



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/05614

Date and time of decision: 9 January 2019 14:25:00  
V Price, Reviewer

**Decision**

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

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the northern provinces in Sri Lanka and of the Hindu faith. He lodged an application for a Safe Haven Enterprise Visa (SHEV) with the Department on 14 June 2017.
2. On 29 August 2018 a delegate of the Minister for the Department (the delegate) refused to grant the visa to the applicant finding that he did not face a real chance or risk of harm on return to Sri Lanka.

### 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. No further information has been obtained or received by the IAA.

### Applicant's claims for protection

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5. The applicant's claims as set out in the statement accompanying his SHEV application can be summarised as follows:
  - He was born in [Town 1], Sri Lanka in 1983. His [relative 1] and two of his uncles were all involved with the LTTE, but he is not aware of their functions or duties within the LTTE. His [relative 1] and one uncle died fighting for the LTTE. His other uncle survived but fled to [Country 1].
  - The applicant worked as a [occupation]. In late 2011, he was [escorting] [customer] from [Town 1] to [Village 1]. They were stopped by [number] police officers on motorbikes. The police handcuffed the [customer]. However, as they were speaking in Sinhalese the applicant could not understand what was going on. The applicant's [equipment] was confiscated and he was taken to the police station. He was interrogated, the police asking why he was assisting the [customer]. The applicant stated that he did not know him and he was just [accompanying the customer]. However, as the authorities equated Tamils with being LTTE, they were suspicious of him and he was kept in custody (between 10 to 15 days). During this time, he was interrogated about his connections to the man. The applicant had to sign documents that he could not understand, as they were in Sinhalese.
  - After his release, he was monitored by the authorities. In early 2012, his friends told him that the police had questioned them about the applicant. The police were searching for him at the [specified place] and the applicant stopped [working]. He became very scared as he knew that many Tamils disappeared after being detained by authorities.
  - The police officers continued to search for the applicant at the [specified place]. The applicant stayed inside and did not go out unless absolutely necessary. He waited for an opportunity to leave by boat, as he knew he would be detected by the authorities if he tried to leave legally. He came to Australia by boat, arriving [in] September 2012.
6. The applicant claimed for fear harm from the authorities on return to Sri Lanka due to his Tamil ethnicity, his imputed political opinion of being pro-LTTE, and for having left Sri Lanka

illegally. He claimed these matters will be exacerbated due to his family connections to the LTTE, his extended period in Australia, and the fact that he has sought asylum in Australia.

7. In the August 2018 submission to the Department (post-SHEV interview submission), the applicant's then representative stated that the applicant faced harm in Sri Lanka due to: his Tamil ethnicity; his imputed political opinion in support of Tamil independence and the LTTE; his familial connections with LTTE members; as he was caught, detained and questioned for transporting a LTTE member of interest to the Sri Lankan authorities in late 2011; the fact that his home district, [Town 1], was a former-LTTE controlled territory; and for his illegal departure from Sri Lanka in 2012 and attempt to seek asylum in Australia, including as a member of a particular social group being 'returned failed asylum seekers who departed Sri Lanka illegally'.
8. The delegate also considered whether the applicant faced harm on return to Sri Lanka due to his Hindu faith.

## **Factual findings**

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### **Applicant's background and profile.**

9. I accept on the documentary and oral evidence provided by the applicant that he is a national of Sri Lanka and that he is of Tamil ethnicity and an adherent of the Hindu faith. I accept his consistent and credible evidence that he was born in, and resided in, [Town 1] in the northern provinces of Sri Lanka until his departure from the country. His wife and [number] children and his [sibling] continue to reside in Sri Lanka. I find he would return to [Town 1] in the northern provinces of Sri Lanka.
10. The applicant claimed his [relative] and two of his uncles were members of the LTTE. The applicant was unable to provide any details relating to the duties his relatives performed for the LTTE, however, given his relative youth at the time, I accept as plausible he was not aware of these matters and draw no adverse inferences from his inability to provide this information. On the basis of the consistency of his evidence on this matter and having regard to information from the United Nations High Commissioner for Refugees (the UNHCR) that at the height of its influence in 2000-2001 the LTTE controlled and administered 76% of the northern and eastern provinces of Sri Lanka, I accept the applicant's claims that his [relative] and uncles were members of that organisation.<sup>1</sup> I accept that his [relative] and one of his uncles were killed fighting for the LTTE and that his other uncle fled to [Country 1].
11. In its most recent report the Australian Department of Foreign Affairs and Trade (DFAT) accepts that the authorities in Sri Lanka continue to monitor close relatives of high profile former LTTE members.<sup>2</sup> In this case, it is questionable whether the applicant would be considered a 'close relative' of his uncle and [relatives]. However, in any event, I place weight on the applicant's oral evidence in his interview with the delegate (the SHEV interview) that he and his family experienced no difficulties or harm of any kind in the past from the authorities or anyone else for any reason associated with his relatives' participation in the LTTE, or because his uncle went to [Country 1]. I also note that the applicant's evidence did not indicate that the authorities have sought him for any reason connected to the activities of his relatives. I conclude from his evidence that neither the applicant nor his family have been

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<sup>1</sup> United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report" 2018, 23 May, CISEC96CF1164.

attributed with an adverse political or other profile as a result of the activities of his [relative] and uncles with the LTTE or due to his uncle moving to [Country 1]. I find that authorities do not have any ongoing interest in the applicant for his family connections to the LTTE or because his uncle moved to [Country 1].

12. I accept the applicant's oral evidence at the SHEV interview that he was not personally involved in the LTTE. The applicant claimed he was nonetheless attributed with an adverse profile towards the end of 2011 when he was arrested, questioned and detained in the course of his work as a [occupation] after [taking] a [customer] with actual or suspected connections to the LTTE (the 2011 incident). The applicant did not raise this matter in the interview conducted with him in 2012, shortly after his arrival in Australia. However, in an interview conducted with the applicant in January 2013 he broadly referred to being detained on suspicion of being an LTTE supporter. I place no adverse weight on his failure to raise this matter in the 2012 interview. I refer to independent information that in the past, particularly during the conflict, many Tamils in the north and east reported being monitored, harassed, arrested and/or detained by security forces, and that LTTE support was also at times imputed on the basis of (Tamil) ethnicity.<sup>3</sup> In this context, I consider plausible and accept that: the applicant was [stopped] while [escorting a customer who] had actual or suspected LTTE connections; his [equipment] was confiscated; he was taken for questioning and was detained at the police station for up to 15 days before being released upon signing a document. When asked to provide details of his experience, the applicant stated he was questioned on a daily basis but did not claim to have experienced any physical harm or other mistreatment during this time and I accept his evidence on this matter.
13. While I accept that the applicant was arrested, questioned and detained as claimed, I have some concerns with his evidence that he remained of interest to the authorities and that the authorities searched for him after that time. I do not consider plausible that the authorities would have released the applicant if they believed him to have had connections to the LTTE and wanted to arrest him for that reason as claimed. Rather, the fact that he was released indicates to me that he was not of any concern to the authorities at that time and I consider it more likely that their investigation revealed the applicant had no personal association with the LTTE or to his [customer]. Nor do I accept as plausible the applicant's contention that the authorities, who would have been aware of his name and address as a result of his questioning, searched for him on a number of occasions at the [specified place], but did not visit his home. Rather, had the applicant been of genuine interest to the authorities as he as claimed, I consider they would have been able to locate him at home in the seven to eight month period between his release from detention and departure from the country. Finally, the applicant's evidence was that during the period in which he claimed to be in hiding, he personally attended a government office to apply for and obtain his birth certificate. Even noting his evidence that this office was not staffed by police or members of the military, I consider his conduct in leaving his home and openly travelling to a government office, to be inconsistent with his claims that he remained in hiding the whole time and that he was at risk of arrest and detention. Rather, I consider this conduct indicates he was not fearful of arrest and was not in fact subject to any adverse attention from the authorities at that time.
14. Having regard to the above matters cumulatively, I am not satisfied on the evidence before me that the applicant was of any ongoing interest to the authorities after his release from detention in 2011 for any actual or imputed association with his [customer] or the LTTE. I am not satisfied that the authorities searched for him, including at the [specified place], at any time after his release from detention in 2011. I find he would not have an adverse profile for

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<sup>3</sup> See for example, DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

any reason in connection with the 2011 incident on return to Sri Lanka, including for any association with his [customer] or with the LTTE.

15. The applicant was not politically active in Sri Lanka in the past and nor has he claimed to have been engaged in any political, pro-LTTE, Tamil separatist, or otherwise anti-Sri Lankan government activities here in Australia, despite having the opportunity to do so. I find that he does not have an interest in participating in any such activities and that he would not do so on return to Sri Lanka and will not have an adverse political profile of any kind on return to Sri Lanka.
16. I accept that due to the manner of his return to Sri Lanka the authorities would become aware the applicant departed the country illegally, that he has been in Australia for an extended period of time, and that he is a returned failed asylum seeker.

### **Refugee assessment**

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17. 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**

18. 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.
19. I have accepted the applicant is Hindu. As noted above the delegate considered a claim to fear harm for this reason arose on the material before him. Approximately 12.6 per cent of the population are Hindu, mostly Tamils in the northern province.<sup>4</sup> DFAT has advised that in 2016 there were allegations by activists and politicians of violations affecting Hindu places of worship, but did not provide the details of the alleged violations.<sup>5</sup> DFAT also indicated they were not aware of any organisations in Sri Lanka that systematically document violations against Hindus, and as such they could not verify this information. The applicant did not claim

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<sup>4</sup> DFAT, "Sri Lanka - Country Information Report" 2018, 23 May, CISEC96CF1164.

<sup>5</sup> Ibid.

to fear harm due to his Hindu faith on return to Sri Lanka, and when asked at the SHEV interview whether he had experienced harm in the past for this reason, he stated he had not. On the evidence before me, I am not satisfied that he faces a real chance of any harm on return to Sri Lanka now or in the reasonably foreseeable future due to his Hindu faith.

20. I have accepted that the applicant is a Tamil male from the north of Sri Lanka and that he will be returning to [Town 1]. I accept that historically, Tamils were discriminated against in Sri Lanka, particularly during and in the years after the civil conflict.<sup>6</sup> However, information in the review material indicates that the situation has improved since the change of government in 2015.
21. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds'.<sup>7</sup> Tamils are the second largest ethnic group in Sri Lanka, constituting 93 percent of the population in the northern provinces where the applicant is returning.<sup>8</sup> The Tamil community continue to report discrimination in employment, particularly in relation to government jobs, but DFAT has assessed this is not the result of an official policy of discrimination but rather due to disrupted education because of the conflict and language constraints. It is recognised that monolingual Tamil speakers in the north and east of the country can have some difficulty communicating with authorities due to the small number of Tamil speakers in the police officers and military, there government incentives to improve this situation and Sinhala and Tamil are both recognised as official languages of Sri Lanka. Overall, DFAT assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment and housing.<sup>9</sup> Moreover, the inclusion of Tamils in political dialogue has increased since 2015, there are numerous Tamil political parties and it is considered that Tamils now have a substantial level of political influence.<sup>10</sup> DFAT has advised that Tamils do not receive unwarranted attention from authorities due to their political involvement, and overall, there are no barriers to Tamil political participation.
22. During the conflict many Tamils in the north and east, were monitored, harassed, arrested or detained by security forces and, at that time, more Tamils were detained under the Prevention of Terrorism Act (1978) (PTA) than any other ethnic group.<sup>11</sup> As noted above, in the past, security forces imputed LTTE support based on ethnicity. However, DFAT has recently assessed that under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life had significantly decreased.<sup>12</sup> Many though not all, Tamils detained under the PTA have now been released and, while it is true that the PTA remains in force, its operation has been suspended.<sup>13</sup> Members of the Tamil community in the north continue to claim that authorities monitor public gatherings and protests, and that they practice targeted

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<sup>6</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; and DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>7</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164; and DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

<sup>8</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid; "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka", Office of the High Commissioner for Human Rights, 23 July 2018, CIS7B839411830; "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka", Office of the High Commissioner for Human Rights, 23 July 2018, CIS7B839411830; and The Island, "PTA suspended pending passage of new Counter Terrorism Law", 8 February 2017 CXC90406620371.

surveillance and questioning of individuals and groups.<sup>14</sup> However, the information indicates this is largely directed at individuals with certain profiles, including those with certain suspected LTTE connections, those engaged in activism, those associated with politically sensitive issues, including missing persons, land release and memorial events, rather than the Tamil community in general.<sup>15</sup>

23. Police increased their presence in parts of the northern province in 2016 and 2017 due to an increase in criminal activity attributed to the Aava group (alleged to comprise former LTTE members recruited by military intelligence).<sup>16</sup> The information does not indicate that this group was targeting Tamils or that the nature and extent of their activities rises to a level such that there is a real chance or risk of any harm to the broader community. Security checkpoints were established on the highway leading into Jaffna from the south and communities in both the north and east reported that monitoring was undertaken by military intelligence and the Police Criminal Investigation Department (CID). There are also reports in the east of local community informants (eg. neighbours and business owners) undertaking monitoring on behalf of the authorities.<sup>17</sup> Intelligence agencies also monitor links to foreign groups, including some in the Tamil diaspora.<sup>18</sup> Nevertheless, some members of the Tamil community reported they felt more empowered to question monitoring activities than they had in the past.<sup>19</sup>
24. The current president was elected on a platform of post-conflict reconciliation, transitional justice, good governance, anti-corruption and economic reform.<sup>20</sup> Information before me is that progress on these commitments has been slow, and the Sri Lankan public and other international and human rights observers are increasingly uncertain that the government will deliver the stated reforms.<sup>21</sup> In its 2018 report, DFAT acknowledged concerns raised by various human rights commentators, including the International Truth and Justice Project, Amnesty International and Freedom From Torture, about the ongoing risk of mistreatment, including torture, by the security forces in Sri Lanka. DFAT also had regard to the 2016 report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and assessed that torture may be carried out by police in regular criminal investigations, though it was noted that this risk increases when individuals were perceived to pose a threat to national security.<sup>22</sup> I have also read the reports from these organisations and from Human Rights Watch, which were included in the review material.<sup>23</sup> Having considered the reports from the various human rights organisations, DFAT assessed that the incidents of torture have decreased, they are not state sponsored, and concluded that overall irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a

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<sup>14</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid; and UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

<sup>19</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Amnesty International, Amnesty International Report 2016/17 - Sri Lanka, 22 February 2017; "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka", Office of the High Commissioner for Human Rights, 23 July 2018, CIS7B839411830; HRW, "LOCKED UP WITHOUT EVIDENCE: Abuses under Sri Lanka's Prevention of Terrorism Act", 29 January 2018, CIS7B83941158; International Truth & Justice Project (ITJP), 'Unstopped: 2016/17 Torture in Sri Lanka', 14 July 2017, CISEDB50AD4849; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; and Freedom From Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", August 2015, CISEC96CF13070.

low risk of mistreatment that can amount to torture.<sup>24</sup> I have considered the post-SHEV interview submission regarding the limitations of the DFAT report. However, noting that the DFAT report is distinct from Australian Government policy with respect to Sri Lanka and that it is prepared from on-the-ground knowledge and discussions with a range of sources in Sri Lanka as well as reports from numerous international organisations, I give weight to this assessment.

25. Having regard to all of the information before me, including the applicant's post SHEV interview submission, I accept that problems remain in Sri Lanka. The Sri Lankan government is sensitive to the potential re-emergence of the LTTE and there are noted concerns regarding the ability of the current government to implement reforms. However, the weight of the information before me indicates, and I am satisfied that, overall there has been an improvement in the situation for Tamils in Sri Lanka and that despite the noted issues, the Sirisena Government has taken positive steps towards reconciliation. Tamils have greater representation in government, and a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment and housing. The prevalence of monitoring of Tamils, even in former LTTE controlled areas has reduced such that only those with certain profiles would now attract monitoring and the community feels able to question these practices. I also give weight to the 2017 report from the UK Home Office in which they concluded that being of Tamil ethnicity alone does not in itself warrant international protection.<sup>25</sup>
26. Overall the information before me does not indicate that Tamils face a real chance of serious harm in Sri Lanka solely on the basis of their Tamil ethnicity. Nor does the information indicate that being of Tamil ethnicity, or residing in an area that was previously controlled by the LTTE, of itself now imputes LTTE membership, a pro-LTTE opinion, or support for Tamil independence. I find that the applicant will not be imputed with LTTE membership or support, of having a pro-LTTE opinion, or of supporting Tamil independence or separatism. Nor, having regard to the availability of familial support, his [number] years of education and his employment history both in Sri Lanka and Australia, am I satisfied that he will be unable to find accommodation and employment on return to Sri Lanka. I am not satisfied that the applicant faces a real chance of serious harm on the basis of his Tamil ethnicity, as a Tamil male from [Town 1] in the north, or due to any political opinion, including in support of Tamil independence and the LTTE, if he returns to Sri Lanka or now or in the reasonably foreseeable future.
27. DFAT refers to the UNHCR's 2012 'Eligibility Guidelines for Assessing the international Needs of Asylum Seekers from Sri Lanka'.<sup>26</sup> This stated that people with real or perceived links to the LTTE including, 'former LTTE combatants or cadres' and 'persons with family links or who are dependent on or otherwise closely related to persons with' certain LTTE related profiles may need international protection. However, there have been significant and relevant changes to within Sri Lanka since the publication of that report and it no longer reflects the current situation. DFAT recently advised that Sri Lankan authorities continue to monitor former LTTE members and supporters, including on stop and watch lists. Former LTTE leadership are at the highest risk of monitoring, arrest, detention or prosecution, regardless of whether they performed combat or civilian roles.<sup>27</sup> Low profile former members of the LTTE would be likely to be detained and sent to rehabilitation centres. Both high and low profile former members

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid; and UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

<sup>26</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>27</sup> Ibid.



would be monitored following release from rehabilitation; as would close family members of high profile former LTTE members.<sup>28</sup> DFAT has been unable to verify that a family connection to former LTTE members has led to people being arrested and detained. DFAT indicates that certain former LTTE combatants may face societal discrimination, but this is largely those who participated in human rights abuses against the Tamil community.<sup>29</sup>

28. The UK Home Office considered in 2017 that international protection would only be warranted for: individuals who had a significant role in the LTTE, or would be perceived to have a 'significant role' in relation to post-conflict Tamil separatism within the diaspora and/or in a renewal of hostilities within Sri Lanka; journalists or human rights defenders; individuals who gave evidence to the 'Lessons Learned and Reconciliation Commission' implicating the authorities in alleged war crimes; and persons whose name appears on a computerised "stop" list accessible at the airport.<sup>30</sup> The assessment by the UK Home Office that participation in diaspora activities, such as attending demonstrations, is not of itself enough to evidence that an individual will attract adverse attention on return to Sri Lanka, is consistent with the advice of DFAT that only high profile leaders of pro-LTTE diaspora groups may come to the adverse attention of Sri Lankan authorities.<sup>31</sup>
29. In this case, I have found above that the applicant was not himself involved in LTTE and that he is not of ongoing interest to the authorities for any reason in connection with the 2011 incident including for any association with his [customer] or with the LTTE and would not have an adverse profile on return for this reason. I have also found above that the authorities do not have any ongoing interest in the applicant for his association with his relatives, including due to their LTTE activities or because his uncle went to [Country 1]. I have found the applicant has not been politically active in the past and he would not do so in the future. Accordingly, having regard to the applicant's profile and the information above, I find that he does not face a real chance of any harm for these reasons if he returns to Sri Lanka now or in the reasonably foreseeable future.
30. I have accepted that the applicant will be identified as a failed asylum seeker on return and that the extended period of time he has spent in Australia and his illegal departure from Sri Lanka will become known to the authorities.
31. On the basis of information in the 2018 DFAT report, I accept that upon arrival in Sri Lanka, the applicant will be processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS), a unit of the CID based at the airport, and maybe the Terrorism Investigation Department (TID).<sup>32</sup> These agencies will check the applicant's travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. I also accept that as he will be travelling on temporary travel documents, police will investigate whether the applicant is trying to conceal his identity due a criminal or terrorist background or whether he is trying to avoid court orders or arrest warrants. I accept this process can involve interviewing applicant and that police may undertake further enquires, including for example attempting to contact the home suburb or town police of his family, contacting any former neighbours and family, and checking criminal and court records. Based on DFAT advice, I accept that this process can

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> UK Home Office, 15 June 2017, OG6E7028826; and DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>31</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>32</sup> Ibid.

take several hours due to the administrative processes, interview lengths, and staffing constraints at the airport. The applicant will be processed in a group, and the individuals in that group cannot exit the airport until all returnees have been processed.

32. Having regard to my findings above regarding the applicant's profile, I am satisfied that he will not be on a stop or watch list. I am also satisfied that through the process of investigating the applicant's profile and history as set out above, he will be found not to have an adverse profile and that any investigation will determine that he does not otherwise present any other risk or threat to national security. I find that while being processed, the applicant will be held at the airport in the custody of the authorities. I have taken into account that allegations of torture or mistreatment of returnees has been raised by various human rights organisations, but I do not accept these reported incidents are indicative of the circumstance that would or could be faced by the applicant upon return having regard to his particular profile. DFAT has advised that all returnees are treated according to these standard procedures irrespective of their ethnicity and religion, and considers that returnees are not subject to mistreatment during processing at the airport.<sup>33</sup>
33. Overall, I am satisfied that any period of detention that would occur while these investigations are ongoing will still be brief and would not exceed the several hours that group processing generally takes. I am not satisfied that such processing is of itself, or having regard to his profile, would result in treatment amounting to serious harm to the applicant. Weighing these factors together and considering all the circumstances, including the applicant's particular profile set out above, including his Tamil ethnicity, that he is a Tamil male from [Town 1] in the north, my findings he is not of ongoing interest to authorities for his family connections to the LTTE, his uncle moving to [Country 1], or arising from the 2011 incident, and the extended time he has spent residing in Australia, I am not satisfied that he faces a real chance of serious harm in the returnee processing phase.
34. I have considered what may occur when the applicant returns to the northern provinces of Sri Lanka. In 2018 DFAT advised that thousands of asylum seekers have returned to Sri Lanka since 2008, including from Australia.<sup>34</sup> In addition, DFAT reports since the change of government in 2015, more Sri Lankan Tamils are considering repatriation. However, DFAT has advised that while systematic surveillance of returnees has decreased, there have been reports of authorities checking on returnees. There is anecdotal evidence that there have been regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017. As noted by DFAT, the UNHCR reported in 2015 that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. DFAT assessed in 2018 that continued surveillance of returnees contributes to a sense of mistrust within communities and this accords with reports of refugees and failed asylum seekers being socially stigmatised upon their return. DFAT also assesses that returnees may face some societal discrimination upon return to their communities, which could also affect their ability to secure housing and employment.<sup>35</sup>
35. I accept the applicant may be visited and received calls by the authorities on return to the northern provinces and that he may be monitored upon return. However, having regard to his accepted profile discussed above, I am not satisfied that any such visits/phone calls/monitoring will amount to a threat to his life or liberty, significant physical harassment or ill treatment, a threat to or denial of his capacity to subsist, or that it otherwise amounts to

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<sup>33</sup> Ibid; and DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

<sup>34</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164.

<sup>35</sup> Ibid.

serious harm of the kind contemplated by the Act. I accept many Tamil returnees face difficulties re-integrating and finding suitable employment. However, in this case the applicant has family who continue to reside in Sri Lanka and will be able to assist or support him on return to Sri Lanka. I also note that the applicant is an adult and is returning to an area with a significant Tamil population. He completed [number] years of his education and has attained skills working in a variety of occupations in both Sri Lanka and Australia. Overall, I am not satisfied that he will face social stigma at a level such that he will be unable to find accommodation and employment on return to Sri Lanka and nor am I satisfied that he will not be able to access basic necessities and services such that he faces serious harm on return to Sri Lanka.

36. I have accepted the applicant departed Sri Lanka illegally. In 2017 and 2018, DFAT advised that it is an offence under the Sri Lankan Immigrants and Emigrants Act (the I&E Act) to depart Sri Lanka other than via an approved port of departure.<sup>36</sup> Information from DFAT does not indicate that detention is selectively applied, that returnees are processed in any discriminatory manner or that those who committed an offence under the I&E Act face a higher risk of torture or other mistreatment. I also consider that DFAT's assessment that returnees are not subject to mistreatment during processing to be relevant, as is their assessment that Sri Lankans face a low risk of mistreatment amounting to torture and that the risk of such treatment by authorities is heightened for individuals considered a threat to national security. I have set out above the entry process to which all returnees are subject on arrival in Sri Lanka and having regard to advice from DFAT, and the applicant's profile, have found above that he will be questioned on return and accepted that his illegal departure will be identified.
37. Information is that once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed.<sup>37</sup> Police will also undertake further enquiries about activities while abroad if returnees are former LTTE members.<sup>38</sup> At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. At this point the Court will determine the next steps for each individual, and information is that crew and facilitators or organisers of people smuggling ventures are usually held in custody. However, I accept advice from DFAT that those arrested can remain in police custody at the CID Airport Office for up to 24 hours and that in the event a magistrate is not available before this time, for example due to a weekend or public holiday, those charged may be detained for up to two days in an airport holding cell. Information from DFAT in 2017 and 2018 is that in general, prisons in Sri Lanka do not meet international standards due to overcrowding, poor sanitary conditions and a lack of resources.
38. Having regard to the above country information and to the circumstances of the applicant's departure from Sri Lanka I accept he will be charged under the I&E Act for his illegal departure. As noted above, DFAT has advised that returnees are not subject to mistreatment during processing at the airport, and overall Sri Lankans face a low risk of treatment amounting to torture, and I consider these matters relevant to this assessment. Noting this and given my findings above regarding his accepted profile, I find he would not face a real chance of serious harm during any questioning at the airport. If the applicant arrives over a

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<sup>36</sup> Ibid; and DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

<sup>37</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164; and DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

<sup>38</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164; and DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

weekend or long weekend, there is a chance that he may be held at a nearby prison until he goes before a magistrate. In this case, I find that there is only a remote chance that that applicant would be detained in such a manner at all. However, in the worst case scenario if he arrives over a weekend or public holiday, the applicant may face only a brief period in detention and, even having regard to poor conditions, in my view this does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment or otherwise amount to serious harm of the kind contemplated by the Act. Nor am I satisfied that the poor conditions faced by the applicant would be due to any intentional conduct by the Sri Lankan authorities. Having regard to these matters, and to the applicant's accepted claims and particular profile as discussed above, I am not satisfied that he faces a real chance of serious harm for his illegal departure during the investigation process or during any brief period spent in detention.

39. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees.<sup>39</sup> Advice from DFAT is that government differentiates between fare-paying passengers and the facilitators and organisers of irregular migration, and is more likely to pursue those suspected of being facilitators or organisers of people smuggling ventures.<sup>40</sup> In 2017 and 2018 DFAT noted that the Sri Lankan Attorney-General's Department, responsible for the conduct of prosecutions, has indicated that no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. Rather, in these cases fines are issued to act as a deterrent towards departing illegally in the future. Fine amounts vary on a case-by-case basis and can be paid by instalment.
40. DFAT has advised that if a person pleads guilty to an offence under the I&E Act they will be fined and are then free to go. If a person pleads not guilty, in most cases they will be granted bail on personal surety immediately by the magistrate, or may be required to have a family member act as guarantor. If bailed, there are rarely any conditions imposed on a discretionary basis, but may involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture.
41. On the basis of the above information, and having regard to the applicant's profile as set out above, I find the weight of the evidence indicates that he will be issued a fine and released or, if he pleads not guilty, he will be released on his own personal surety, or a family member will be available to act as guarantor. The applicant was a passenger on a people smuggling vessel and has not claimed to have been involved in organising or facilitating people smuggling. In these circumstances, I find that he will not be subject to any custodial sentence but that he will be fined for his illegal departure, which does not amount to serious harm. Having regard to my findings above, I also find that the applicant will be able to pay any fine issued to him, even by instalments. I find that the applicant does not face a real chance of serious harm for his illegal departure if he returns to Sri Lanka now or in the reasonably foreseeable future.
42. In any event, I also find that the evidence is that all persons who depart Sri Lanka illegally are subject to the terms of the I&E Act on return to the country. The law is therefore not discriminatory on its terms and or in its application. For these reasons, I find that this is a law of general application. Case law confirms that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to

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<sup>39</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CISEC96CF1164; and DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

<sup>40</sup> DFAT, "Sri Lanka - Country Information Report", 23 May 2018.

discrimination. As noted above, the information before me does not support that the law is selectively enforced or that it is applied in a discriminatory manner. Accordingly, even having regard to the applicant's particular profile, I find that the investigation, prosecution and punishment for his illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

43. I am not satisfied that the applicant faces a real chance of serious harm or persecution if he returns to Sri Lanka now or in the reasonably foreseeable future, for any reason associated with his illegal departure, his asylum application in Australia or the circumstances he will face through returnee processing, including due to the extended period of time he has spent in Australia, as a member of a particular social group of 'returned failed asylum seekers who departed Sri Lanka illegally, due to his Hind faith, his Tamil ethnicity, because he is a Tamil male from the [Town 1] in the north, any familial connections to the LTTE, because his uncle went to [Country 1], for any reason arising from the 2011 incident, including an association with his [customer] and/or the LTTE, or for any political opinion.

#### **Refugee: conclusion**

44. Having regard to the totality of the evidence before me, including the independent information, and the applicant's claims individually and cumulatively, I am not satisfied that he has a real chance of serious harm or persecution if he returns to Sri Lanka now or in the reasonably foreseeable future, including due to: his Hindu religion; Tamil ethnicity; as a Tamil male from [Town 1] in the north; any political opinion, including in support of Tamil independence or the LTTE; his familial connections to the LTTE; because his uncle went to [Country 1]; for any reason in connection with the 2011 incident, including any association with his [customer] or the LTTE; for any reason associated with being a failed asylum seeker; the extended period of time in Australia; and/or for any reason associated with his illegal departure. He does not have a well-founded fear of persecution.
45. 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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46. 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**

47. 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.
48. I have set out above my findings of fact regarding the applicant's background and claims.
49. Having regard to the independent information I have found above that the applicant does not face a real chance of serious harm due to: his Hindu faith; his Tamil ethnicity; as a Tamil male from [Town 1] in northern provinces of Sri Lanka; due to any political opinion, including in support of Tamil independence or the LTTE; his familial connection to the LTTE; because his uncle went to [Country 1]; or for any reason in connection with the 2011 incident, including any association with his [customer] or the LTTE. I also find for the same reasons and on the same information set out above, that these claims do not give rise to a real risk of significant harm as defined to the applicant for the purpose of ss.36(2)(aa) and s.36(2A) of the Act.
50. I have accepted that the applicant will be identified as a failed asylum seeker on return to Sri Lanka and that it will become known he has spent an extended period of time residing in Australia. Having regard to the independent information set out above, I accept that he will be subjected to a screening process on return as detailed above. I am satisfied that any period of detention that would occur while these investigations are ongoing will be brief and would not exceed the several hours that group processing generally takes. Having regard to the applicant's profile as set out above, I am not satisfied that such processing is, or would result in, significant harm to the applicant. Weighing these factors together and considering all the circumstances, including the applicant's particular profile and the relevant independent information set out above, I am not satisfied that he faces a real risk of significant harm in the returnee processing phase for the purpose of s.36(2)(aa) of the Act.
51. I accept the may be visited and receive phone calls by the authorities on return to the northern provinces and that he may be monitored. However, having regard to his particular profile and circumstances, I am not satisfied that any such visits/phone calls/monitoring will amount to significant harm. It does not amount to the death penalty; an arbitrary deprivation of life or torture; and I am not satisfied that there is an intention to inflict severe pain or suffering, pain of suffering that is cruel or inhuman, or that it amounts to degrading treatment or punishment intended to cause extreme humiliation. I accept many Tamil returnees face difficulties re-integrating and finding suitable employment. However, in this case, the applicant will have the support of family members on return. He is an adult and is returning to an area with a significant Tamil population. He completed [number] years of his education and has attained skills working in a variety of occupations in both Sri Lanka and Australia. Overall, I am not satisfied that he will face social stigma at a level such that he will be unable to find accommodation and employment on return to Sri Lanka and nor am I satisfied that he will not be able to access basic necessities and services such that he faces significant harm as defined on return to Sri Lanka. I am not satisfied that these matters give rise to a real risk of significant harm for the purpose of ss.36(2)(aa) and 36(2A) of the Act.
52. I have accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally and that he will be questioned on return. Having regard to the country information and his particular profile, set out above, I find that he does not face a real risk of significant harm during the process of questioning at the airport. Information from DFAT is that returnees may need to be held for a short duration in prison while waiting to appear before a magistrate. In the event that the applicant is required to spend a short period of time in prison while waiting to appear before a magistrate, I am not satisfied that he will face significant harm as defined. Further, I note that the applicant may be subjected to poor prison conditions during any brief period of his detention, but country information

confirms this is due to overcrowding, poor sanitation and lack of resources. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, I am not satisfied that there is an intention to inflict severe pain or suffering, pain of suffering that is cruel or inhuman, or that it amounts to degrading treatment or punishment intended to cause extreme humiliation. In these circumstances, the poor prison conditions to which the applicant may be subject do not of themselves constitute significant harm as defined under ss.36(2A) and 5 of the Act. I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention.

53. I have also accepted that the applicant will be charged with an offence under the I&E Act, that he will not face a custodial sentence and that he will be fined for his illegal departure. I find that he can pay the fine, and that the imposition of a fine does not amount to significant harm under the definition in ss.36(2A) and 5 of the Act. I find that his illegal departure from Sri Lanka does not give rise to a real risk of significant harm for the purpose of s.36(2)(aa) of the Act.

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

54. Having regard to the applicant's claims individually and cumulatively, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm for the purpose of ss.36(2)(aa) and 36(2A) of the Act, including on the basis of: his Hindu religion; Tamil ethnicity; as a Tamil male from [Town 1] in the north; any political opinion, including in support of Tamil independence or the LTTE; his familial connections to the LTTE; because his uncle went to [Country 1]; for any reason in connection with the 2011 incident, including any association with his [customer] or the LTTE; for any reason associated with being a failed asylum seeker; the extended period of time in Australia; and/or for any reason associated with his illegal departure.
55. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **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.