



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA20/08461

Date and time of decision: 13 July 2020 08:49:00  
J McLeod, 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') is a Sri Lankan national. He arrived in Australia with his father and some other family members [in] April 2013, when he was [Age] years old. On 18 August 2017 he individually lodged an application for a Safe Haven Enterprise Visa ('SHEV'). The applicant's claims for protection were explored at interview on 12 December 2019, after which his case was transferred to another officer to assess. This officer, a delegate of the Minister for Immigration and Border Protection (the delegate), refused the grant of visa on 28 May 2020.

### 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') ('the review material'). No further information has been obtained or received.

### Applicant's claims for protection

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3. The applicant's claims, as articulated in his written Statement of Claims (SOC) prepared with the assistance of a Legal Practitioner on 18 August 2017, can be summarised as follows:
  - He is a Tamil Hindu male who was born in [Location 1], Northwest Province, Sri Lanka in 1993. His family moved to [Trincomalee], Eastern Province in 2000 and he resided there until he came to Australia in 2013. He had never held a passport or left the country before then.
  - His father distributed prohibited items in the LTTE areas in the 1990s. He was twice detained and mistreated by the authorities and released via bribe (the last time being in 2005). He suffered ongoing harassment from them.
  - At the end of 2011 his father was questioned about the applicant and his brother, 'K'. K was then taken to Colombo on suspicion of holding weapons and assisting the Liberation Tigers of Tamil Eelam (LTTE). K was released but was constantly taken for questioning until he fled Sri Lanka in 2012.
  - The Criminal Investigation Department (CID) continued harassing their father, but in K's absence they also turned their attention on the applicant and his brother 'LA', in an attempt to obtain more information about whether their father and K had been in the LTTE. The applicant and LA were twice detained, interrogated and beaten by the CID – they were once taken to Colombo for a two day period, and then, in around early 2013, they were held for five hours at the Trincomalee CID office. The applicant and LA then went into hiding until they left for Australia with their father and several other family/step-family members.
  - Since they left Sri Lanka, the authorities have visited his mother's home three times looking for them.
  - The applicant fears being harmed by Sri Lankan authorities due to his being a young Tamil male and his family history of suspected LTTE affiliation. He was already being constantly harassed, detained and questioned and he believes he will be treated with greater suspicion having left the country, claimed asylum and resided abroad for a prolonged period.

## Factual Findings

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### *Applicant's evidence during the SHEV interview*

4. During the SHEV interview on 12 December 2019, the applicant retracted much of his SOC, and information he provided in his Arrival interview. At the beginning of the SHEV interview ('the interview') he stated he had previously provided false information to the department, under instruction from his father, who had told him what to say. He said he had been waiting to tell the truth and now that his father had left Australia and returned back to Sri Lanka, he could do so. However, when the officer interviewing him ('the officer') asked which parts of his SOC were true, the applicant said he didn't know, that some of it may be true, but it was all as told to him by his father who told him it was the only way he would be accepted to stay in Australia. He had followed his father's instruction and told his lawyer the claims his father told him to include.
5. Inter alia, during the interview, the applicant said he was born and studied in Sri Lanka. He said he then lived in [Country 1] for seven years and returned to Sri Lanka in 2011 before coming to Australia in 2013. He has provided a copy of his Sri Lankan birth certificate and an original version of a document which is untranslated but which he described in the SHEV interview as a temporary identity card. It bears his photograph and a stamp and signature from the Grama Niladhari in [Location 1] dated [March] 2013. He also, during the interview, provided a copy of his Sri Lankan passport, issued in [2007]. It confirms his name and date of birth as claimed and states his birthplace as [Location 1].
6. While the applicant indicated that much of his SOC was falsified, he seemed unsure as to whether some parts of it may be true. As such, the officer explored the claims raised in the SOC during the interview and the delegate also obtained the applicant's father's SHEV application, interview recording and decision.
7. The officer asked the applicant in the interview about his father's work distributing items to the LTTE in the 1990s and the applicant said he didn't know anything about it; he had just told his lawyer what his father had told him to say. He said his father used to sell things like [goods] from the back of his bicycle and if his father had sold the prohibited items to the LTTE, he would have done so without the family knowing about it. He said it was true that when he was a small boy his father was detained and had his [body part] broken by the CID at the Fourth Floor and was released via a bribe. However, he did not know what happened after that. He said that while his father was out, some people who looked like officers came looking for him, and then left. The applicant did not find out anything more about the visit, though he thought that as his father had been taken away before, he would have also been taken on that occasion had he been there. He confirmed his father was not taken again. I note the applicant's father's evidence was that he frequently bribed army checkpoint officers to move between the army and LTTE controlled areas doing business from 1990 until he was arrested and tortured for a week in the Fourth Floor in 1995, then released on bribe, but was threatened and harassed after that. The father's evidence also refers to the 2005 detention incident, and ongoing problems with the authorities until he departed in 2013.
8. As for the applicant's brother, K, the applicant said in the interview that according to his mother, while he was in [Country 1] in 2011, someone had come to take his father away, but he wasn't there so they took K instead, and then she paid a bribe for his release. He doesn't know who took him, but he thinks his mother thought they were LTTE. The delegate asked how this had affected his brother and the applicant said his brother was only a boy, studying at the time and he would have been emotionally and mentally affected if he had been taken. He said some of his brother's friends had been taken, as normally happened after their IDs and ages were checked.

9. The applicant confirmed in the interview that his father and K had returned back to Sri Lanka from Australia, he said because their cases were rejected, K wanted to get married and they wanted to see their family members. The officer asked how they were coping in Sri Lanka and the applicant said they are living there on the money they earned in Australia. Later in the interview he added that they are ok back in Sri Lanka but he doesn't know what the future will hold and maybe they won't stay there. He also noted later that some of his friends had returned back to Sri Lanka, but he preferred to stay in Australia.
10. As for his own profile and experiences, the applicant confirmed in the interview that he had not been in the LTTE and never engaged in politics. He confirmed he had not had any problems, interactions or experiences with the CID (and gave no indication of such with other members of the authorities), though, he added, he would have faced problems had he been in Sri Lanka, but he was in [Country 1] from 2005 or 2007 until 2011. He confirmed the incidents of his detention in his statement (prior to and in early 2013) were untrue, included on the instruction of his father. He said he didn't have any problems in Sri Lanka, but he didn't like to live in Sri Lanka or [Country 1]; he was looking for an overseas life so he came here. He said he had left Sri Lanka and does not want to live there because he doesn't like the government; officers are corrupt and want money and bribes. He said no one follows the rules or pays taxes or fines and the government doesn't enforce them; they don't allocate money to help people like him.
11. The officer asked if he feared being harmed by anyone in Sri Lanka and he said there wasn't anyone as such, but he does have a fear of living there. Although it has not happened to his family, he has read in the news that the new government is kidnapping Tamils. He also raised fears of being harmed in further bombings like the 2019 Easter bombings. He said he would not have any warning before being kidnapped or hurt in a bombing or required to pay a bribe. He said everything is about politics, money and corruption and only people who have money can live in Sri Lanka, and even they face risks. At the end of the SHEV interview he stated he wanted to go and visit his mother and then return to Australia and start working here; he asked that he not be sent to Sri Lanka "for good".

#### *Consideration and findings*

12. Based on the temporary identity card and passport and the applicant's own evidence in the SHEV interview, I am satisfied the applicant is a Sri Lankan national.
13. There is no reason for me to doubt that the applicant is Tamil and Hindu. I accept that he is.
14. I accept the applicant lived in [Country 1] from around 2005 – 2011 or 2012 then returned and lived in Sri Lanka for a period before coming to Australia in 2013. As for his residential history in Sri Lanka, the applicant was silent in the SHEV interview about whether his family did in fact move from [Location 1] to Trincomalee in 2000 as noted in his written application/SOC. The applicant's father's evidence (some of which is before me in the review material) was that they had lived in Trincomalee for the past 13 years. However, it is unclear whether the father produced any documentary or other evidence of residence in Trincomalee and having engaged with his application and interview evidence, I am not satisfied the applicant's father was a credible witness overall. I place little weight on the father's evidence in this respect. The applicant, on the other hand, has provided his temporary Identity card from the Grama Niladhari in [Location 1] dated [March] 2013. According to the Australian Department of Foreign Affairs and Trade (DFAT), National Identity Cards are obtained through one's Grama Niladhari, or the Department for

Registration of Persons.<sup>1</sup> The review material is silent on the issuance of temporary identity cards but it stands to reason that they are also issued in a similar fashion. It difficult to accept that the applicant would have sought his temporary identity card through the Grama Niladhari in a district he had not lived in for 13 years. The issuance of this card in [Location 1], the applicant's admission that he had in fact (contrary to his application/SOC) been living in [Country 1] for most of the last eight years before coming to Australia and that much of the SOC was falsified, leaves me ultimately unsatisfied that the applicant's family relocated to Trincomalee and that this was his most recent residence in Sri Lanka. On the evidence before me, I find it more likely that he returned from [Country 1] and resided in [Location 1], and that this is the place to which he would return from here.

15. As for the father's and K's profiles, I place more weight on the applicant's own evidence in the SHEV interview rather than his father's evidence, and the claims in the SOC. I accept his father was once detained and harmed by the authorities in the 1990s, when the applicant was a small boy. I accept some officers may have visited their house again but I am not satisfied his father was again detained in 2005, that he had to pay ongoing bribes to Sri Lankan authorities or that he suffered ongoing harassment and problems beyond that generally suffered by Tamils during the war and its aftermath. I note the applicant was still a child in 2005, and for several years thereafter but I also take account that as the delegate noted, the applicant's father's evidence indicates he was able to lawfully depart and re-enter Sri Lanka numerous times over the years (having lived and worked in [Country 2] from 1996/1997 until 1999) and travelled between [Country 1] and Sri Lanka at least times between 2005 and 2011/2012. His father's evidence confirms that he was issued three genuine passports and did all of this travel lawfully, on his own passport and without difficulties.
16. As for K, given the applicant's evidence, I am not satisfied he was taken by the authorities, or faced ongoing targeting from them. The applicant's evidence suggests rather, that K may have been at risk of being taken by the LTTE (presumably for recruitment purposes during the war) and, was, like all young Tamil males, being monitored by the Sri Lankan authorities.
17. Based on the applicant's evidence in the SHEV interview, I am satisfied he himself was never detained, or of any adverse interest to the authorities. I also find, as the applicant said these detention incidents were untrue, that his other brother LA was never detained or of adverse interest to the authorities. The evidence does not suggest that the applicant or any of the family he was in Australia with were politically active in Australia or engaged in any activities which would bring them within the authorities' purview of concern.
18. The applicant's father and K have returned to Sri Lanka and have been residing there, by the applicant's account, without problems. Although silent on the date of K's return to Sri Lanka, information in the decision indicates that the applicant's father returned to Sri Lanka voluntarily on 16 January 2019 with IOM assistance. The evidence does not support that either of them have – at any time in fact – been formally charged or prosecuted for any offences, or taken for rehabilitation, as the country information suggests those connected, or suspected of connections with, the LTTE were.<sup>2</sup> The applicant gave no indication in his interview that K and his father (nor his friends who have returned) had faced any problems with the authorities, or anyone, on or since their return to Sri Lanka, and I note his father at least had by then been back in Sri Lanka for

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

2 Danish Immigration Service (DIS), "Human Rights and Security Issues concerning Tamils in Sri Lanka," 1 October 2010, CIS19345

United Kingdom Home Office (UKHO), "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

almost a year. More than five months passed between his interview and the decision being made on 28 May 2020 and a further six weeks has now passed since then and the applicant has given no subsequent evidence indicating that either K, his father, or any family members or people he knows in Sri Lanka have suffered problems from the authorities or other harm, or that they have been approached or questioned about the applicant's continued absence from the country.

19. I am not satisfied that the applicant's father or K, or any other family members are of any adverse interest to the Sri Lankan authorities, or that the authorities searched for them in their absence.
20. I am not satisfied the applicant fears returning to Sri Lanka on the basis of his individual profile, or that of any of his family members. I find his reasons for not wanting to return are grounded in some reports of Tamil kidnappings and a general dislike and distrust of the Sri Lankan government who he does not believe act in Tamils' interests, and a general fear of a repeat of incidents such as the Easter bombings.
21. Lastly, for clarity - the applicant has not claimed to have previously experienced any discrimination or persecution on the basis of his Hindu religion and has raised no concerns of this for the future. I am not satisfied he has any fear of returning to Sri Lanka on this basis or that claims relating to his religion arise from the material.

### **Refugee assessment**

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22. 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**

23. 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.
24. The applicant is a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this review.

25. A lot has changed in Sri Lanka in the seven years the applicant has been in Australia. Since he left the country in 2013, there have been three different Presidential regimes – the Mahinda Rajapaksa regime which served until January 2015, the Maithripala Sirisena regime which served until November 2019, and the now current Gotabaya Rajapaksa regime.
26. The information in the review material indicates that when the applicant left Sri Lanka in late 2012, and for the couple of years thereafter, Mahinda Rajapaksa's regime was still in power. Under his rule, and with his brother Gotabaya Rajapaksa serving as his Defence Secretary, the LTTE were defeated and the 26 year civil war came to an end. But the north and east of the country remained highly militarised. Many Tamils reported being monitored, harassed, arrested and / or detained by security forces, and more Tamils were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group, with LTTE membership or support sometimes imputed purely on the basis of Tamil ethnicity or in combination with a Tamil's age and connections with former LTTE members or territories.
27. The situation for Tamils radically improved under Sirisena's regime which took a proactive approach to reconciliation and advancement of human rights and took active steps to curb the excesses of military power exercised under the previous regime.<sup>3</sup> It is true that under Sirisena, ethnic reconciliation was never fully achieved, several election commitments went unmet, accountability for war crimes and serious human rights abuses was not adequately pursued, and there were continuing (albeit much lesser) reports of mistreatment including arbitrary detention, torture and other harms perpetrated by Sri Lankan police and security forces. The DFAT, United Kingdom Home office (UKHO), the Office of the High Commissioner for Human Rights (OHCHR) and some other reports before me reflect as much.<sup>4</sup> Nevertheless, DFAT's reporting suggest the north and east were largely demilitarised and the harassment and monitoring of Tamils radically reduced. DFAT's information reflects that Tamils gained greater representation in the political mainstream, their inclusion in political dialogue increased and they gained a substantial level of political influence. In its November 2019 report DFAT assessed Tamils faced a low risk of official or societal discrimination on the basis of their ethnicity.
28. The information from the DFAT reports (2017, 2019) and the UKHO's reports (June 2017, January 2020) considered by the delegate<sup>5</sup> indicates that while the government has remained watchful for signs of a potential re-emergence of the LTTE, and is sensitive to other possible Tamil separatist activity and certain other types of political activism, the situation has become more relaxed. DFAT reported that the east and north of the country have been largely demilitarised. In recent years - with the exception of after the 2019 Easter Sunday Terrorist bombings - the PTA has only been used sporadically and the evidence does not support that the applicant would be targeted in

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3 United Kingdom Home Office (UKHO), "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; DFAT, "Sri Lanka - Country Information Report", 4 November 2019, 20191104135244;

Office of the United Nations High Commissioner for Human Rights on Sri Lanka (OHCHR), "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; Freedom House, "Freedom in the World 2019 - Sri Lanka", 5 February 2019, 20190329104735; UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

4 United Kingdom Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; DFAT, "Sri Lanka - Country Information Report", 4 November 2019, 20191104135244; OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; Freedom House, "Freedom in the World 2019 - Sri Lanka", 5 February 2019, 20190329104735; UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

5 DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; DFAT, "Sri Lanka - Country Information Report", 4 November 2019, 20191104135244; UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; United Kingdom Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

relation to those bombings or that he has a similar profile to those Tamils who have been recently detained under the PTA's application. DFAT (2019) also suggests the prevalence of monitoring of Tamils in day-to-day life has decreased significantly, with only those associated with certain politically sensitive issues attracting monitoring in recent times and such monitoring is now done with a more subtle approach, and commonly without violence. The UKHO's 2017 report before me, and DFAT's 2019 report on Sri Lanka<sup>6</sup> referenced by the delegate indicates that overall, the authorities' focus shifted to identifying those active in post-conflict separatism, Islamic extremism, those on stop and watch lists (which capture details of those with extant court orders, arrest warrants or passport impound orders, and those suspected of involvement in terrorist or serious criminal offences) and those who may otherwise be considered a threat to the Sri Lankan state.<sup>7</sup> This was not contradicted in the UKHO's 2020 report, where they noted in fact, that the United Nations High Commissioner for Refugees (UNHCR) and other sources had advised that even former LTTE cadres identified on return to Sri Lanka may not necessarily be detained, and would only be of interest if there were outstanding criminal cases against them.<sup>8</sup> The recent information before me does not support that the government's attention would be adversely focused on someone with the applicant's profile.

29. I have considered that the election of Gotabaya Rajapaksa in November 2019 has meant the return of a Rajapaksa family regime as the President himself formerly served as Defence Secretary under his brother Mahinda's regime and appointed this brother as Prime Minister. Inter alia, the information that was before the delegate indicates the Tamil majority voted against Rajapaksa and are worried there will be a reversal of the human rights improvements that have been achieved since 2015, and a return to the abuses of government and human rights carried out during the war, and its aftermath under this leadership group. Post-election reporting before me indicate that efforts towards ethnic reconciliation have been abandoned and there have been moves away from Tamil cultural recognition. Investigations into the alleged previous wrongdoings of military leaders (many of whom are now part of the government leadership group) previously accused of committing war crimes and/or other abuses against Tamils) have also been abandoned and in 2020 the regime has stepped up surveillance or harassment of human rights defenders, moved away from progress made on the Office of Missing Persons and signalled a closing of the civic space and freedom of expression. There are also concerns about signals to weaken the independence of key institutions and the checks and balances on executive power, and about the encroachment of military leaders into the civil space.<sup>9</sup>
30. I have considered the issues carefully and while it is understandable that the applicant and other Tamils may feel apprehensive about these recent developments and the prospect of again living under a Rajapaksa regime, the information before me indicates the situation is vastly different than when the Rajapaksas previously ruled. The country is no longer in the throes of civil war or an aftermath of such, the LTTE is long defeated, there is no indication in the material of any actual LTTE resurgence or rising of any similar strong separatist force.
31. I have had regard to the applicant's concerns about bribery and corruption in the government, though I note this does not feature in the United States' Department of State (USDOS) Crime and Safety Support for 2019.<sup>10</sup> To the contrary, USDOS suggests that the once commonplace

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6 UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; DFAT, "Sri Lanka - Country Information Report", 4 November 2019, 20191104135244

7 DFAT, "Sri Lanka - Country Information Report", 4 November 2019, 20191104135244; UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

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

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

10 United States' Department of State (USDOS), "Sri Lanka 2019 Crime & Safety Report", 28 February 2019, 20200316130236



allegations of corruption in the security services has dissipated with the professionalisation of the police services. In any event, on the evidence before me I consider that such issues and those raised amongst the other concerns noted above, are at this point, far too speculative to conclude the applicant will face any kind of harm from such developments. Politically, Sri Lanka is in a very different place to when it was previously under authoritarian rule. Presidents may now only serve two terms, and even taking into account imminent elections which may change the level of Tamil representation in Parliament or otherwise strengthen the current government's resolve or ability to carry out its own agenda, I am satisfied that overall, Sri Lanka's democratic landscape is more robust and it is purely speculative on the information before me to conclude that the country will revert to a militarised and/or authoritarian state in the reasonably foreseeable future, or that the election result with otherwise lead to changes that will cause Tamils harm. I consider the nature of the changes across a range of political, security and social measures over the past four to five years in Sri Lanka have been significant and have extended beyond the levels of governance and administration. Societal attitudes have also shifted, and DFAT has recently assessed the risk of official or societal discrimination against Tamils to be low. I am overall satisfied that enough positive changes have been made and sustained such that the information before me suggests that Tamils still face a low risk of official discrimination and are not persecuted on the basis of their race.

32. I am not persuaded that the authorities' security focus has reverted back to the pre-Sirisena priorities. Even under the new government, country information does not support a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE/anti-government opinion. Nor does it support that those with a certain demographic profile (such as being Tamils of certain ages and genders who lived in former LTTE controlled areas) would come to the adverse attention to authorities on such basis, nor even when taken in concert with illegal departure and return after seeking asylum abroad.
33. The evidence does not suggest the situation in Sri Lanka will change in the reasonably foreseeable future such that there will be a regression from the overarching positive developments or that it would otherwise result in Tamils facing a real chance of harm on the basis of their ethnicity, or any imputations arising from such.
34. Having regard to the applicant's personal circumstances, I am not satisfied the applicant was ever perceived as an LTTE suspect or a security concern for any reason before he came to Australia, or that he has engaged in any post-conflict separatism or interacted with any diaspora groups that may concern the authorities. His father and brother have returned and are living there seemingly without issue. There is no credible evidence suggesting the authorities have shown an interest in the applicant in his absence. I am not satisfied his familial links to his father, K, LA or any family members will lead him to be viewed as a security concern or of any adverse interest to the Sri Lankan authorities for LTTE or security related reasons. On the evidence, beyond the general prosecution for illegal departure discussed below, I am also not satisfied the applicant would be wanted or of concern for any criminal or other reasons. I do not consider he is a person the authorities would even monitor or surveil.
35. While the applicant referred to reports of Tamils being kidnapped, DFAT reports 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.<sup>11</sup> The UKHO also noted recently that white van abductions have not occurred in recent years<sup>12</sup> and the United

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

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

USDOS reported that kidnappings occur infrequently, with political or business-related motives.<sup>13</sup> The other country information before me also does not support that Tamil kidnappings have been occurring with any frequency to suggest the applicant would be at risk.

36. Overall, having regard to the applicant's particular circumstances and profile and the country situation in Sri Lanka, I am satisfied the applicant does not face a real chance of being harmed on account of his Tamil identity, nor any imputations arising from these profile factors, his gender, age, nor the other factors in his personal and family's history and circumstances.
37. I accept that as the applicant would be returning on a temporary travel document he would be identifiable to authorities at the airport as a failed or returning asylum seeker from Australia.
38. The information before me from DFAT and the UKHO<sup>14</sup> suggests that along with other returnees, the applicant will undergo some airport processing. This will include interviews and checks against immigration and intelligence databases, criminal and court records and with the police from his local area to confirm his identity and identify any possible terrorist or criminal background, or any other security concerns. While it may be several hours (or possibly overnight if his flight lands at night) before the applicant can leave, he will be free to use the bathroom and to talk to other returnees during this time and the medical facility will be available if required.
39. I note the International Truth and Justice (ITJP) and some media sources consulted by the delegate have raised allegations of mistreatment against Tamil returnees. However, I am not satisfied this is reflective of the current situation or informative of the circumstance that would be faced by the applicant, whom I have found would not be of adverse interest to the authorities upon return. DFAT (2018, 2019) advise that all returnees are subject to these standard procedures, regardless of ethnicity and religion and understand that detainees are not subject to mistreatment during processing at the airport. According to the UKHO's sources, while there may be isolated cases of discrimination, they were not aware of it occurring systematically, or of ordinary Tamils being targeted on return.
40. Having regard to the information from DFAT and the UKHO and given my findings on the applicant's lack of profile and my findings relating to his family members, I consider the authorities will quickly determine that the applicant is not a criminal or security risk and does not appear on a 'stop' or 'watch' list, and nor is he of concern for any other reasons. I find he will not be subject to any questioning or investigation beyond the perfunctory. I am not satisfied that the questioning/investigation or processing itself amounts to serious harm or that the applicant would for any reason face a real chance of suffering anything amounting to serious harm during returnee processing.
41. As for his illegal departure, based on the information from DFAT and the UKHO, I accept he will be questioned and charged under the Immigration and Emigration Act ('I&E Act'), and that this may involve having photographs and fingerprints, and a statement taken. He will be brought before the closest Magistrate's Court at the earliest opportunity, though (pending Magistrate's availability and depending on the timing of his arrival and whether it is on a weekend or public holiday), he may be briefly detained in a holding room overlooking an office, awaiting court

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13 United States' Department of State, "Sri Lanka 2019 Crime & Safety Report", 28 February 2019, 20200316130236

14 DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; DFAT, "Sri Lanka - Country Information Report", 4 November 2019, 20191104135244; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

transfer.<sup>15</sup> DFAT states it is not aware of mistreatment during this process either, and nor am I satisfied on the basis of the UKHO reporting or any other information before me, that the applicant would be mistreated in this process.

42. There is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger and according to DFAT, the Sri Lankan Attorney-General's Department has advised that no custodial sentences have ever been issued to such persons. Rather, from DFAT's information, I surmise that should the applicant plead guilty to departing illegally, he may be fined up to LKR 200,000 (approximately AUD 1,633). I consider the applicant's fine will more likely be at the lower end given well-placed sources have told DFAT the fine is usually between LKR15,000 and LKR20,000 each (approximately AUD122 and AUD163 each). He would then be free to go. If he pleads not guilty, consistent with usual processes, I find he would be granted bail on personal surety or with a family member as guarantor, in which case the applicant would need to wait for his relative to arrive. I am not satisfied there is any reason he would not be granted bail on his own personal surety. However, should a family member be required for any reason, I take into account that the applicant has several family members residing in Sri Lanka; I am not satisfied he would not have a willing family member to go guarantor. Bail conditions are imposed on a discretionary basis and according to DFAT, this can involve monthly reporting to police at the returnee's own expense.
43. The applicant would have to attend court in [Location 3], the place he departed from. And in addition to attending for his own case, he may also have to return a number of times at his own expense, if he is summonsed as a witness. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the I&E Act appear in court every 3-6 months, with protracted delays, with cases only properly progressed when all members of a people smuggling venture have been located.
44. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances over protracted lengths of time can be high, and disruptive to the returnee's lifestyle. I take into account that the applicant was only young ([Age]) when he arrived in Australia and his work experience is limited to [selling] with his father in Sri Lanka and doing factory work in Australia. Nevertheless, he would be returning to Sri Lanka where he has family and I am not satisfied he would not be able to draw on them for some initial support, and on their community networks, for assistance in making connections and obtaining some employment. I am not satisfied the applicant could not pay his fines, even if by installment and manage arrangements for his travel and court appearance/s, or that he would face serious harm arising from financial hardship in the reasonably foreseeable future. Nor am I satisfied that any surety imposed or reporting conditions, the imposition of a fine or any other costs associated with his court appearance/s would constitute serious harm.
45. As for the possibility of detention, I find firstly, that there is only a remote chance that the applicant would be detained at all. Secondly, any period of detention would be brief and the evidence does not indicate that he would be mistreated or harmed while waiting or in any part of the returnee or judicial process. Weighing these factors together and considering all the circumstances, I am not satisfied that there would be more than a remote chance that the applicant would face a threat to his life or liberty or other harm amounting to serious harm as a result of the removal process, processing at the airport or any brief holding period awaiting court transfer or the arrival of a guarantor.

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<sup>15</sup> Though DFAT mentioned 'holding cells', the UKHO confirmed (from sources and though its own observation there are no cells) and I give greater weight to this, and to their diplomatic source that described the place as a "holding room with a large window overlooking to the office".

46. Additionally, I am satisfied the arrest and judicial processes the applicant may face result from the lawful prosecution of a crime and there is no evidence before me that laws relating to illegal departure are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. I find that the process leading to arrest, charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to all Sri Lankans over the requisite age who depart illegally and/or are subject to bail conditions and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
47. I am not satisfied the applicant faces a real chance of persecution arising from the circumstances he may face in returnee processing, nor from the processes and consequences arising from his illegal departure.
48. Following return to his community, I take into account DFAT's 2019 reporting<sup>16</sup> which indicates that most returnees, including failed asylum seekers are not actively monitored on an ongoing basis, and it is not aware of them being treated in a way that endangers their safety and security. DFAT notes that failed Tamil asylum seekers who returned from Australia to the once highly militarised Northern Province have told DFAT that they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits. There is nothing to suggest the situation would not be the same in the applicant's area, whether he returns to [Location 1] (as I think he will) or to Trincomalee. As noted above, I do not consider the applicant is a person the authorities would even monitor or surveil and I do not accept he will face problems in this respect, even noting he will need to register with local authorities on his return.
49. The UKHO<sup>17</sup> refers to Tamils suffering some discrimination along with other minorities and DFAT refers to there being some social stigma against returnees and failed asylum seekers, and to returnees facing difficulties finding suitable employment and reliable housing on return. However DFAT assesses that societal discrimination is not a major concern and there is a low risk of it occurring. Sources told DFAT that locals were generally welcoming, and returnees did not feel they were treated differently. If he does face any societal stigma or discrimination as a returnee or Tamil (or Tamil returnee), I am satisfied it would only be low-level and temporary and would not consist of or result in any serious harm. I note he has relatives in Sri Lanka he remained in contact with (including his mother whom he requested to go visit) and his father and brother, who I note have shared his experience in returning from Australia. He has not indicated any reason why he could not again reside with his family on return to Sri Lanka or that he would not have their support while he transitions back into the community. I am not satisfied he would be denied opportunities to obtain employment or earn a living, or denied any basic necessities or services, or that he will otherwise face serious harm in the reasonably foreseeable future if he is returned.
50. I accept the applicant is fearful of falling victim to bomb attacks, like those that occurred in Easter 2019. I have had regard to the information the delegate considered about the Easter bombing terror attacks against Christian Churches and hotels by a Muslim extremist group. The information indicates that this was the first terrorist attack since the end of the civil war in 2009. Country information does not suggest the attacks were in any way sanctioned or condoned by any Sri Lankan authorities. To the contrary, the information from DFAT suggests the authorities acted swiftly and decisively, immediately increasing security and taking other precautions including imposing a curfew pending investigations. Arrests were made in the months following; those responsible were detained. While church services were temporarily suspended across Sri Lanka,

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

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

they have since resumed, though with heightened security.<sup>18</sup> Having regard to the information before me, I consider the authorities' responsive actions mitigated the risk of any additional attacks and stabilised the security situation.

51. While DFAT assesses future attacks by home grown Islamic extremists are possible, it suggests the Christian community would be the community at risk (and I note the applicant is Hindu) and even for this group it assessed the threat of such violence to be low. While DFAT qualified that its risk assessment could change if such groups were to expand in membership and strengthen their international links, at this stage, I consider such developments to be speculative. Having regard to the analysis in the review material, and on this matter in the 2019 DFAT report, and considering that despite their scale and gravity, these were the first attacks of their kind were a rare occurrence, I consider the possibility of further attacks of this kind - against any targets - to be speculative and any chance of harm to the applicant to be remote.
52. As for other terrorism or violence, the civil war has been over for 11 years now. There are reports of occasional violence and country information indicates the government is sensitive to a resurgence of LTTE or other separatist movements but it does not suggest that war will resume or that another war will break out or that the frequency of violence would be such that the applicant would face a real chance of harm in the reasonably foreseeable future. I am not satisfied that the applicant faces a real chance of harm on these bases.
53. At the end of the SHEV interview the applicant mentioned that if he got sent back to Sri Lanka, he would face problems from his father for telling the truth about his protection claims. However, he did not suggest then, nor subsequently that he held any fear of his father harming him over this, or any matter. While I accept the applicant's father may be disappointed or even angry at the applicant for reneging on the claims his father told him to advance, I am not satisfied on the evidence that his reaction to the applicant's return will involve violence or other harm. I am not satisfied the applicant faces a real chance of harm from his father.
54. I have considered the applicant's claims cumulatively, but for reasons explained above, and with particular emphasis on the significant changes that have occurred in Sri Lanka since the applicant has been abroad, I am not satisfied he has a well-founded fear of persecution – in any part of Sri Lanka.

### **Refugee: conclusion**

55. 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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56. 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.

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

## **Real risk of significant harm**

57. 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.

58. 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.

59. As set out above, I accept that the applicant will be subject to returnee processing including interviews/questioning, the giving of statements and other checks, and will be charged and subject to judicial proceedings for his illegal departure. I accept this will involve keeping him at the airport for processing and that he may be briefly detained in a holding room awaiting court transfer. He may be subject to bail, reporting conditions, multiple court appearance and fines and have to incur associated legal/transportation costs. However, the information before me does not indicate that returnees and illegal departees are subject to mistreatment during entry procedures, returnee processing or during the brief period the applicant may be detained prior to coming before a magistrate, awaiting for a guarantor to arrive at court, or any other part of the process. I am not satisfied from the information before me that there is any intention to inflict severe pain or suffering, or pain and suffering that could reasonably be regarded as cruel and inhuman, or extreme humiliation. Nor I am satisfied there is a real risk of the death penalty being carried out, the applicant being arbitrarily deprived of his life or tortured in these circumstances. I am not satisfied the applicant faces a real risk of significant harm from any of this.

60. I am satisfied the applicant will not face a real risk of significant harm from the authorities relating to his status as a Tamil returnee. However on the small chance that he experiences some societal discrimination or social stigma, I am satisfied it would be low-level and temporary, and would not in any event, involve any acts or omissions at the official or societal level which would result in a denial of opportunities to obtain employment or earn a living, or denied housing or any basic necessities or services. I am also satisfied he would not otherwise face harm that would constitute significant harm as defined in the Act.

61. I have otherwise found the applicant would not face a real chance of any harm on return. Based on the same information, and for the same reasons, I am not satisfied he faces a real risk of harm, including significant harm from anyone in connection with those claims.

62. After having regard to all of the applicant's circumstances, and the country information noted above, I am not satisfied that he faces a real risk of suffering significant harm on return to any part of Sri Lanka.

## **Complementary protection: conclusion**

63. 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.