



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06283

SRI LANKA
IAA reference: IAA19/06284

SRI LANKA
IAA reference: IAA19/06285

Date and time of decision: 14 March 2019 19:01:00
M Wei, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicants are a husband (Applicant 1), his wife (Applicant 2) and their adult son (Applicant 3). The applicants lodged their combined visa applications for Safe Haven Enterprise Visas (SHEV) on 28 September 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visas on 24 January 2019.

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). No further information has been received or obtained.

Applicants' claims for protection

3. Applicant 1 and Applicant 3 have made claims for protection. Applicant 2 made no claims for protection of her own; rather she seeks the visa on the basis of being a member of the same family unit of Applicant 1. All applicants were represented by the same registered migration agent before the delegate. Applicant 1 and Applicant 3 were interviewed separately by the same delegate on 26 July 2018 (Applicant 3's interview followed Applicant 1's interview) with the assistance of a Tamil interpreter. Their migration agent also attended both interviews.
4. The applicants' claims are essentially based on the claimed profile of Applicant 1, who claims, as a [driver] and a silent member of the Liberation Tigers of Tamil Eelam (LTTE), to have provided organised transport, bed and board to LTTE members who were fleeing Sri Lanka from Colombo during and after the war.
5. Applicant 1's claims can be summarised as follows:
 - He is a Tamil and a Christian. He was born in [year] in [suburb], Colombo. He married his wife in 2009. He has a daughter born in [year] and a son (Applicant 3) born in [year].
 - He was a [driver] from 1992-2009. He met various people through his [driving]. The Sri Lankan authorities were very suspicious of Tamil speaking [drivers] and viewed them as sympathetic to the Tamil and LTTE cause.
 - Prior to the war ending in 2009, he was stopped on three occasions and detained overnight during police monitoring operations.
 - He was a supporter of the LTTE and became a member in 2005, working for the LTTE fulltime. The LTTE used him as a transporter for LTTE soldiers to help them get from the outskirts of Colombo city into the city so they could safely attend to their arrangements to leave the country during and after the war. This included nine or ten of those high ranking members. Over times, he was required to give higher-ranking members bed and board.
 - In 2009, he assisted two young Tamil soldiers for approximately one week with transport. After he dropped these men at their destination, he was stopped by two men and was instructed to go to an area. He was dragged into a white van and was questioned about the two Tamil men. They hit him several times before letting him go.

- Later he received a call from one of the Tamil men informing him that the other man had been arrested by the Criminal Investigation Department (CID) and advising him to hide.
- The next morning, a white van came to his home. He fled his home from the backyard and went into hiding.
- He bribed custom officers at the airport and was able to leave the country for [Country 1], then [Country 1] without problems.
- The CID had continued to visit his home after he left, making enquiries about him and making threats to his son.
- In [2010], he was arrested and detained by the [Country 1] authorities for approximately four months for trying to leave unlawfully and come to Australia.
- While in detention in [Country 1], he, among other detainees, were forced into interviews with the officials from the Sri Lankan High Commission. They were fingerprinted, photographed and interrogated by the officials against their will.
- They were released from detention in [month] 2010. The incident in [Country 1] became widely publicised in Sri Lanka and as a result, the CID began to target his wife and son to the point where their lives were at risk and they also left Sri Lanka for [Country 1] in May 2011. They were assisted by an agent to pass through the airport without being detected by the authorities.
- His family unsuccessfully applied asylum through UNHCR in [Country 1].
- The applicant continued to support the LTTE movement and his fellow LTTE members after the war had ended. He believes that the LTTE will rise again and fight for equality for the Tamil people.
- If he were to return to Sri Lanka, he would be identified immediately given the wide publicity of what happened in [Country 1] and that his fingerprints were taken.
- He fears returning to Sri Lanka on the basis of his Tamil ethnicity, his LTTE involvement, his pro-LTTE political opinion and as a returning failed asylum seeker from a Western country.

6. Applicant 3's claims can be summarised as follows:

- He is a Tamil and a Christian, born in [year] in Colombo.
- The authorities were suspicious of his father because he was a Tamil speaking [driver]. Both of his parents provided shelter to LTTE members fleeing Sri Lanka in their home during the war. His father was stopped on a few occasions during police monitoring operations and sometimes was held overnight.
- In August 2009, his father was stopped by the CID and questioned about two men he provided [services] earlier. In the early hours of the following morning, CID visited his home searching for his father.
- He and his mother were visited by the CID several times after his father left Sri Lanka and questioned about his father's whereabouts. He was interrogated and threatened that he would be arrested if his father did not turn up.
- His father was arrested in [Country 1] for trying to leave [Country 1] for Australia illegally in April 2010. When his father was released from prison in [Country 1], it was publicised in the newspapers and televisions in Sri Lanka. After that, he and his mother

began to experience some problems with the CID until they left Sri Lanka in May 2011 to join his father in [Country 1].

- He fears that the Sri Lankan authorities would associate him with his father's activities in Sri Lanka and suspect that he continued to help LTTE members passing through Colombo.
- Their applications to the UNHCR for protection in [Country 1] were not successful.
- He fears returning to Sri Lanka on the basis of his association with his father, his Tamil ethnicity, as a sympathiser of the LTTE and his as a failed asylum seeker from a Western country.

Factual findings

7. The applicants claim that they are Tamils and Christian from Colombo, Western Sri Lanka. The applicants have provided a number of personal documents, including Sri Lankan birth certificates, national ID cards and a marriage certificate of Applicant 1 and Applicant 2. Based on the evidence before me, I accept that all applicants are Tamils and Christian, born in [years] respectively. I accept that Applicant 1 and Applicant 2 are married and Applicant 3 is their son. I find that the applicants are citizens of Sri Lanka and Sri Lanka is the receiving country for the purposes of the Act.

Applicant 1 - Sri Lanka

8. Applicant 1 has been consistent with his claims that he was a [driver] in Colombo since the 1990's until August 2009. I accept this.
9. Applicant 1 has also been relatively consistent that he was arrested and detained three times and was held overnight from 2000 when the security situation tightened and prior to the end of the war in 2009 (the Sri Lanka civil war ended in May 2009)¹. Each time, he was released without charge. Although Applicant 1 was able to identify the police stations at which he was held, his evidence was overall vague as to why he was arrested and detained. He stated in the visa application it because the authorities were suspicious of the Tamil population. He stated in the SHEV interview that because he spoke Tamil, CID arrested him three times 'on suspicion' and on one occasion he was arrested by the army and was handed over to the CID. He stated in his Arrival and Entry interview ('entry interview) that he was detained on 'suspicion of being a Tamil'. His evidence was also not clear when these arrests occurred. He stated in the visa application vaguely they occurred prior to the war ended. He stated at the SHEV interview that the first time occurred in 2001 or 2002, the next time was one or two years later.
10. Country information before me with respect to that period indicates that security forces deliberately targeted Tamils with searches and detentions and Tamils were indiscriminately arrested in Colombo under the emergency regulations. The country information also indicates that LTTE members hiding among the Colombo population were deemed responsible for a series of bombings and that Tamils in Colombo were targeted by increasingly heavy security.² Applicant 1 was working as a [driver]. He would have had to

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

² Immigration and Refugee Board of Canada, "Sri Lanka: Treatment of Tamils in Colombo by members of the Sri Lankan security forces and police", 9 February 2012, LKA103960.E

travel through different checkpoints necessarily as part of his work. Although his evidence was fairly general, in light of the country information, I am willing to accept that Applicant 1 was arrested and detained three times prior to the war ended and each time he was released without charge after being held overnight. I am satisfied that the reason he was arrested was because he was a Tamil and that Tamils were indiscriminately targeted at that time. I accept that as a [driver], Applicant 1 would have more frequently come into contact with the authorities during security checks and at checkpoints and it is also possible that authorities at times might have been suspicious that people in his [vehicle] were from the LTTE. While Applicant 1 also stated at the SHEV interview that he was released on bail on one occasion, his evidence does not otherwise suggest he was ever charged or required to report or face court. I am not satisfied that Applicant 1 was charged or held on bail at any time when he was detained. I find that Applicant 1 was released each time without any charge after enquiries were made. I accept it is possible that Applicant 1 might have been photographed or fingerprinted on those occasions. However, I am not satisfied that the authorities monitored him or had any particular ongoing interest in the applicant because of these past arrests and detention.

11. The Applicant 1's claims for protection are centred on his provision of transport and accommodation for LTTE members in Colombo. Unlike some of his other evidence however his accounts of his involvement with the LTTE and his work involving in providing assistance to LTTE members fleeing Sri Lanka has varied over time.
12. In his entry interview held in July 2013, Applicant 1 was asked about his reasons for his leaving Sri Lanka. He stated he was pulled over by a white van after dropping two Tamil men off. He was threatened, his hair was pulled and he was kicked. 'They' came to his house that night and he escaped through the back door. Applicant 1 stated 'no' when he was specifically asked if he has been associated or involved with any political group or organisation, or if he was involved in any activities against the government.
13. In his visa application, Applicant 1 stated that he did not mention the full story about what happened in Sri Lanka in his entry interview because the smugglers told him not to reveal his involvement with the LTTE to the Australian authorities or he would be deported back to Sri Lanka as a terrorist. Applicant 1 stated that as a [driver] he assisted prominent LTTE members fleeing Sri Lanka and he provided LTTE members 'a safe house' when needed. He stated that this came about through his [driving] through the various people he met. The Sri Lankan authorities were very suspicious of Tamil speaking [drivers] and viewed them as sympathetic to the Tamil and LTTE cause.
14. In his visa application, Applicant 1 also provided a very detailed account of an incident he says occurred in August 2009. He stated that he picked two young Tamil men one day and these men continued to hire his services for about a week. On their last hire, a white van followed him and flashed its headlights. After he dropped these men to their destination and turned back towards Colombo town centre, two men showed their hands to stop him and got into his [vehicle]. They directed him to drive to an area where a white van was parked; four other men were in the van. He was assaulted and questioned as to why he did not stop when they flashed their lights at him and also about the two men who were in his [vehicle]. He was let go after they took his personal contact details and told he would be called if they needed further information. He went home and told his wife what happened. Later that night, one of the two Tamil men called him and warned him to be careful because his friend had been taken by the CID. Around 1am the next morning, a white van arrived at the front of his home and six people got out of the van. He recognised two of the men were the same men that

stopped him on the night before. He fled from the backyard before the men reached the front door.

15. At the SHEV interview, the delegated asked Applicant 1 the reasons why he left Sri Lanka. Applicant 1 referred to the claimed incident in August 2009 where he took hire from two young Tamil males. He stated he was able to escape in the night when the CID came to his house to arrest him, because his house was on the road, he could hear the sound of their vehicle. He stated that he did not actually know these two Tamil men were from the LTTE but suspected so after one of the boys called and warned him. When the delegate asked Applicant 1 how he would know these boys were from the LTTE, he stated that he was able to identify them from the way they look and talked, but only suspected and could not confirm that. When Applicant 1 was asked why he chose to help these Tamil men hiring his [vehicle], he stated that he was a Tamil speaking [driver] and 'took hire from everybody'.
16. The delegated asked about Applicant 1 of his written statement in the visa application that he provided assistance to prominent LTTE members trying to flee through Colombo. Applicant 1 replied that he did not know whether they were prominent LTTE figures or not but tried to save their lives. When the delegate asked Applicant 1 again if he were merely a [driver] doing normal [work] or if he was providing assistance to LTTE specifically, he replied that he usually took hire as he had to earn money and that he could not tell if they were LTTE members or not. The delegate again sought confirmation from Applicant 1 about his statement in the visa application that he was providing assistance from 2006 to LTTE members fleeing the country. Applicant 1 asked the delegate to repeat the question and then replied that when these Tamils came from villages, they looked like strangers with beards and long hair. He would drive them to salons to get them cleaned up and took them to 'the office' to get documents. When Applicant 1 was asked how he came across these people, he stated that when he first met one person, the person would call him and told him that his friends were coming and asked him to look after them safely and to help them to flee the country. These people would then call him directly. Applicant 1 also told the delegate that while he was not a LTTE member he was a supporter before the break.
17. The delegate put to Applicant 1 that his claims had evolved over time and that he appeared to have had embellished them. The delegate also put to the applicant that in his entry interview he had said that he did not have involvement in any political groups, and that his claimed assistance to LTTE members fleeing Sri Lanka appeared to be incidental support and not planned. He was given a break to discuss with his migration agent about the concerns raised by the delegate.
18. After the break, Applicant 1 stated that he had not been truthful about his claims and he had not fully disclosed his involvement with the LTTE and he only told '40% of the information'. He said that he was too afraid to tell the truth to his family and he did not tell his migration agent either. He claimed that he was in fact involved in the deliberate organisation, transport and accommodation of LTTE members attempting to flee Sri Lanka from 2006. He also stated that LTTE members were specifically sent to him for assistance. It was agreed that Applicant 1 would provide a written statement detailing his involvement with the LTTE within seven days. The migration agent later sought extension of time and a further seven days extension was granted.
19. In the post interview statement, Applicant 1 stated that he had always been a supporter of the LTTE and officially started working for the LTTE to transport members sometime from 2005 to 2009. He was a paid silent member. He used to get instructions from the LTTE and provided paid assistance to over 50 LTTE members fleeing Sri Lanka and at least ten of those

were high ranking LTTE members. He provided higher ranking members bed and board. With respect to the claimed incident in August 2009, he stated that he was under instruction to pick up these two Tamil young males. He did not disclose this information earlier because he was lectured by the smugglers in [Country 1] and [Country 2] not to tell the UNHCR or the Australian authorities of his association with the LTTE and he was afraid of being considered as a terrorist and sent back to Sri Lanka.

20. I do not find Applicant 1's explanation that he did not tell the truth of his involvement with the LTTE compelling or convincing. Applicant 1 and his family were in [Country 1] for several years before they came to Australia. They had registered with the UNHCR claiming refugee status in [Country 1] and engaged in the appeal process with the UNHCR. Applicant 1 was also put on notice at the beginning of his entry interview that the entry interview was his opportunity to provide any reasons why he should not be removed from Australia and that he was expected to give true and correct answers to the questions asked, and if the information he gave at any future interview was different from what he told at the entry interview, it could raise doubts about the reliability of what he stated. Applicant 1 had already stated in the visa application that he did not mention the full story in the entry interview because of the warning from the smuggler, and he had claimed in the visa application that he provided assistance to prominent LTTE members trying to flee through Colombo. This suggests that Applicant 1 was no longer fearful in disclosing his LTTE involvement at the time of the visa application. Yet he claimed the same after the natural justice break towards the end of the SHEV interview and in the post interview statement. Applicant 1 was assisted by a registered migration agent with his protection visa application. His protection visa application was lodged in September 2017 after he was firstly invited to apply a year earlier. He was also on notice to tell the truth at the SHEV interview. I do not accept at the time of the SHEV interview Applicant 1 was afraid to disclose his active LTTE Involvement. Applicant 1's evidence before the break at the SHEV interview was clear that he did not know the Tamils who hired his [services] were members of the LTTE but he only suspected they might be because the way they looked. He also stated that they showed hands and stopped him, rather than them being an organised pick up. The delegate also had to prompt Applicant 1 by reading out what he stated in the visa application as to his claimed assistances to the LTTE and prominent LTTE members. I consider that had Applicant 1 have the level of involvement with the LTTE he now claims, he would not have repeatedly told the delegate that he only suspected the Tamils he provided with [services] were members of the LTTE at the SHEV interview. I am not convinced that Applicant 1 was telling the 'truth' at the end of the SHEV interview and in the post interview statement, after concerns were put to him by the delegate. The applicant's inability in providing spontaneous evidence about his LTTE involvement at the SHEV interview (before the natural justice break) in responding to the delegate's questioning, strongly suggest that his later evidence about his active involvement in the LTTE was not his personal experience.
21. Applicant 1 also stated in the SHEV interview that villagers in his community informed the authorities that many Tamils resided at his home after he left Sri Lanka. Country information indicates that registration of Tamils coming from the north and east to Colombo began in 2006 under the emergency regulations and that lodges in Colombo, especially those owned by Tamils, had to provide the names of inhabitants to the police. Country information referred to above also indicates that security forces were deliberately targeting Tamils with searches and detentions and Tamils were indiscriminately arrested in Colombo under emergency regulations. The country information indicates that LTTE members hiding among the Colombo population were deemed responsible for a serious of bombings and that Tamils

in Colombo were targeted by increasingly heavy security.³ In this environment, I am not convinced that Applicant 1 would have provided bed and board to LTTE members in his home without these people being registered and then transported these people in his [vehicle] around Colombo before or after the conflict.

22. Applicant 1's evidence of his alleged escape on the night when officers came to his house was also inconsistent and not convincing. According to his statement in the visa application, after he went to bed, around 1am the next morning, a white van arrived at the front of his house. He watched six people got out of the van and was able to recognise two of the men who stopped him earlier in the day. He was then able to flee from the back yard before the men reached the front door. Somewhat differently he stated at the SHEV interview, he was able to run away because his house was on the road so he could hear the car was coming.
23. I am not satisfied that Applicant 3's evidence is helpful in support of Applicant 1's involvement in the LTTE or Applicant 1's encounters with authorities in August 2009. Although Applicant 3 claimed that his parents provided shelter and transport to the LTTE members in Colombo from 206-2009, his evidence was overall vague and he told the delegate that did not know much about his parents' activities and only suspected those people who stayed at his home were LTTE members. Applicant 3's accounts as to his father's alleged encounters with the authorities in August 2009, as set out below, were also changing over time and not consistent with Applicant 1's evidence.
24. Applicant 1 claimed that he went into hiding after he escaped. According to his visa application, he had money and identification with him. He firstly went to his aunt's house about a half a kilometre away from his house and he then went to an estate about 80kms away and stayed there for two days. He then returned to Colombo when he thought things had settled down and stayed at his uncle's house in [suburb] for about 10 days while making arrangement for [Country 1]. Applicant 1 told the delegate that he registered his marriage after the alleged incident. His marriage certificate indicates that he married his wife [in] August 2009 before a marriage Registrar in the same district in [location], where his home was located, having two witnesses from the same area. Applicant 1 did not leave Sri Lanka until September 2009. He also left Sri Lanka on his own genuine passport through Colombo airport. Although he claims that he paid a bribe, I do not accept this was the case for the reasons explained below.
25. Country information indicates there were many checkpoints before the war in Colombo. Sources also indicates that shortly after the war in 2009, 'there were still as many checkpoint/road blocks as before, if not more', and there was still heavy military and police presence and all persons in Colombo were subject to checking, whether they were on foot, in public transport or in a vehicle. The procedures at the checkpoints were mainly about verification of identity documents and checking on personal belongings and cars. They also believed people were asked about their place of origin and place of residence. Tamils were more targeted for checking. Tamils from the north and east were asked for their police registration certificate in addition to the National Identity Card.⁴
26. Applicant 1 stated that he registered his marriage in a house and not in a government office. I accept this might be the case. However, I have serious doubt that Applicant 1 would have stayed in Colombo in [Suburb] where he was born and used to live, having registered his

³ Immigration and Refugee Board of Canada, "Sri Lanka: Treatment of Tamils in Colombo by members of the Sri Lankan security forces and police", 9 February 2012, LKA103960.E

⁴ UK Foreign and Commonwealth Office, "Report of Information Gathering Visit to Colombo, Sri Lanka 23-29 August 2009", August 2009, CIS17964

marriage in the same neighbourhood where his family home is located, also travelling through Colombo between [Suburb] and [location] and also to the airport, if he were wanted by the authorities, given the security checks in place during that time.

27. Applicant 1 claims that he faced problems at the airport and that he had to pay a bribe. He stated in the visa application that had to pay a bribe to two customs officers to pass through without any problems. At the SHEV interview, he stated that, at Customs, one officer asked to check his passport and ticket. He was asked to follow the officer to a toilet, where he gave the officer [amount] and after that he was let through. I am not satisfied Applicant 1's evidence is credible. His evidence that he was directed to go to a toilet by a Customs officer who was on duty and then took a bribe from him at the SHEV interview is not consistent with his statement in the visa application that he paid a bribe to two customs officers. I am also not convinced, were Applicant 1 wanted by the authorities as claimed, he would have taken the risk walking into the airport without making pre-arrangement for safe passage through the airport. In considering the other concerns as raised above, I am not satisfied that Applicant 1 was allowed to exit Sri Lanka after paying a bribe.
28. Applicant 1 claimed that he was always a supporter of the LTTE movement. He was asked at the SHEV interview about his involvement with the Tamil community or the LTTE. Applicant 1 stated that he fully supported to 'save life' but he did not 'support any destructive activities'. He also stated in the post interview statement that he believes that 'the LTTE will rise again and fight for equality for the Tamil people'. I accept that Applicant 1 might have felt sympathetic to the LTTE cause. However, Applicant 1 was and has not been political active. I am not satisfied that Applicant 1 holds actual political opinion in this regard.
29. Overall, I am not satisfied that Applicant 1 has provided a truthful and reliable account of his past experience in Sri Lanka. I am willing to accept that Applicant 1, as a [driver], provided [services] to a range of customers, including Tamils or young Tamils from the north and east and some of them might be associated with the LTTE. I am willing to accept that Applicant 1 may at times have suspected that some of his customers were members of the LTTE. I am also willing to accept that Applicant 1 provided bed and board to some of his customers from his home at times. However, I am not satisfied that Applicant 1 was a member of the LTTE and had been engaged in providing assistances to LTTE members under the instructions from the LTTE or that he otherwise worked for the LTTE.
30. With respect to the claimed incident in August 2009, while it is possible that Applicant 1 was hired by two Tamil male passengers, I am not satisfied he was interrogated and assaulted on the day soon after he dropped them off to their destination. I am not satisfied that one of the men warned him. I also do not accept that the authorities came to his home looking for him and that he escaped and went to hiding the following morning. It follows that I do not accept that authorities continued visiting his home, harassing and threatening his wife and son after he left Sri Lanka (his claim that the authorities took further interest in him after he was interviewed by officials from the Sri Lankan High Commission is dealt with below).
31. I am willing to accept that Applicant 1 may have felt sympathetic to the LTTE as a Tamil himself who had experienced some undue harassment in the past because of his ethnicity. I am not satisfied that Applicant 1 has otherwise supported the LTTE. I am not satisfied that the Sri Lankan authorities would now perceive Applicant 1 as a member or supporter of the LTTE. I am not satisfied that Applicant 1 has any actual or perceived link to the LTTE.

Applicant 1 - [Country 1]

32. Applicant 1 claimed that he was arrested and detained by the [Country 1] authorities in [Country 1] for approximately four months for trying to leave unlawfully and come to Australia. While in detention, he and other detainees were forced into an interview as a group with the officials from the Sri Lankan High Commission, who told them to return to Sri Lanka and that they would be pardoned. Applicant 1 stated that he was told by a [Country 1] security guard working at the detention centre that these officials from the Sri Lankan High Commission had cameras on their pens and were going to photograph the detainees. Applicant 1 stated that after this, the detainees were released due to the protests from a refugee advocate. Both Applicant 1 and Applicant 3 claimed that the release of Applicant 1 and other detainees in [Country 1] was widely publicised in Sri Lanka and following this, things for Applicant 3 and Applicant 2 in Sri Lanka worsened and to the point that Applicant 2 and Applicant 3 had to leave Sri Lanka in May 2011.
33. Applicant 1 stated that he did not have evidence to prove the wide publicity in Sri Lanka. I note at Applicant 3's SHEV interview which took place on the same day following Applicant 1's interview, Applicant 3 showed the delegate a copy of a [Country 1] newspaper article of a group of detainees in [Country 1] and their migration agent stated the one of the men in the photo was Applicant 1. The migration agent also acknowledged that the photo of the detainees was unclear and the article was not translated as it was illegible and that they had tried to get a better copy from the newspaper in [Country 1]. It does not appear this copy of the article was submitted at Applicant 3's interview or another copy with translation was provided after the interview. I give this article no weight.
34. Applicant 1 claimed in the visa application that detainees were fingerprinted, photographed and interrogated by officials against their will. His evidence at the SHEV interview does not suggest that he was fingerprinted or interrogated. I am willing to accept that Applicant 1 was interviewed as a group by Sri Lankan Consular officials while he was detained in [Country 1] and was encouraged to return to Sri Lanka in 2010. I am also willing to accept that authorities in Sri Lanka might also be aware of his detention in [Country 1]. However, I do not accept that Applicant 1 was forcibly fingerprinted, photographed and interrogated by the Sri Lanka Consular officials, noting his evidence at the SHEV interview was that it was a group interview and they could avoid being seen their faces. I am willing to accept that the release of the detainees because of the work of the [Country 1] refugee advocate was publicised in [Country 1] media, however I am not satisfied this was widely publicised in Sri Lanka. Given my above findings that Applicant 1 was not of ongoing adverse interest from the Sri Lanka authorities and was not sought out before or after Applicant 1 departed Sri Lanka, I am not satisfied that authorities in Sri Lanka took interest in Applicant 1's wife and Applicant 3 in Sri Lanka following the group interview or the media reports of detainees in [Country 1].

Applicant 3

35. Applicant 3 claims to have experienced harm in the past and fears harm in the future because of his father, Applicant 1's actual and imputed LTTE link and profile.
36. Applicant 3 stated in the visa application in vague terms that from 2006-2009, his parents provided shelter and transport to the LTTE members in Colombo. The authorities were suspicious of his father because he was a Tamil speaking [driver] and his father was stopped on a few occasions during police monitoring operations and sometimes was held overnight. During the SHEV interview, Applicant 3 stated that he was a young man at the time and did not know much about his parents' activities. He stated that his father and mother were paid

to provide food and temporary accommodation to LTTE members from the north fleeing Sri Lanka. He stated that his father brought boys and girls from a lodge (apartments in Colombo where he believed LTTE members rented room there) to their home. These people would stay at his house for a day or so. Applicant 3 stated that he suspected by the way they spoke and look that they were LTTE members from the north. He remembered approximately 9-10 people staying at his home over a period of three to four years. He stated that people came and went and that his family did not face any problems with anyone for the majority of the time from 2006-2009 apart from the incident in 2009 when his father took hire from two people.

37. Applicant 3's evidence about his father's LTTE involvement was overall vague and lacked convincing detail. While Applicant 3 might have limited first-handed information as to the extent of his father's claimed LTTE involvement, I also find that Applicant 3 has not been consistent in his evidence as to the claimed incident he appeared to have witnessed personally. For example, when describing the claimed incident in August 2009 which prompted his father's departure of Sri Lanka, Applicant 3 stated in the visa application that his father came home bleeding one day and told them that CID had interrogated him about two Tamil men. During the early hours of the following morning, he heard men came into the house and searched for his father (his father escaped that time). He did not suggest that his father was taken from their home. However, at the SHEV interview, Applicant 3 stated, when his father stayed at home, men in civil uniforms who he suspected were from the CID came into his house. They interrogated his father about the two Tamil men. His father was taken by them and he came home after four to five hours. These are quite differing accounts.
38. Applicant 3 also stated at the SHEV interview that after his father left he was threatened that he would be arrested if his father did not turn up. He claimed he was threatened and interrogated at least three times while he was still living in their house. He also stated that after about ten days, he moved to [central] Sri Lanka, which was about [specific] away from Colombo, and that he often moved around and stayed at different places for a period of 18 months to avoid the authorities. However, in the visa application, the applicant also stated that he was working [in] Colombo from 2005 until May 2011.
39. I do not accept that Applicant 3 went to Central Sri Lanka or moved around to avoid the authorities if he continued to work [in] Colombo. I am not satisfied that Applicant 3 came to the adverse interest of the Sri Lankan authorities at any time after his father left Sri Lanka and before he left Sri Lanka. I do not accept he had to pay a bribe in order to leave the airport.
40. I am willing to accept that like his father, Applicant 3 may have felt sympathetic to the LTTE. I am however not satisfied that Applicant 3 has otherwise supported the LTTE. I am not satisfied that the Sri Lankan authorities would perceived Applicant 3 as a member or supporter of the LTTE. I am not satisfied that Applicant 3 has any actual or perceived links to the LTTE.
41. I am not satisfied that Applicant 1 came to the adverse interest of the authorities since the end of conflict. I am not satisfied that Applicant 3 or Applicant 2 was harassed or threatened. It follows that I am also not satisfied that their house was being destroyed subsequently. I am not satisfied either of the applicants were of adverse interest to the Sri Lankan authorities when they left Sri Lanka, or during years they have spent abroad.

Refugee assessment

42. 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

43. 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.
44. Sri Lanka had a population of 21.2 million in 2017. Approximately 29 per cent of the population lives in the Western Province where Sri Lanka’s commercial capital, Colombo, and official capital, Sri Jayawardenapura Kotte (a suburb of Colombo), are located. Five per cent of Sri Lankans live in the Northern Province, and 7.6 per cent in the Eastern Province. Sri Lanka’s most recent census in 2012 estimated that 74.9 per cent of the population was ethnic Sinhalese, 15.4 per cent was Tamil, 9.2 per cent was Muslim or Moors, and 0.5 per cent were ‘others’. Sinhalese and Tamil are the two official languages, with Tamil used mostly in the north and east. English is widely spoken.⁵
45. The long civil conflict between the Sri Lankan military and the LTTE from 1983 to May 2009 displaced hundreds of thousands of people and killed tens of thousands of people on both sides. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict, and security forces also imputed LTTE support based on ethnicity, and emergency regulations were, at times, applied in a discriminatory manner. During the conflict, the authorities detained more Tamils under the Prevention of Terrorism Act (PTA) than any other ethnic group.⁶ However, country situation has significantly improved since the end of the war, especially since 2015 under the current government. Country information discussed below no longer supports a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion to Tamil males or young Tamil males.

⁵ DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064

⁶ Ibid.

46. While the Sri Lanka authorities remain sensitive to the potential re-emergence of the LTTE throughout the country and surveillance of Tamils in the north and east continues, particularly of those associated with politically sensitive issues, the government no longer restricts travel to the north and east. The country information before me does not suggest there is continuing surveillance of Tamils in western Sri Lanka. The government removed military checkpoints on major roads in 2015. Military involvement in civilian life has diminished, although military involvement in some civilian activities continues in the north. Overall the monitoring of Tamils in day-to-day life has decreased significantly under the current government. Some members of the Tamil community reported they felt more empowered to question monitoring activities. Tamils also have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance.⁷ The government also had a variety of ministries and presidentially appointed bodies designed to address the social and development needs of the Tamil minority. The government has implemented a number of confidence-building measures to address grievances of the Tamil community.⁸
47. The UK Home Office in its 2017 report also states the government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state and it is persons who are perceived to be a threat to the state through having or being perceived to have a significant role in relation to post-conflict Tamil separatism would be of adverse interest to the authorities. I am not satisfied any of the applicants is such a person. The UK Home Office also opines that in its opinion, being of Tamil ethnicity would not itself warrant international protection, neither, in general, would a person who evidences past membership or connection to the LTTE.⁹
48. It is also reported that human rights issues remain a significant concern in Sri Lanka and security forces continued after the war to harass some civilians and Tamils with impunity and resort to violence and excessive force to extract confessions. DFAT, after having considered the reports on torture from other sources, including the International Truth and Justice Project (ITJP)'s 2017 report, assesses that the risk of torture perpetrated by security forces has decreased since the end of the civil conflict and is no longer state-sponsored. The US Department of State in its 2018 report also acknowledges that the government has taken steps to investigate, prosecute, and punish some officials who committed human rights abuses. The government made limited progress toward establishing additional transitional justice mechanisms. The government had a variety of ministries and presidentially appointed bodies designed to address the social and development needs of the Tamil minority. The government has implemented a number of confidence-building measures to address grievances of the Tamil community. The UN special Rapporteur Ben Emmerson in his 2018 report, while remaining concerned about the implementation of PTA, also noted some positive movement from the government. DFAT reported that since 2015, the government has released some detainees, mostly Tamils, and that PTA has not been used since 2017, except in two cases with special approvals from the Attorney General against suspects in the alleged assassination plots against a TNA Member of Parliament and against the President Sirisena and former Defence Secretary G Rajapaksa. DFAT also reported that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, has significantly reduced since the end of the conflict. DFAT understands that disappearances are no longer

⁷ Ibid.

⁸ US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333

⁹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

common. In respect of the recent events occurred towards the end of 2018 surrounding the sacking of Prime Minister Wickremesinghe and appointing Rajapaksa as Prime Minister, President Sirisena had agreed to uphold Sri Lankan Court of Appeal's decision to suspend Rajapaksa. Wickremesinghe is quoted to have stated that the court verdict demonstrated a triumph for democracy in Sri Lanka. The information before me overall suggests that while it has not been removed, the risk of torture faced by the majority of Sri Lankans including Tamils in general is remote unless arrested, detained or interrogated by the authorities for criminal or mostly terrorism related offences. The information also indicates that the risk of detention faced by Sri Lankans or Tamils generally under the PTA is small.¹⁰

49. DFAT has also assessed that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. It notes that members of the Tamil community reported discrimination in employment, particularly in relation to government jobs, but assesses that limited Tamil appointments are a result of other factors including education level and language constraints not official discrimination.¹¹
50. The applicants' submission to the delegate, argues that that the DFAT, as an Australian government agency, is not independent, which impacts on the accuracy of its reports. I note that DFAT states that its assessment of the country situation 'is distinct from Australian Government policy with respect to Sri Lanka'. DFAT Report also takes into account a range of relevant and credible open source reports, including those from various human rights groups¹². I also give little weight to a number of decisions of the Refugee Review Tribunal and the Administrative Appeals Tribunal referred to in the submission, given the particular circumstances of those individuals who were subject to these decisions.
51. I accept the applicants are Tamils from Colombo, Western Sri Lanka. I accept they are Christian, though they made no claim of fearing harm based on their Christianity. Although I accept Applicant 1 was arrested and detained overnight on three occasions during the war in the course of his [work] because of his Tamil ethnicity, I am not satisfied that Applicant 1 was of any ongoing adverse interest to the Sri Lankan authorities after the war or was sought out by the authorities while he was in Sri Lanka. I am not satisfied that Applicant 1 was an actual supporter or a member of the LTTE, beyond being sympathetic to the LTTE cause. I accept that Tamils during the conflict were perceived to have supported the LTTE.¹³ I accept that Applicant 1 in the course of his normal business as a [driver] provided [services] or bed and board services to a range of customers, possibly including members of the LTTE. Given he had no actual knowledge of these customers' background and that he 'took hire from everybody', I am not satisfied that he would now be perceived as someone who was a supporter of the LTTE, as having involved in transporting or sheltering LTTE personnel. I am not satisfied that

¹⁰ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", January 2016, CIS38A801275; ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; Freedom from Torture, "Sri Lanka – Update on torture since 2009", May 2016, CIS38A8012881; Office of the High Commissioner for Human Rights, "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka", 23 July 2018 CIS7B839411830; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; DFTA, "Country Information Request C181005093018339 – Current status of PTA in Sri Lanka", November 2018, CXBB8A1DA37923; US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333; Aljazeera, "Sirisena, Jayasuriya fail to break Sri Lanka deadlock", 1 November 2018, CXBB8A1DA37720; The Island, "President agrees to uphold court decision to suspend PM Rajapaksa – Sampanthan", 4 December 2018, CXBB8A1DA39821

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

Applicant 1's experiences in [Country 1] had brought him or his family members to the adverse attention of the Sri Lankan authorities. I am not satisfied that Applicant 1 holds pro LTTE or anti-government political opinion, or would be perceived as holding one. I accept that Applicant 1 may wish to continue to work as a [driver] in future. The country information before me does not support that Tamil [drivers] are at any particular risk of harm. I am not satisfied that the other applicants came to the adverse interest to the authorities or were wanted by the authorities.

52. Having considered the information discussed above, I am not satisfied that, if applicants were to return to Sri Lanka now or in the reasonably foreseeable future, there is a real chance they would come to the adverse attention of the Sri Lankan authorities or anyone because of Applicant 1's past experiences and their Tamil ethnicity or they have felt sympathetic to the LTTE.
53. The applicants were in [Country 1] for several years and had applied for protection through UNHCR in [Country 1]. Applicant 1 was also interviewed as a group by Sri Lankan Consular officers in [Country 1]. They have been in Australia since 2013. I accept they would likely be identified as returning asylum seekers upon returning to Sri Lanka. The Sri Lanka government has publicly encouraged all Sri Lankans living overseas to return or invest in the Sri Lankan economy, though human rights groups greeted this with scepticism. DFAT assesses Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their risk profile. DFAT reported that over 2400 Sri Lankan nationals departed Australia for Sri Lanka between 2008 and 2017, and the figures also show that over 1500 asylum seekers were returned from Australia between 2008 and 2015, indicating there have been a larger number of returnees from Australia in recent years between 2016 and 2017. Many others also returned from the US, Canada, the UK and other European countries. Most returnees are Tamil.¹⁴
54. Although a number of reports and articles as referred to in the submission and in the delegate's decision (including the reports from the ITJP and the Freedom from Torture) have reported that returning failed asylum seekers were subject to mistreatment in the past, the weight of the country information indicates that the reasons for the mistreatment was likely due to the victim's actual or suspected links to the LTTE. There is lack of recent reports to support the claim that Tamil returnees who have sought asylum abroad and have lived abroad for some time are imputed with anti-government or pro LTTE opinion or suspected of having involvement in LTTE or pro separatism activities or face a real chance of being of adverse interest to the authorities for this reason.
55. The DFAT report states while the government has reportedly decreased systematic surveillance of returnees, it is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017.¹⁵ The applicants in this case are from Colombo, and the country information does not indicate surveillance of Tamil returnees or asylum seekers in this area. Applicants 2 and 3 do not have a history of adverse interest with the Sri Lankan authorities and I am not satisfied Applicant 1 was of adverse interest to the authorities after the cessation of the war in 2009.
56. DFAT notes that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka and refugees and failed asylum seekers reported social stigma from their communities and in some communities, people resent the financial support provided to

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED850AD105

¹⁵ Ibid.

refugee returnees. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face.¹⁶ I accept that the applicants will need to re-establish themselves in Sri Lanka given their long absence. Both Applicant 1 and Applicant 3 were working in Sri Lanka. Applicant 1 also worked in [Country 1]. Applicant 1's daughter's family and other extended relatives are living in Colombo. While his house in Colombo is no longer in good condition, it is being looked after by his relatives, with his wife's mother living next door. On the evidence before me, I am not satisfied that any such treatment the applicants may face, including possible stigma and the practical challenges associated with re-establishment, would amount to serious harm.

57. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). Returnees are subject to identity checks at the airport. Different agencies, including the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times, the Terrorism Investigation Department, process returnees, including those on charter flights from Australia. These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. DFAT understands detainees are not subject to mistreatment during processing at the airport.¹⁷
58. Applicant 1 was previously arrested and detained and maybe photographed or fingerprinted in the past. I accept that the authorities may also be aware of their seeking asylum in [Country 1] and Australia. However, I find that Applicant 1 is not of ongoing adverse interest to the authorities, neither is Applicant 2 or Applicant 3 of adverse interest to the authorities. The evidence before me does not support that they would now be viewed adversely if they were to return to Sri Lanka. The applicants departed Sri Lanka lawfully, as such, they would not face charges under the I&E Act. I am not satisfied there is a real chance the applicants would be subject to mistreatment during the process at the airport.
59. I am not satisfied that the applicants, in their circumstances, would face a real chance of serious harm due to being a returning asylum seeker from Australia. I am not satisfied the applicants face a real chance of persecution if they were to return to Sri Lanka now or in the reasonably foreseeable future.

Refugee: conclusion

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

Complementary protection assessment

61. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

¹⁶ Ibid.

¹⁷ Ibid.

Real risk of significant harm

62. 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.
63. I accept that the applicants may face some practical challenge upon resettling or social stigma as returning asylum seekers. I am not satisfied however that such treatment reaches the relevant thresholds so as to amount to significant harm. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied that it amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purpose of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on these bases.
64. I have otherwise found there is a not real chance the applicants would face any harm. As real chance and real risk involve the same threshold, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Sri Lanka, there is a real risk that the applicants will suffer harm, including significant harm.

Complementary protection: conclusion

65. 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 applicants do not meet s.36(2)(aa).

Member of same family unit

66. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1).
67. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows all the applicants do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:
 - (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
- the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - 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
 - 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:

- conflict with a characteristic that is fundamental to the person's identity or conscience; or
- conceal an innate or immutable characteristic of the person; or
- without limiting paragraph (a) or (b), require the person to do any of the following:
 - 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;
 - conceal his or her true race, ethnicity, nationality or country of origin;
 - alter his or her political beliefs or conceal his or her true political beliefs;
 - conceal a physical, psychological or intellectual disability;
 - enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - 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):

- that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
- the persecution must involve serious harm to the person; and
- 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 threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist;
- denial of access to basic services, where the denial threatens the person's capacity to subsist;
- 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.