



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06515

Date and time of decision: 3 May 2019 15:33:00  
F Kerr, 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 Hindu Tamil from Sri Lanka. He arrived in Australia [in] November 2011. On 7 March 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 27 March 2019 a delegate of the Minister (the delegate) refused to grant the visa.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 15 April 2019, the applicant provided information to the IAA in the form of a written submission and supporting documents. The submission sets out a number of reasons why the applicant disagrees with the Department's decision, takes issue with the delegate's reasoning and reiterates some of the applicant's evidence and claims. To that extent, I do not consider it to be new information.
4. The documents provided are a letter from the parish priest at [a church], [Town 1], Batticaloa and two letters and identity cards relating to the applicant's [siblings] who he states have been found to be refugees in [Country 1]. The applicant explained that he did not provide the documents previously because he wasn't asked for them and didn't understand that they might be relevant to his case.
5. In regard to the letter from the parish priest at [a church], the letter is dated 20 August 2013 and predates the delegate's decision by a number of years. The letter is in the nature of a personal recommendation and to that extent, I accept that it contains information personal to the applicant. The letter also confirms that the applicant was not able to go ahead with his [business]: "[D]ue to the war and conflict situation in the country during 2009-2012". Beyond this, the letter does not corroborate the applicant's specific claims regarding being kidnapped and extorted, or the identity of the group which he claims was responsible for his decision to shut down his business. I have accepted the applicant's claims about why he decided not to continue with his business and I do not consider the letter from the parish priest usefully adds to the material which I have before me. I am not satisfied that exceptional circumstances exist which would justify considering the letter from the parish priest at [a church].
6. I have decided not to accept the documents relating to the applicant's [siblings] who he says have been found to be refugees in [Country 1]. The two letters (one dated 19 December 2017 and the other which appears to be undated) and the identification cards for his [siblings] are in [another language]. Notwithstanding the applicant's stating in the covering email/submission that he will email English translations of the evidence as soon as possible, as at the date of this decision no translations have been provided and I am unable to understand the contents of the letters. I am willing to accept that his [siblings] have refugee status in [Country 1]; that much is apparent from the identification cards provided. However, beyond the statement in his SHEV interview that they obtained a visa in [Country 1] because of his problems, there is no information before me regarding the circumstances in which they were granted refugee status in [Country 1] and its relevance to the applicant's circumstances. Each decision under the Act turns on its own facts and I consider the fact that his siblings have refugee status in [Country 1] has no material bearing on my decision which must be made by taking into consideration the

referred material and other evidence before me and assessing that against the criteria in the Act.

7. The applicant states in his submission that he trusts he will be given the opportunity to attend an interview with the IAA before a decision is made if any concern arises regarding his application. Except in some limited circumstances set out in in the Act, the IAA must conduct its review without accepting or requesting new information or interviewing the applicant. While the IAA has a discretion to get any information not before the Minister which it considers relevant, it does not have a duty to get, request or accept new information: s.473DC(2). Like the delegate, I have largely accepted the applicant's claims and I have decided in the circumstances of this case not to invite the applicant to an interview.

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

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8. The applicant's claims can be summarised as follows:
  - He grew up in [Town 2], Batticaloa. The Sri Lankan Army (SLA) controlled the area and caused lots of problems to Tamil people. On one occasion when he was in Year [grade], he and another three Tamil students were beaten by SLA personnel while waiting for a bus to go to school.
  - His father owned a [business]. The SLA regularly came into his store, interrogated and beat him. On one occasion, around 2000, the Liberation Tigers of Tamil Eelam (LTTE) came into his shop and told him he would have to make [products] for them. The LTTE took him away for two weeks at a time approximately a year prior to his death. The stress he was under was too much and he died of a [a medical condition].
  - He was fit and heavily involved in sports. The LTTE regularly attempted to recruit him to work with them. He said no but they kept sending letters to his house to try to recruit him.
  - He was scared of what the LTTE would do if he continued to decline to join them. He left school after year [grade]. His family sent him for safety to his [brother] in Colombo where his brother worked in a [shop].
  - In around 2009/2010 he opened a [store] in [Village 1] as he had trained [in this occupation]. Around late February 2011, he received a threatening letter, demanding money and that if he did not pay there was no guarantee for his life.
  - He believes he was being targeted by the Tamil Makkal Viduthalai Pulikal (TMVP) because he owned a [shop] and they assumed he had money. He didn't take the letter seriously and did not pay the money demanded.
  - [In] February 2011 he was kidnapped. Two or three people came into his shop at closing time, put guns to his head and forced him into a white van. They told him to give them his brother, K's, contact details in order to pay the [amount] ransom. They said they would not release him until the money was paid.
  - After two days, he was released after his brother paid the ransom.
  - Around May 2012, he received two or three threatening phone calls demanding more money and he told the caller he had already paid money. He was scared for his safety and thought he'd be killed if he stayed. He decided to close the shop.
  - He never reported the incidents to the police, as his friends and family warned if he did so he would be in more danger, as the police were supporters of the TMVP.

- He feared for his life and decided to leave. He went to [City 2] and then travelled to Colombo and stayed with K for four months. He kept a low profile in Colombo and stayed in the house as he was afraid the TMVP or the authorities would find him and harm him after their threatening letters and phone calls. He decided he could not stay in Sri Lanka and departed Sri Lanka to travel to Australia.
- The TMVP came to his mother's house after he left and when she told them that he was in Australia, they told her that he would face serious trouble if he returned to Sri Lanka.
- The TMVP is still active and influential in Sri Lanka, and he will not be protected by the authorities because they have strong ties to the TMVP.
- He heard on the news that failed asylum seekers have suffered serious harassment from the authorities in Sri Lanka, and they have been beaten.
- Due to his father's LTTE affiliations, he will be captured and tortured if he returns.

### **Refugee assessment**

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9. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Well-founded fear of persecution**

10. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

### *Applicant's background and history/LTTE involvement*

11. In support of his identity the applicant provided a number of untranslated documents with his SHEV application. Subsequently, he provided a translation of the copy of his birth certificate which is consistent with his claimed identity. He and the delegate discussed in his SHEV interview some spelling variations in the way his name is written. I accept, as did the delegate, that these are attributable to transliteration variations. I accept the applicant's identity as claimed. I find that Sri Lanka is the receiving country.

12. Overall, I accept the applicant's evidence regarding his family background and early life in Sri Lanka. I note some anomalies in the information he has provided over the course of the protection visa process. For example, on his SHEV application form he indicated he did not study after 1999 whereas in the written statement submitted with his SHEV application he states that he discontinued studying when he was in year [grade] which would be around 2001. His address history is similarly unclear. His SHEV application form indicates he lived in his home [Village 1], Batticaloa district from birth ([year]) to sometime in 2002 when he went to live in [Town 3] for around two years. There is no indication he went to live in Colombo after year [grade] as he claimed in the written statement submitted with his SHEV application he did, until much later in 2012.
13. I do not consider that anything much turns on these anomalies except to the extent that he claimed that he decided to stop attending school after year [grade] because the LTTE was continually asking him to join and to avoid them, he went to live with his brother in Colombo. In his SHEV interview he was asked whether he had ever had any contact with the LTTE. He said he personally hadn't and that the only person who had contact with the LTTE was his father. In view of the inconsistencies and anomalies in his evidence I do not accept that the applicant was approached by the LTTE a number of times to join them, that they sent letters to his house to recruit him, or that he decided to stop attending school after year [grade] and went to live in Colombo to avoid being recruited by the LTTE.
14. I accept it is plausible that in common with the vast majority of those who lived in LTTE controlled areas, in around 2000 his father was forced into working for the LTTE. The LTTE was in control of the area around Batticaloa at the time the applicant lived there<sup>1</sup> and the mostly Tamil civilian populations of the areas it controlled were required to interact with the LTTE as a matter of course.<sup>2</sup> Its operations were supported through both voluntary and forced recruitment<sup>3</sup> which I consider consistent with the applicant's evidence regarding his father being blackmailed into working for the LTTE to avoid his children being recruited.
15. However, nearly twenty years have passed since his father performed work for the LTTE over a period of around two years. The applicant does not claim his father's work for the LTTE was ever known to the authorities or that at any time between 2000 and his own departure from Sri Lanka, he or any other member of his family has been questioned, detained, monitored, or otherwise subject to any kind of action because of that work. I am willing to accept that when the applicant was growing up his father was beaten and interrogated on more than one occasion by the SLA in an effort to find out who was planting bombs. However, this appears to have occurred before his father was forced into working for the LTTE and the applicant does not claim that, before his death, his father or after his father's death, any other member of his family experienced any interest from the authorities because of that work. I find the fact that the applicant's father did some work for the LTTE over the period 2000 to 2002 was unknown to the authorities at that time. On that basis, I am satisfied that nearly twenty years later, there is no more than a remote chance that his father's brief affiliation with the LTTE would become known to the authorities.
16. But even if it did, I am not satisfied that the applicant is at risk of harm because of his father's work for the LTTE in 2000 to 2002. The Sri Lankan authorities have changed their focus in the years since the end of the civil war and, in particular, since the change of government in 2015.

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<sup>1</sup> UK Home Office "Country of Origin Information Report Sri Lanka" 11 November 2010, CIS1897

<sup>2</sup> Department of Foreign Affairs and Trade (DFAT) "DFAT Thematic Report People with Links to the Liberation Tigers of Tamil Eelam" 3 October 2014, CIS2F827D91260

<sup>3</sup> Ibid

Their focus now is on those persons 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 within the diaspora and/or a renewal of hostilities within Sri Lanka.<sup>4</sup> The applicant does not claim to have had any involvement in Tamil separatist activities in Australia or to have been involved in any activities in Australia or Sri Lanka that would fit this description. Further, even those with prior links to the LTTE are now able to return to their community without suffering ill-treatment<sup>5</sup> and for that reason, I am not satisfied that the applicant would be at risk of harm from the Sri Lankan authorities now or in the reasonably foreseeable future because of his father's affiliation to the LTTE between 2000 and 2002.

*Experiences with the TMVP/Tamil ethnicity and imputed political opinion generally*

17. The applicant has submitted a business registration document and a blank invoice/receipt evidencing his ownership of [a] shop. These documents support the applicant's claims in a general sense: that after training [in his occupation], he returned to Batticaloa and opened a [shop] in his home [Village 1] in approximately 2009/2010.
18. The delegate appears to have accepted the applicant's claims regarding the February 2011 letter, abduction, extortion/ransom demand, and release. Unfortunately, possibly because she accepted the claim, the applicant was not asked to provide oral evidence about these experiences. The few questions asked about the kidnapping incident related to the applicant's evidence that it was the TMVP who threatened and kidnapped him. The delegate put to him that in his entry interview he couldn't even get the name of the group right so he really didn't know who it was; it could have been any criminal gang.
19. The written record of his entry interview shows the group being referred to as the 'TMPP'. The delegate thought this indicated that the applicant didn't really know who it was who was behind the threat. I place no weight on the written record of his interview indicating the name of the group as TMPP. I have listened to the recording of that interview. The quality of the audio is poor but it is entirely possible there has been a mistake in transcribing what was said by the applicant or interpreter.
20. There is, however, one related matter of concern. The applicant has submitted a handwritten letter on the letterhead of the TMVP dated 20 February 2011 which appears to be the letter he refers to in his SHEV statement as preceding his kidnapping. No translation of that letter has been provided and I am unable to understand its contents. But it is unclear why the applicant would state in his entry interview that the group demanded money "without saying who it was" when he had the letter sent to him from the TMVP. This raises, in my mind, a question about the authenticity of the letter provided with his application, purportedly from the TMVP. This was not an issue raised with the applicant in his SHEV interview and for that reason, I do not place any weight on it.
21. In any case, there is ample credible evidence that after the war, the TMVP was active in the east (Batticaloa and [City 2]) and targeted business people to collect money, engaging in criminal activities such as threats, abductions and extortion to maintain its cadres.<sup>6</sup> Consistently with his evidence, sources told the Danish Immigration Service in 2010 that it

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<sup>4</sup> UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5, 15 June 2017, OG6E7028826

<sup>5</sup> *ibid*

<sup>6</sup> Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; 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;

would be very difficult to seek protection from the police because they “walk hand in hand” with the paramilitary groups.<sup>7</sup>

22. I consider this consistent with the claims in his SHEV application and overall, I find he has given consistent evidence about this claim since first interviewed. I accept the events of 2011 occurred as claimed and while I have some doubt, I am prepared to accept that it was the TMVP who kidnapped, threatened, detained and extorted money from his brother, K, to secure the applicant’s release. I also accept there were two or three threatening phone calls in around May 2012 in which the caller demanded money and that is it plausible that the TMVP were responsible for the calls. I accept that the applicant did not pay, was extremely concerned for his safety and this led to his decision to close the shop in [Village 1].
23. What the applicant did immediately after closing his shop is not entirely clear as he has given different versions over the course of the protection visa process of where he lived after he closed the shop in May 2012 including that he went straight to Colombo (entry interview), to [City 2] for around two months and then Colombo for four months (SHEV statement) or whether he continued to live in Batticaloa until leaving Sri Lanka in November 2012 or lived in Colombo from May 2012 until November 2012 (each of which was stated at different times in his SHEV interview). These inconsistencies were not matters explored with the applicant in his SHEV interview and he was not asked to explain the different versions of where he says he lived over that period.
24. There is some consistency in his evidence that he went to Colombo either immediately after closing the shop (May 2012) or shortly afterwards (around July 2012) and I am prepared to accept that he did. His evidence was that he went to Colombo because he was scared the TMVP or authorities would find and harm him as they had previously threatened. While I am prepared to accept that the applicant’s fears for his safety led to him to relocate to Colombo for up to six months, I do not accept that he lived in hiding out of fear of the authorities for the period he lived with his brother in Colombo. The applicant has not claimed and there is no credible information before me that, apart from when he was still at school, he had any adverse interactions with the authorities or that he was ever personally of interest to the authorities and I find he was not of adverse interest or suspicion to the authorities at that time and up to the time of his departure.
25. Given he states he went to Colombo to avoid the TMVP and country information that the TMVP operated in the eastern province of Sri Lanka and did not have the power to target people outside the east<sup>8</sup> I have some doubt as to whether he lived essentially in hiding from the TMVP but I am prepared to accept this is the case.
26. The applicant has not claimed that the motivation for his kidnap and extortion in 2011 or threatening phone calls in 2012 was other than financial gain. He told the delegate in his SHEV interview that his brothers who also work in [a] business had also been threatened but that the TMVP didn’t do anything to them and said it was because he was the only one who owned a [shop], he had a lot of money with him at that time and that’s the main reason he was targeted. He said that before he opened his own shop when he was just working for someone else, he didn’t have any problems. I find that that the applicant was targeted by the TMVP purely for financial gain, that he was perceived as an easy target, and that the kidnap, extortion, and threats for more money were opportunistic and criminally motivated.

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<sup>7</sup> Danish Immigration Service “Human Rights and Security Issues concerning Tamils in Sri Lanka”, 71, 1 October 2010, CIS19345

<sup>8</sup> Ibid

27. The applicant claimed in his SHEV statement that he had spoken to his family since coming to Australia and they told him the TMVP came to his mother's home, asked after his whereabouts and told her that when he returns he is going to face serious trouble. He has not provided any detail about this claim, in particular, when this visit occurred or why the TMVP would tell his mother he would be in serious trouble given his evidence that the motivation for him being targeted by the TMVP related to his owning a [store] which he had closed by the time they visited. He has not claimed that in the period of over a year between K paying the ransom and the phone calls which led to his closing the shop there were any other approaches by the TMVP and I consider it implausible that after the shop was closed they would approach his mother, ask about him and say he'd be in serious trouble. I also note he did not refer to this significant threat in his SHEV interview and for these reasons, I am not satisfied that this visit and threats by the TMVP to his mother occurred.
28. He fears returning to Sri Lanka and again being subjected to kidnapping or even death at the hands of the TMVP and other associated government authorities and even though he's heard on the news that the leader of the TMVP has been arrested, he has been told the group is still extremely active and influential. I accept that the kidnap, extortion and threats to which he was subject were traumatic and frightening experiences, and that at the time he left Sri Lanka paramilitary groups operated with impunity and he had a genuine, subjective fear for his safety.
29. However, it is now nearly seven years since the applicant left Sri Lanka and the country information before me indicates a significant improvement in the security situation, particularly in the north and east, since he left and in particular, since the election of the Sirisena government in 2015.
30. The government no longer restricts travel to the north and east. It 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, and the Sri Lankan government exercises effective control over the entire country.<sup>9</sup>
31. While the information before me indicates that even after the end of the war there were frequent instances of disappearances, killings and abductions for ransom carried out by groups including paramilitary groups and the security services, DFAT assesses that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, has significantly reduced since the end of the conflict.<sup>10</sup> After a history of systematic enforced disappearances including so-called "white van" disappearances in the context of antiterrorism operations, ransom or economic extortion or a combination of all three, such disappearances are mostly a thing of the past.<sup>11</sup> DFAT assesses that a small number of abductions involving white vans in 2016 and 2017 referred to incidents where police did not follow protocol during arrest.<sup>12</sup>
32. In regard to his submission that the TMVP is still extremely active and influential. DFAT referred in February 2015 to the TMVP being aligned with the government during the conflict and also that while it and other groups had reportedly renounced paramilitary activities, it was aware of credible reports of paramilitary groups, including the TMVP, being involved in

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<sup>9</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>10</sup> *ibid*

<sup>11</sup> UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5, 15 June 2017, OG6E7028826

<sup>12</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064



criminal activities.<sup>13</sup> However, its most recent report does not refer to any reports of such activities. The only reference to the TMVP is as a Tamil political party which contested and won some seats in the February 2018 local government elections.<sup>14</sup> Other than this and a reference to the report of the Office of the United Nations High Commissioner for Human Rights Investigation on Sri Lanka which found paramilitary groups involved in extrajudicial killings, disappearances and kidnappings for ransom during the period 2002 - 2011<sup>15</sup> DFAT's 2018 report does not refer to paramilitary groups as currently active and involved in unlawful activities in Sri Lanka. Other reports before me from credible, authoritative sources relying on in-country information<sup>16</sup> do not indicate that the TMVP is still active as a paramilitary group and involved in kidnapping, extortion and associated criminal activities and to that extent, I do not accept the applicant's submission.

33. Moreover, as the applicant notes, in 2015 the TMVP leader and former Eastern Province Chief Minister, Pillayan, was arrested, detained and further remanded until February 2016 on charges in connection with the killing of Tamil National Alliance (TNA) parliamentarians Joseph Pararajasingham in December 2005 in Batticaloa.<sup>17</sup> The other leader of the TMVP, Karuna, who left the TMVP in March 2009 is also under investigation over a number of crimes committed under the previous regime.<sup>18</sup>
34. While I have accepted that the applicant was targeted in the past because of the perception that, as a business owner he was perceived as having money, I do not accept that he is at risk of similar harm in future. The country information indicates a decrease in the incidence of abductions and ransoms generally and the evidence does not indicate that TMVP continues to have any involvement in criminal activities.
35. The applicant submitted a number of news articles concerning a variety of recent criminal events in Sri Lanka and stated in his SHEV interview that such things could possibly happen to him. Crime rates across Sri Lanka vary but are highest in Colombo district.<sup>19</sup> As well as the information submitted by the applicant there are other reports before me regarding the activities of criminal gangs involved in illegal activities including obtaining protection money and ransoms from businessmen.<sup>20</sup>
36. However, I consider the applicant's claim that "such things" could possibly happen to him speculative. Considering the length of time that has passed since the events of 2011 and 2012, the decrease in paramilitary and criminal activities by the TMVP, the greatly improved security situation generally and my findings that there was no interest in him after he left Sri Lanka by the TMVP or any other group, I am not satisfied there is a real chance that the applicant will again be targeted for kidnapping and/or extortion or other harm by the TMVP or any other paramilitary group or the authorities.

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<sup>13</sup> DFAT "DFAT Country Report – Sri Lanka" 16 February 2015, CISEC96CF1164

<sup>14</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>15</sup> Ibid

<sup>16</sup> UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5, 15 June 2017, OGD95BE927333; UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017, CISEDB50AD3780; US Department of State "Country Reports on Human Rights Practices for 2017 Sri Lanka" 20 April 2018, OGD95BE927333; US Department of State "Sri Lanka 2015 Crime and Safety Report" 4 May 2015, CISEC96CF12840;

<sup>17</sup> newsfirst.lk "Former Eastern Province Chief Minister Pillayan further remanded" 10 February 2016 CX6A26A6E2225

<sup>18</sup> Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD) "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

<sup>19</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>20</sup> The Island "Jaffna terror network moves to Colombo" 7 August 2017, CXC90406611724; Adaderana.lk "In case of a ransom call, call Police!", 11 June 2015, CXBD6A0DE18351; Sri Lanka Watch "2 Extortion Gangs arrested", 26 May 2016, CX6A26A6E4621; US Department of State "Sri Lanka 2015 Crime and Safety Report" 4 May 2015, CISEC96CF12840;

37. I am similarly not satisfied there is a real chance of the applicant otherwise being subjected to harm on the basis of his Tamil ethnicity. He does not claim to have ever been subjected to adverse interest by the Sri Lankan authorities other than the incident I accept occurred when he was beaten as a school boy when he was year [grade] (around 2000). This was during the war, however, when many Tamils were suspected of LTTE involvement on the basis of their ethnicity and subjected to routine harassment, arrest, monitoring, or detention by security forces.<sup>21</sup> Since then, DFAT assesses that monitoring of Tamils in day-to-day life has decreased significantly under the current government although some surveillance of Tamils in the north and east continues.<sup>22</sup> Surveillance and monitoring, however, is less intense than was the case previously.<sup>23</sup>
38. After its election, the Sirisena-led government took steps to curtail executive power, re-establish independent commissions (in particular, it is credited with restoring the legitimacy and independence of Sri Lanka's Human Rights Commission), de-proscribed a number of international diaspora organisations, reviewed cases of those held under the Prevention of Terrorism Act, and released some detainees.<sup>24</sup> In contrast to the combative approach of the previous Rajapaksa government, it also initiated a new, more open dialogue with the international community.<sup>25</sup> During 2017 the Tamil National Alliance and the Defence Ministry initiated a formal dialogue on returning military held lands, and the army chief publicly committed to the military prosecuting personnel who committed criminal acts during and after the war.<sup>26</sup> The UK Home Office's Fact Finding report after a visit to Sri Lanka in July 2016 identified a number of ongoing concerns for the Tamil population in relation to human rights and other issues, but a number of the sources they consulted conceded that there had been improvements for Tamils since the change of government in 2015.<sup>27</sup>
39. On the applicant's evidence, he made a good living from his [business]. He claims he was targeted because he owned the shop and [he] had money and I have found that he was targeted opportunistically and for financial reasons. The evidence does not disclose any serious harm because of his ethnicity or for any other reason beyond the claims discussed above. While I accept he no longer owns his own [business], the applicant is [trained in his occupation], has relatives in that trade and I am satisfied that he would be able to resume working [in his occupation] and there is not a real chance he would suffer significant economic hardship that would threaten his capacity to subsist or that he would be denied the capacity to earn a livelihood.
40. The authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile.<sup>28</sup> The applicant does not have a profile with the authorities and does not claim to have had any involvement in activities in Australia which could bring him to the attention of the Sri Lankan authorities<sup>29</sup> and I consider it unlikely he would be subject to monitoring on return but I do not, in any case, consider monitoring amounts to serious harm.

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<sup>21</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>22</sup> Ibid

<sup>23</sup> UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OGD6E7028826

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> US Department of State "Country Reports on Human Rights Practices for 2017 Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>27</sup> UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112.

<sup>28</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064

<sup>29</sup> UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OGD6E7028826

I am not satisfied that there is a real chance of the applicant experiencing discrimination, harassment, or mistreatment at a level that would amount to serious harm in the reasonably foreseeable future whether from the Sri Lankan authorities or any other group or persons.

41. Overall, I am not satisfied there is a real chance of the applicant being seriously harmed because of his ethnicity or gender, imputed political opinion, his father's LTTE affiliation, previous beating by the SLA, past kidnapping and extortion or failure to meet the 2012 extortion demands, his origins in the east, membership of a particular social group of wealthy Tamil business owners, or any combination of these factors.

*Illegal departure/returning asylum seeker*

42. The applicant left Sri Lanka by boat. He says in the written statement submitted with his SHEV application that he has heard on the news that people who have been returned after failing to obtain asylum have suffered serious harassment from the Sri Lankan authorities on their return and that many people in that situation have been beaten and he believes it would happen to him.
43. I accept that the applicant departed Sri Lanka illegally. He does not have a passport and I also accept that, as a person travelling on a temporary travel document, he is likely to be perceived on his return as a failed asylum seeker. The country information indicates these things will have implications for him on his return but for the reasons set out below, I do not accept he is at risk of harm in this process.
44. Processing of returnees on arrival at Colombo airport may be carried out by a number of agencies who check travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. The process can take several hours.<sup>30</sup> Returnees travelling on temporary travel documents are subject to a series of police checks on arrival at the Colombo international airport to confirm their identity and ascertain if someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants.<sup>31</sup> Returning passengers may be interviewed, the person's claimed hometown police may be contacted as well as neighbours and family.<sup>32</sup> All returnees are treated according to these standard procedures and are not subject to mistreatment during processing at the airport.<sup>33</sup>
45. The applicant does not have a profile with the authorities for any reason and I find he is not at risk of any increased attention from the authorities during this process. As discussed above, even if his father's work for the LTTE came to light on return, the country information does not support a conclusion that he would be at risk of harm because of that.
46. DFAT's latest report canvasses a number of practical challenges to successful return to Sri Lanka that refugees and failed asylum seekers can face including some social stigma/societal discrimination, and difficulty finding suitable employment and reliable housing on return.<sup>34</sup> The applicant's family continues to live and work in his home area, some of them in the [business], and I am satisfied he will be able to re-establish himself without suffering harm in relation to either housing or employment. While I accept he may face some social stigma/societal discrimination, I am not satisfied that it amounts to serious harm.

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<sup>30</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064

<sup>34</sup> Ibid

47. Returnees who depart Sri Lanka irregularly are generally considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act).<sup>35</sup> Penalties for leaving Sri Lanka can include imprisonment of up to five years and a fine of up to LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,670).<sup>36</sup> A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go.<sup>37</sup> If a person pleads not guilty, they will be granted bail by the magistrate on the basis of personal surety or guarantee by a family member.<sup>38</sup> Anecdotal evidence is that most passengers of people smuggling ventures spend many years on bail, and most are free to go after paying a fine.<sup>39</sup> Bail is usually granted to voluntary returnees, conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.<sup>40</sup>
48. In cases where an illegal departure is suspected, returnees are charged and arrested under the I&E Act, photographed, fingerprinted, and have a statement taken.<sup>41</sup> The person is then taken to the nearest Magistrate's Court. Returnees can remain in police custody at the CID airport office for up to 24 hours after arrival while enquiries are completed, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held for up to two days in an airport holding cell.<sup>42</sup>
49. The delegate referred to country information reports of some returnees in recent years being detained and arrested on return.<sup>43</sup> The common risk factor appears to be significant actual or perceived links to the LTTE or involvement in Tamil separatism, although as noted above, the UK Home Office assesses that even those with prior links to the LTTE are now able to return to their community without suffering ill-treatment.<sup>44</sup>
50. I also note that nearly half of returnees in the north had received a visit at their homes for a purpose other than registration although only 0.3 per cent indicated they had any security concerns following their return.<sup>45</sup> While it is possible the applicant may face some monitoring by the Sri Lankan authorities on return, country information indicates that monitoring has reduced since the change of government. In any case, I do not accept that some level of monitoring amounts to serious harm.
51. There is nothing else in the applicant's profile that suggests he would be at risk of increased scrutiny and/or attendant mistreatment on return, nor does the information suggest that simply being a returning asylum seeker is a risk factor for prolonged detention and possible harm. I am not satisfied on the information before me that the applicant will face serious harm on his return as a failed Tamil asylum seeker. I accept that he will be investigated at the airport, have his identity checked, and will be charged with the offence of illegal departure for which he is liable to a fine under the I&E Act. The country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act on return. The law is not

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<sup>35</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064

<sup>36</sup> Ibid at 5.32

<sup>37</sup> Ibid at 5.22

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> Ibid at 5.33

<sup>41</sup> Ibid at 5.30

<sup>42</sup> Ibid

<sup>43</sup> International Truth & Justice Project "Unstopped: 2016/17 Torture in Sri Lanka" 14 July 2017 CISED50AD4849; Freedom From Torture "Sri Lanka – Update on torture since 2009" 6 May 2016 CIS38A8012881; Tamilnet "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027

<sup>44</sup> UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0 15 June 2017, OG6E7028826

<sup>45</sup> DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064

discriminatory on its terms and case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.<sup>46</sup> The evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the processing, investigation, prosecution and punishment of the applicant under the IE Act would be a law of general application and does not amount to persecution for the purpose of s.5H(1) and 5J(1) of the Act.

52. I am not satisfied the applicant faces a real chance of serious harm on the basis of being a failed Tamil asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future.

53. I have also taken into consideration the applicant's circumstances as a whole. I have accepted his claims regarding past treatment by the TMVP. However, considering his personal characteristics and assessing them against the country information before me, I am not satisfied there is a real chance of the applicant being seriously harmed by the TMVP, paramilitary groups, the Sri Lankan authorities or any other group or person if he returns to Sri Lanka now or in the reasonably foreseeable future.

#### **Refugee: conclusion**

54. 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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55. 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**

56. 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.

57. I have found that the applicant does not face a real chance of suffering serious harm for any of the reasons he has claimed. I note that the 'real risk' test imposes the same standard as the 'real chance' test.<sup>47</sup> Taking into account my findings and the country information before me, I am not satisfied that there is a real risk of the applicant being subjected to significant harm in the form of the death penalty, arbitrary deprivation of life, torture, cruel or inhuman treatment

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<sup>46</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

<sup>47</sup> *MIAC v SZQRB* (2013) 210 FCR 505

or punishment, or degrading treatment or punishment at the hands of the TMVP, the Sri Lankan authorities or any other persons or group.

58. While there is a possibility that he may face monitoring, and a level of societal discrimination as a failed asylum seeker and refugee in the form of some social stigma I am satisfied that, while hurtful, such treatment would not amount to significant harm.
59. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes and identified as an illegal departee. He is likely to be investigated, may be detained for up to two days at the airport, fined for the offence of illegal departure and may incur costs associated with the judicial process. I am not satisfied, however, that this treatment amounts to significant harm. I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. The treatment does not consist of the death penalty or arbitrary deprivation of life, nor does it amount to torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. I am also not satisfied that the brief detention, questioning and fine for his illegal departure amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation, or other form of significant harm within the meaning of s.36(2A).
60. Considering his personal circumstances and profile altogether, along with the country information before me, I am not satisfied that his claims, even when taken together, mean that he is at real risk of significant harm within the meaning of ss.36(2A) and 5(1) on his return to Sri Lanka now or in the reasonably foreseeable future.

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

61. 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.