a community of Tamils, including members of his own and his wife's family, in a refugee camp in Tamil Nadu. Given their ethnicity and connection to Sri Lanka, I accept that Tamils in those camps conducted activities in support of Tamils in Sri Lanka. I have had regard to the fact that the applicant's claimed role in these events amounted to no more than spreading news about an event and attending support and memorial events. I do not consider that his description of his role in Tamil activities indicates that he was a central organiser or an activist for Tamil separatism. I do not consider that he would have had any political profile in India beyond the other Tamils who lived in the camp and participated in those events. I accept that the Q-branch may have made enquiries of camp residents who were involved in those events as they closely monitored the lives of the people who lived there.
22. I do not accept that the evidence supports that it was likely any information about applicant's LTTE 'proactivity' known to Q-branch may have been exchanged with the Sri Lankan government. I consider that the applicant's representative's claims in this regard amount to no more than speculation. Further, DFAT reporting does not indicate a strong interest by the Sri Lankan authorities in pursuing LTTE sympathisers from Tamil Nadu⁵. According to a UNHCR survey, over 90 per cent of returnees from Tamil Nadu felt either generally or completely safe in Sri Lanka. Credible sources were not aware of returnees from Tamil Nadu being subjected to monitoring or harassment by the authorities. I do not accept that the applicant has a political profile in Sri Lanka as a result of his involvement in pro-Tamil activities in India. Further, the applicant has not indicated any involvement in Tamil activities in Australia where he has resided for the past seven years. I do not accept that the applicant is involved in any movement for Tamil separatism, or that he is politically active or that he has indicated any plan to be politically active on his return to Sri Lanka.

Failed asylum seekers

23. The applicant claims that his mother took him by boat to India. The applicant's wife claims that she departed Sri Lanka for India in 1990 with her father and sister when she was [age] years old. She has not advised how they departed Sri Lanka and I accept that she may not recall those details given her age at the time. As the applicants were fleeing a war and they have never claimed to have held passports, I consider it likely that both departed for India illegally by boat. The minor applicants have never lived in Sri Lanka and I do not consider that they could be considered to have departed illegally.

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.105

24. I consider that the circumstances of the applicants' return, including on temporary travel documents and the provision of the children's identity documents, may mean that the authorities at the airport in Sri Lanka will be aware that they spent time and sought asylum in India and Australia.

Refugee assessment

25. 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

26. 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.
27. I accept that the applicant and his wife are Tamils from the Northern Province of Sri Lanka and that the applicant fears harm on the basis of a political opinion imputed to him by the authorities in Sri Lanka. I do not accept that the applicants or their parents were members of the LTTE or that the applicants were of any interest to the authorities in Sri Lanka before they departed the country as young children. I do not accept that the applicant has any profile in Sri Lanka as a result of his parent's interactions with the LTTE or that he has any profile beyond his Tamil ethnicity and origin in the Northern Province. I do not accept that the applicant has been involved in any activities that could be construed as supporting an ongoing Tamil separatist movement that he would be known to the authorities in Sri Lanka or that he is politically active. I accept that the applicant and his family lived in India from 1990 until their departure for Australia in 2013. I accept that they left India due to their treatment in India as Sri Lankan refugees and not for reasons related to a fear of harm in Sri Lanka. I consider that if they were returned to Sri Lanka it would be apparent that they had lived in India and Australia and that they had unsuccessfully sought asylum in Australia.
28. I have had regard to the treatment of Tamils in Sri Lanka and any adverse political opinion that may be imputed to them as a result of their ethnicity and origin in the Northern Province. DFAT reports that Tamils constitute the largest ethnic minority in Sri Lanka, at 15.3

per cent of the population⁶. Most Sri Lankans tend to live within their own ethnic communities, although different ethnic groups live within close proximity in major urban areas. DFAT reports that Tamils comprise most of the population in the Northern Province, the area where the applicant and his wife were born. DFAT reports that Sri Lanka's 26 year civil war, which continued until May 2009, is estimated to have claimed 100,000 lives and displaced over 900,000 people⁷. In that context I accept as plausible that the applicants had family members who were impacted by the conflict, including the applicant's father who was shot and killed in 1987, his brother who went missing in 2004, his brother in law who was questioned in 2005 and his cousin who died in a bomb attack in 2009. I also accept as plausible that the applicant's childhood home in [District 1] was partly demolished by a bomb blast and occupied by troops and the applicant's family lost their title to the property.

29. DFAT reports that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict and in the post conflict period and in that context it is plausible that the applicant's parents, brother in law and sister faced questioning by the security forces during the war. The applicants have submitted that they fear returning to Sri Lanka but they cannot describe the threat exactly, they have heard of the atrocities of the Grease Men and of how young men are abducted regularly without reason. There is no information before me, nor have I located any indicating that Grease Men are operational at the current time in Sri Lanka or that they have posed any threat in recent years.
30. In terms of other mistreatment of Tamils, several local and international organisations have alleged torture by the Sri Lankan military, intelligence and police forces, mostly from the period immediately following the war and involving people with imputed links to the LTTE⁸. The report of the Office of the UN High Commissioner for Human Rights Investigation on Sri Lanka (OISL), released in September 2015⁹, found that government and LTTE forces likely committed grave violations, possibly amounting to war crimes and crimes against humanity, between 2002 and 2011. The 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 Prevention of Terrorism Act (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 which occurred over 11 years ago.
31. DFAT reports that there continues to be strong evidence of torture and mistreatment being used in Sri Lanka, in the context of criminal investigations and in prisons¹⁰. Local sources told DFAT that the police did routinely mistreat suspects during criminal investigations, including as a way of extracting confessions. Sources also told DFAT that mistreatment was common in prisons. Mistreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture. According to 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. I do not accept that the applicants are wanted for any outstanding criminal activity or that they are suspected of working with the LTTE or that they are politically active.

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 2.7

⁷ Ibid, 2.2

⁸ For example, Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project (ITJP), "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 2.43, 4.20

¹⁰ Ibid, 4.24

Given their profile, I find there is no more than a remote chance of the applicants being detained in prison and/or tortured on their return to Sri Lanka now or in the reasonably foreseeable future.

32. DFAT reports that there have been significant improvements in the security situation in Sri Lanka since the cessation of the war including in the Northern 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 Sri Lankans face a low risk of mistreatment on a day-to-day basis¹¹.
33. DFAT reports¹² that recent developments in Sri Lanka's political landscape are significant and indicative of a more positive future for Tamils. The Sri Lankan Constitution provides for race equality and DFAT assesses there are currently no official laws or policies that discriminate on the basis of ethnicity or language and that Tamils face a low risk of official or societal discrimination on the basis of ethnicity including in their ability to access education, employment or housing.
34. The Sirisena government which was elected in January 2015 reportedly prioritised human rights and reconciliation and made significant progress in that regard, including: replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict-era back to its former owners; releasing some individuals detained under the PTA; and engaging constructively with the UN. DFAT reported that following its election, the Government also established an Office of National Unity and Reconciliation to develop a national policy on reconciliation and has committed to establishing a range of offices to give effect to reconciliation measures such as an Office on Missing Persons; an Office for Reparations; a Truth, Justice, Reconciliation and Non-Recurrence Commission; and a Judicial Mechanism with a Special Counsel¹³. DFAT reports that there have also been a number of symbolic changes in recent years in Sri Lanka, including giving official approval for memorial events to take place in the north and east. A local source told DFAT the atmosphere at war commemorations was 'constructive' and Tamils were increasingly comfortable marking such events¹⁴.
35. The UK Home office¹⁵ also found that since the end of the civil war the focus of the Sri Lankan government has changed and under the Sirisena government, there were improvements in the general feeling of personal freedom within the country. The UK Home Office reported that most Tamils do not suffer persecution simply for being a Tamil but that it is possible that high profile members of the Tamil diaspora may face risk on return, although the Attorney General's Department stated that they would only be at risk if they had committed a crime within Sri Lanka. Members of the CID stated that mere membership of a proscribed group would not be enough to make a person of interest. So-called 'White Van' abductions have not occurred in recent years, and whilst beatings and mistreatment is alleged to occur in police detention contacts felt that this is not to the same brutality as the past.

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 4.29

¹² Ibid, 3.1

¹³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 2.43-2.50; DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.13

¹⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826, part 6

36. There is evidence that after the bombings in Sri Lanka in Easter 2019 there was a marked increase in the number of arrests made under the PTA at a time when there was increasing anti-Muslim violence in the country, blamed in part on Buddhist groups, in apparent reprisal for the April bombings claimed by the Islamic State of Iraq and the Levant group that killed more than 250 people. The information before me does not suggest that the applicants or any people with the applicants' profiles would be implicated in the Easter bombings and arrested under the PTA. On 3 June 2019, it was reported¹⁶ that 579 suspects were being detained under the PTA. Of those detained, 25 were Sinhalese, 13 Tamils and 537 Muslims, demonstrating that these arrests were not biased towards Tamils or Tamils with an LTTE connection. Furthermore, until the Easter Sunday bombings, the PTA had been used only very sparingly since its effective suspension in late 2016 and there was some prospect for its repeal¹⁷. Given their profiles, I find there is no more than a remote chance of the applicants being detained under this law on their return to Sri Lanka now or in the reasonably foreseeable future.
37. I also note that DFAT reported that the Sri Lankan government now only has one rehabilitation centre (down from 24) for former LTTE members and at the time the report was published the centre housed only one former LTTE member¹⁸. According to the same DFAT report, whilst the one remaining rehabilitation centre would remain open for the foreseeable future, this centre had been largely redeployed for the purposes of rehabilitating drug addicts. A source also indicated the authorities were not actively looking for non-rehabilitated former LTTE members. DFAT further advises that it is not aware of rehabilitation being imposed on any former LTTE members who have returned from Australia. There are some reports of the recent arrest in Sri Lanka of some former LTTE cadres; however, these reports indicate that the arrests were due to specific recent activities, rather than for historical links to the LTTE. I am not satisfied that the applicants were involved in the LTTE or that they claimed to have been involved in the LTTE and I am not satisfied that they face a real chance of being sent to a rehabilitation centre on their return to Sri Lanka from Australia.
38. Overall, I accept that the serious mistreatment of some Tamils with certain links is an ongoing issue in Sri Lanka including those detained for criminal matters or political activism and I appreciate that the reporting of this may have caused the applicants to have concerns about returning. I emphasise that the weight of the evidence indicates that this mistreatment has significantly reduced since the applicants departed Sri Lanka and that the chance of such treatment for being a Tamil or a Tamils from the Northern Province with the profile they claim to have, are no more than remote. Given the improved situation in the country, the fact that it is over 11 years since the cessation of the conflict and the applicants' overall profiles, I am not satisfied the applicants face a real chance of any harm on their return now or in the reasonably foreseeable future for reasons including their ethnicity, place of origin, LTTE associations or actual or imputed political opinion even when considered cumulatively with my assessment below.
39. I accept that if the applicants were to be returned to Sri Lanka from Australia they may be considered by the authorities to be failed Tamil asylum seekers due to the manner of their return and the fact that they would be travelling on temporary travel documents. I have reviewed the material before me in relation to the process of returning to Sri Lanka¹⁹. I

¹⁶ The Sunday Reader, "Police arrest 2289 over Easter Sunday terror attacks – Police Spokesman SP Ruwan Gunasekara", 3 June 2019, 20190711142139

¹⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.6-3.8

¹⁸ Ibid, 3.62

¹⁹ Including: DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345; Immigration and

consider that the 2019 DFAT report²⁰ provides the most recent description and evaluation of the process of returning to Sri Lanka and place emphasis on its account as it has been prepared for the express purpose of assessing the protection claims of asylum seekers.

40. DFAT reports that the Sri Lankan Constitution entitles any Sri Lankan citizen 'the freedom to return to Sri Lanka'. The *Immigrants and Emigrants Act* (the I&E Act) governs exit and entry from Sri Lanka. Sections 34 and 35(a) of the I&E Act make it an offence, respectively, to depart Sri Lanka other than via an approved port of departure, such as a seaport or airport, and without a valid passport. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine. Returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under the I&E Act.
41. Different agencies, including the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times, the Terrorism Investigation Division process returnees at Colombo's Bandaranaike International Airport, including those on charter flights from Australia. These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. Australian officials based in Colombo may meet charter flights carrying voluntary and involuntary returnees. The IOM meets assisted voluntary returnees after immigration clearance at the airport and provides some cash and onward transportation assistance. Processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths and staffing constraints. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed, although returnees are free to go to the bathroom and to talk to one another during this time.
42. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport. and I am satisfied that the delays are not excessive. I am not satisfied that the applicants will come to any particular attention of the authorities as a result of this investigative process or that they will be harmed as a result of that process. I am not satisfied that they have any profile of interest to the Sri Lankan authorities beyond the adults having departed the country illegally.
43. Where an illegal departure from Sri Lanka is suspected, returnees can be charged under the I&E Act. The minimum age of criminal responsibility in Sri Lanka is 12 years. Under Sri Lankan law, anybody over the age of 12 at the time of their alleged offence is treated as an adult. Children over the age of 12 can therefore be charged with breaking the I&E Act, so long as they were 12 or older at the time of the alleged offence. No charges are imposed against children under 12 years of age or those persons who were younger than 12 at the time of the alleged offence. I am satisfied that the adult applicants were under 12 years old at the time

Refugee Board of Canada, "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)", 10 November 2017, OG020B81694, LKA103815.E; UK Home Office, "Sri Lanka - Bulletin: Treatment of Returnees", 1 December 2012, CIS28615; Australian Associated Press, "All is forgiven— Sri Lankan PM says returning asylum seekers won't be charged", 15 February 2017, CXC9040661932; TamilNet, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065

²⁰ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 5.31-5.50

they departed the country illegally and that they can demonstrate this with their Indian documents, I am therefore satisfied that none of the applicants can be charged for an illegal departure under the I&E Act for their departure from Sri Lanka. Additionally, the Sri Lankan Government claims no returnee from Australia to Sri Lanka has been charged under the PTA., although DFAT cannot verify this claim.

44. DFAT reports that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. Although individual experiences vary, many Tamil returnees choose to return to the north, either because it is their place of origin or they have existing family links, or because of the relatively lower cost of living compared to the south. The applicants claim to have no ties to Sri Lanka and have not indicated the area to which they would return and I consider it is likely they will settle in an area where they are more likely to find affordable housing and the prospect of employment. DFAT reports that many Sri Lankans, including from the north and east, have relocated to Colombo for economic reasons.
45. The Sri Lankan Government has consistently stated that refugees are welcome to return and, in August 2016, released a 'National Policy on Durable Solutions for Conflict-Affected Displacement'. During a visit to Australia in February 2017, Prime Minister Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka. Human rights groups greeted this statement with caution. Despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Some refugee returnees receive reintegration assistance in the form of transport assistance and livelihood support upon return to Sri Lanka from the government, UN agencies and NGOs, but this requires a returnee to meet strict eligibility guidelines and is minimal. Failed asylum seekers receive limited reintegration assistance. Many returnees have difficulty finding suitable employment and reliable housing on return. The IOM provides eligible returnees with livelihood assistance and makes regular visits to monitor the welfare of returnees.
46. DFAT understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.
47. Bureaucratic inefficiencies rather than official discrimination present the biggest challenge to reintegration for returnees. Refugee returnees, particularly those who returned without UNHCR facilitation, can experience delays in obtaining necessary identification documents and citizenship. Lack of documentation inhibits access to social welfare schemes and the ability to open bank accounts, find employment or enrol in educational institutions. Limited job availability in the north and east further contributes to difficulties in securing employment and housing. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. Some Tamils who had failed to secure asylum in Australia and since returned to the

Northern Province told DFAT they were able to reintegrate into their communities and find employment.

48. DFAT understands that returnees may face financial difficulties reintegrating into their communities, but do not experience societal discrimination for seeking asylum elsewhere. Some refugees and failed asylum seekers reported social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had not experienced societal discrimination following their return. Returnees from Tamil Nadu that DFAT has spoken to report they are glad to have returned to Sri Lanka and would recommend return to other refugees. While there is some social stigma attached to returnees from Tamil Nadu, sources told DFAT that locals were generally welcoming and returnees did not feel they were treated differently.
49. The applicants' representative has made submissions that the applicant is fearful for his future in Sri Lanka as he will not have any financial support nor the support of any family member or community support. It is submitted that he has limited education and he has not secured ongoing employment in Australia. I have had regard to the fact that the applicant has attended school from grade 1 to grade 12 in India, although I note he did not complete grade 12. He was able to relocate to Australia, a country where he had never lived before and which had a different language, and he found accommodation and casual work. I accept that he receives financial assistance in Australia but I note that the applicant is young and he has not pointed to any conditions he has that would prevent him or his wife from finding work in Sri Lanka. I do not accept that the applicants will be denied access to work and services; and therefore, they will suffer significant economic hardship and the capacity to earn a livelihood that threatens their capability to subsist; nor do I accept that they will be denied access to basic services where the denial threatens the person's capacity to subsist. I do not accept that any challenges that the applicants may face in terms of getting established, finding employment, or any social stigma they may experience as returning asylum seekers from Australia, if it does occur, amounts to serious harm.
50. Overall, I am not satisfied that the applicants face a real chance of harm on their return to Sri Lanka for being Tamils from the Northern Province and/or Tamil Nadu or on the basis of being imputed with an adverse political opinion due to their family's LTTE connections or on the basis of their other background, profile and/or experiences. Further I am not satisfied that the applicants face a real chance of serious harm as a result of their illegal departure from Sri Lanka and seeking asylum and spending time in Australia or any combination or accumulation of those factors.
51. I am not satisfied that the applicants hold a well-founded fear of persecution.

Refugee: conclusion

52. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

53. Under s.36(2)(aa) of the Act, 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

54. 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.
55. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
56. I accept that on their return to Sri Lanka, the applicants may be subject to investigation and processing at the airport as part of the return procedures. I do not consider that the adult applicants will be charged with any offence as a result their of illegal departure due to their age at the time of the offence. I am not satisfied the applicants will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of that process. The evidence does not suggest that the process is intended to inflict pain or suffering that could reasonably be regarded as cruel or inhuman in nature, 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 as defined in the Act.
57. I have accepted that, on their return to Sri Lanka, the applicants may face challenges as returning asylum seekers as outlined above including the need to establish themselves and find work and accommodation, I have accepted that there is a low chance that they may face some social stigma in the community as people who have not lived in Sri Lanka for a long time or at all. I am not satisfied that these difficulties and treatment would amount to significant harm as defined. I am not satisfied that it would amount to the arbitrary deprivation of life or the death penalty. I am also not satisfied that it would amount to being subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as defined in the Act. I am not satisfied there is a real risk of significant harm on this basis, or when considered in conjunction any treatment they may experience as part of the return procedures.
58. In relation to the remainder of the applicants' claims, I have found that there is not a real chance that the applicants will face any harm on their return to Sri Lanka for any other claimed reasons or combination or accumulation of those reasons. Real chance and real risk

involve the same standard²¹. On the same factual findings, I am similarly not satisfied that the applicants face a real risk of suffering any harm on any of the remaining grounds raised, including significant harm, should they be returned to Sri Lanka.

59. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Sri Lanka there is a real risk they will suffer significant harm.

Complementary protection: conclusion

60. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

Member of same family unit

61. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a spouse and dependent children.
62. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

²¹ *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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