



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07029

Date and time of decision: 23 September 2019 08:36:00  
M Oakman, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Eastern Province, Sri Lanka. He arrived in Australia [in] April 2013 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 1 June 2017. On 20 August 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). No further information has been obtained or received.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - He fears that if forced to return to Sri Lanka he will be seriously harmed including being killed. He is afraid of this harm from the paramilitary and the military in Sri Lanka;
  - He has already had his life threatened on a number of occasions and believes that the threats to his life will be carried out; and
  - He believes the police and authorities cannot protect him as he believes that the paramilitary and the military must be cooperating in some way. He could not move anywhere else in Sri Lanka to avoid this harm as the paramilitary are all over Sri Lanka and similar incidents are also happening all over Sri Lanka. As a Tamil, who is viewed as wealthy and with LTTE connections through his brother-in-law he would also be targeted.

### Factual findings

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#### Receiving country

4. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from the Eastern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

#### Background

5. The applicant states he was born in [year] in Kalmunai, Eastern Province, Sri Lanka. He lived in [various location] in [City 1], Colombo and again in [a suburb] in [City 1], as set out in his SHEV application. He married in 1989 and has [a number of children] born in [years], respectively. His wife [and some of his children] live together in [a suburb in] [City 1] and his other daughter lives in Australia with her Australian citizen husband. His daughter in Sri Lanka [works]. He has [a number of siblings], who live in the Amparai district of Sri Lanka. He is in almost daily contact with his wife and children in Sri Lanka. He attended school up to Year [number]. From about 1980 to 2000 he worked as a self-employed [Occupation 1] in [City 2], training under his [brother] for the first year. Due to a lack of work in [City 2] he then worked

as [an Occupation 1] in Colombo from 2000 to 2009. Due to a lack of work in Colombo he worked in a [business] in [City 1] from 2009 to 2013.

### Problems in Sri Lanka

6. The applicant claims he was in [City 1] for the most part while he was in Sri Lanka but was never there when the Liberation Tigers of Tamil Eelam (LTTE) were fighting. During the time the LTTE was active the Sri Lankan Army (SLA) searched the houses in the village on a weekly basis. In 1990 the SLA searched his home in [City 1] and found his brother-in-law, "P", in the house. P was his wife's [brother] and the SLA arrested him, saying he was suspected of being in the LTTE. The applicant was in [City 2] at the time and was told of events afterwards by a phone call from his wife. As far as the applicant knows P was the only member of their family who may have been involved with the LTTE. They knew nothing more about him until they heard through the applicant's mother-in-law that P died while under arrest. P died sometime in 1994 or 1995.
7. The applicant claims that in about October 2012, around 7pm, two Tamil men whom he did not know came to his house. They put a rifle on the table and shouted at him. They said that his brother-in-law had been arrested in his house; at the time of his arrest P was in the LTTE and had a lot of money from the LTTE with him; and that money should be with the applicant. They told him they would return later to investigate and that if he did not give them the money he would be in great danger. Because his children were crying, the men wanted to go away. They told him they would be back and if he told the police, SLA or village headman they had come and demanded money, he would be killed. He left immediately to stay at the [business] in [City 1] because he believed the men would return to his home. He came back from time to time in the evening and returned the next morning to the [business]. He believed the [business] was safer as it was in a more densely inhabited area and there was security everywhere. He did not go to the authorities over the incident, both because of the men's threats and he believed the authorities were collaborating with the paramilitary.
8. He claims that it was widely reported in newspapers at the time that people in white vans would come to people's houses to demand money and, if they did not give them money, they would take the people away. The men did not tell him how they knew about P's money; he did not know about any money as he was not there when P was arrested; and he believes his wife would have told him if P had brought any money. At the time the men came the applicant was relatively well to do compared to others in their village and it was possible word had got around that he was rich because he had been involved in [Occupation 1] and people think [people in his occupation] like him had money. He believes it is possible the men thought he had money that belonged to the LTTE or that he was threatened because they thought he made money as [an Occupation 1]. He thought the men were paramilitary because they had a rifle and he feared they would take him away, like the people taken in white vans. He also said he thought they may have been in the LTTE, in jail, then released and came looking for the money.
9. The applicant claims that around [April] 2013 an unidentified man, and there may have been another man, came and told him that they would come the next day and take him for an inquiry. He asked what sort of inquiry and was told the man's boss told him to tell the applicant they would return tomorrow for an inquiry, and the man walked away. The applicant told his wife he was in great danger, that she should look after the children and he would call her when he was safe. He packed and left by bus to another town where he happened to see a friend who asked what brought him there; the friend invited him to stay a few days and arranged for him to come to Australia.

10. The applicant claims two months after he left, while on Christmas Island, he spoke to his wife on the phone and she told him the two men had returned and asked where he was. She told them he had a breakdown and gone missing. The men said they would take care of him, that is, kill him. His wife also told him that they returned approximately five months later and asked if she had any information about him. She said she had not heard anything from the applicant, they were causing her stress with her [young] girls at home and if they came again she would go to the police.
11. The applicant's details were released in the early 2014 data breach, as discussed further below. The applicant claims that after the data breach occurred two men went to his home in Sri Lanka, on two occasions, to enquire about his whereabouts. He could not remember exactly but thought their first visit occurred six months after he arrived in Australia and he was still in the camp at the time. The second time the men came was after he had been released from the camp and on that occasion his wife told them she was separated from her husband and not to come again as she had her daughters there and she would complain to the police if they came back.
12. The Department of Foreign Affairs and Trade (DFAT) notes<sup>1</sup> that a UN report covering the period from 2002 to 2011 found there were frequent kidnappings for ransom during the war, particularly in the north and east, largely attributed to the Sri Lankan security forces, paramilitary groups and the LTTE. Other country information from 2010 to 2012 also confirms that around that time kidnapping for ransom and extortion occurred, both for political and criminal motives, with the targets including business men.<sup>2</sup>
13. The applicant has maintained since his arrival interview with the Department (September 2013) that his brother-in-law was arrested in 1990 because he was suspected of involvement with the LTTE, and subsequently died, and that he was visited in late 2012 by two men after money connected with his brother-in-law and that in April 2013 a man came and told him they would return the next day to make enquiries. However, there are a number of difficulties with the applicant's claims in relation to his events from 2012 until he left Sri Lanka in April 2013.
14. The country information discussed above indicates that extortion, including extortion aimed at business men, was not uncommon in Sri Lanka during and in the years immediately after the war. However, although he did speculate as to a number of possible motivations and origins for the men demanding money from him, the applicant was quite clear in his SHEV statement and at the SHEV interview that the two men who made the extortion attempt specifically referred to his brother-in-law P being arrested in the applicant's house and that P had LTTE money with him at the time of his arrest. I consider it entirely implausible that in 2012 two men would come and demand that the applicant pay them the money, whether it was LTTE money or otherwise, that the men believed P had at the time of his arrest at the applicant's house in 1990, some 22 years before. I do not consider it credible that a man would visit the applicant at home in April 2013, simply to tell him that they would be there again tomorrow to make an inquiry as such an action did nothing but warn the applicant they were coming and, as he claims he did, allowed him to flee. I also do not consider it credible that, if a demand for money was made in the first visit in October 2012, no further demands for money were made, or action taken to search the house to seize any cash or other

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<sup>1</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>2</sup> UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; and Landinfo, "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286.

valuables that may have been present, in the April 2013 visit or in the later visits purportedly made to his wife after he left Sri Lanka. Similarly, as the applicant's wife was P's brother, I do not consider it credible that, if they did visit her, the two men did not also take the opportunity to question her or otherwise press their claim about P's money, but just asked her about the applicant's whereabouts. Additionally, the applicant claimed for the first time at the SHEV interview that his wife was visited twice after the data breach in early 2014. I do not consider it credible that, if true, the applicant failed to mention these two further visits to his wife to ask about his whereabouts in his SHEV statement.

15. In assessing the applicant's evidence I have taken into account the difficulties often faced by applicants for protection, particularly those who some period has passed since they departed their country of origin. However, the issues identified above go beyond minor errors and discrepancies that could be attributed to factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, or a lack of cohesive narration due to trauma, and show significant credibility problems in the applicant's evidence. I am satisfied that he has fabricated parts of his evidence in order to boost his claim to protection. Given the consistency of the claim, and in the absence of any identified credibility issues, I accept that P was arrested because of suspected involvement with the LTTE at the applicant's home in [City 1] in 1990 and that P subsequently died while still under arrest in 1994 or 1995. However, I reject his claims that two men came to his home in October 2012; that a man came to his home in April 2013; and that anyone had visited his home since he left Sri Lanka to ask his wife about his whereabouts. I am not satisfied on the material before me that the applicant was ever subjected to extortion or threats in Sri Lanka because of P, his work as [an Occupation 1], or for any other reason.

### **Returned Asylum seeker**

16. The applicant claims he departed Sri Lanka in April 2013 to travel to Australia as a passenger in a boat organised by a smuggler. I find that, if the applicant was to return to Sri Lanka, he may be considered a returned asylum seeker who departed illegally by the Sri Lankan authorities.
17. The applicant was one of a number of asylum seekers who were in immigration detention on 31 January 2014 whose information was published by the Department in February 2014 due to a data breach on its website. The information published included a person's name, date of birth, nationality, irregular maritime arrival and their detention status, but did not reveal their claims or that they had applied for a protection visa.<sup>3</sup> I accept that the applicant's name, date of birth, nationality, that he was an irregular maritime arrival and his detention status were released in the data breach.

### **Refugee assessment**

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18. 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.

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<sup>3</sup> Protection visa decision record, 20 August 2019, page 17.

## Well-founded fear of persecution

19. 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.

### *Tamil ethnicity, LTTE links and imputed political opinions*

20. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.<sup>4</sup> However, there have been a number of significant changes since the 2015 election of the Sirisena government. The new government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms to restrict executive powers, and took steps to restore the independence of the judiciary. In contrast to the approach of the previous Rajapaksa government, it also initiated a new, more open dialogue with the international community, including human rights organisations, and signalled its willingness to address long-standing allegations of past human rights abuses and violations.<sup>5</sup>
21. The Sirisena government has implemented a number of confidence-building measures to address grievances of the Tamil community. It has replaced military governors with civilians in the Northern and Eastern Provinces. The Office of National Unity and Reconciliation continues to coordinate government reconciliation efforts, promoting social integration, securing language rights for all Sri Lankans and supporting a healing process through a proposed Commission. 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>6</sup> The United Nations High Commissioner for Human Rights observed in February 2016 that one of the most important long-term achievements in the past year had been the restoration of the legitimacy and independence of the Sri Lanka's Human Rights Commission (HRCSL). The UN noted in 2016 that the Sirisena government has created a political environment conducive to reforms, significant momentum had been achieved in the process of constitutional reform and it had taken important symbolic steps towards reconciliation and changing the majoritarian political culture.<sup>7</sup> The US Department of State

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<sup>4</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>5</sup> UK Home Office (UKHO), "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

<sup>6</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>7</sup> UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

(USDOS) notes in its recent report that the HRCSL generally operated independently of, and with a lack of interference from, the Sri Lankan government.<sup>8</sup>

22. The UK Home Office's (UKHO) fact finding 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>9</sup> DFAT has indicated in its two most recent reports 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. Some members of the Tamil community report discrimination in employment, particularly in relation to public sector employment. However, DFAT assesses that the limited Tamil appointments are a result of a number of factors including disrupted education because of the war and language constraints. DFAT states that Tamils have a substantial level of political influence and their inclusion in the political dialogue has increased under the Sirisena government. DFAT understands that Tamils do not receive unwarranted attention from the authorities because of their political involvement, and assesses that there are no barriers to Tamil political participation. As discussed above, many Tamils in the north and east reported being monitored, harassed, arrested or detained by security forces under the Rajapaksa government. Members of the Tamil community in the north and east continue to claim the authorities monitor public gatherings and protests, and practise targeted surveillance and questioning of individuals and groups. DFAT assesses that the monitoring of Tamils in day to day life has decreased significantly under the Sirisena government, but surveillance of Tamils in the north and east continues, particularly for those associated with politically sensitive issues.<sup>10</sup> The government no longer restricts travel to the north and east, it has removed military checkpoints on major roads in 2015, and military involvement in civilian life has diminished, although the military continues to be involved in some civilian activities in the north.<sup>11</sup>
23. In summary, this country information indicates that although some monitoring still occurs, overall the monitoring and harassment of Tamils in the north and east has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation for Tamils generally has substantially improved.
24. I am not satisfied that the applicant's fear of harm on account of his Tamil ethnicity, for any LTTE links or any imputed political opinions is well-founded. DFAT confirms<sup>12</sup> that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE. While the UKHO 2017 report also notes that persons with an actual or perceived significant involvement with the LTTE or in post-conflict Tamil separatism may be at risk, in its view simply being a Tamil does not give rise to protection claims nor, in general, does a person's past membership or connection to the LTTE.<sup>13</sup>
25. Country information indicates that Tamils were routinely subjected to monitoring and harassment during the war and under the Rajapaksa government, there are credible reports

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<sup>8</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

<sup>9</sup> UKHO, "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>10</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>11</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>12</sup> Ibid.

<sup>13</sup> UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

of torture being carried out by the Sri Lankan authorities during the war and its immediate aftermath, but there has been a marked improvement in the general situation and country conditions for Tamils in Sri Lanka since the change of government in 2015.

26. There are still reports of torture occurring in Sri Lanka since the change of government, including from the UN Special Rapporteur on Torture, the HRCSL, and other sources,<sup>14</sup> although DFAT is unable to verify allegations of torture in Sri Lanka in 2016 and 2017.<sup>15</sup> The risk of torture has decreased since the war, the number of torture complaints has greatly reduced, white van abductions are seldom reported, arbitrary arrests have reduced and although there are reports of the use of excessive force against civilians by the police and security forces, such incidents are rare and the civilian authorities generally maintain effective control over the military.<sup>16</sup> DFAT assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture.<sup>17</sup>
27. I accept that the applicant and his family lived in an area that was controlled by the LTTE at times during the war. I accept that his brother-in-law P was arrested at his [City 1] home in 1990 for suspected involvement with the LTTE by the Sri Lankan authorities and that P subsequently died while still under arrest in 1994 or 1995. However, having regard to the information before me, I am not satisfied the applicant faces a real chance of harm now or in the reasonably foreseeable future, for a number of reasons. First, as the UKHO report notes, residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection. Secondly, although P was arrested in his home because of suspected LTTE involvement, the applicant does not claim that he, or his wife, was ever questioned, arrested, detained, charged, taken to court, imprisoned or sent to rehabilitation, at any time by the authorities, whether about P, other LTTE connections, or for any other reason. The only adverse attention the applicant suffered from the Sri Lankan authorities or the paramilitaries was the SLA regularly searched his and other houses in the village during periods when the LTTE was active in the area. Thirdly, it is now some 18 or 19 years since P died, and any interest the Sri Lanka authorities may have had in P's activities and LTTE links will have disappeared over that time. Additionally, it has been over six years since the applicant has been in Sri Lanka and during that time the Sirisena government came to power and the general situation and country conditions for Tamils in Sri Lanka have improved substantially. Neither the authorities nor anyone else, on my findings, have made any enquiries about the applicant since he left Sri Lanka. Furthermore, as the UKHO 2017 report notes, a person's past LTTE membership or involvement no longer generally gives rise to a need for protection.
28. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE.<sup>18</sup> The UKHO 2017 report indicates that although the Sri Lankan authorities may monitor overseas activities, they are only interested in significant involvement in pro-Tamil separatist diaspora activities and activity such as attending demonstrations overseas is not in itself evidence that

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<sup>14</sup> United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>15</sup> DFAT, "UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>16</sup> USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; and UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, O6E7028826.

<sup>17</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>18</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.



a person will attract interest from the Sri Lankan authorities.<sup>19</sup> DFAT states that high profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and assesses that the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile and that returnees may be subject to surveillance. A UN High Commissioner for Refugees (UNHCR) survey from 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. However the UNHCR also interviewed refugee returnees in 2016 and only 0.3 per cent indicated they had any security concerns following their return. DFAT's 2018 report also notes that although the Sri Lankan government has reportedly decreased systematic surveillance of returnees, it is aware of anecdotal evidence of regular visits or phone calls by the CID to failed asylum seekers in the north as recently as 2017.<sup>20</sup>

29. The applicant does not claim he has had significant involvement, or any involvement, in activities that might be considered as, or perceived to be, pro-Tamil separatist or pro-LTTE diaspora activities in Australia. I am not satisfied that the applicant's profile, which as discussed is not one that places him at a real chance of harm, will be increased by the fact that the applicant has spent more than six years outside of Sri Lanka and claimed asylum in Australia. Nor am I satisfied, given his profile, there is a real chance that he will be monitored or subject to surveillance because of his time in Australia and/or as a Tamil asylum seeker, if returned.
30. The applicant does not have a profile that country information suggests he faces a real chance of harm, now or in the reasonably foreseeable future, for any real or perceived LTTE links, for any imputed political views and/or because of his Tamil ethnicity. I do not consider that the Sri Lankan authorities or any paramilitary groups had any adverse interest in the applicant around the time he left Sri Lanka, nor, given that the Sri Lankan authorities or paramilitaries have not made any enquiries about the applicant's whereabouts since he left Sri Lanka, and the harassment and monitoring of Tamils has significantly decreased under the Sirisena government, together with a person's past LTTE connections no longer generally being of interest, that he would be of any adverse interest to the Sri Lankan authorities or paramilitaries, or that he faces a real chance of suffering harm, if he returned to Sri Lanka. I am not satisfied he faces a real chance of harm for reason of his ethnicity, background and links to the LTTE.
31. I am satisfied that the applicant will not face a real chance of persecution on the basis of any links to the LTTE, for any imputed political opinions, and/or because of his Tamil ethnicity, if returned to Sri Lanka, now or in the reasonably foreseeable future.

#### *Perceived wealth*

32. The applicant fears that he may be targeted as a Tamil who is perceived as wealthy. The applicant conducted business and worked in Sri Lanka as [an Occupation 1] for many years and I accept that he may resume working or conducting business as [an Occupation 1], if he returns to Sri Lanka, and may be perceived as wealthy as a result.
33. As discussed above, country information indicates that extortion and kidnappings for ransom attempts, including targets who were business men, were not uncommon during the war and in the years immediately after the war. A 2015 report from the UDSDOS indicated that

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<sup>19</sup> UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

<sup>20</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

kidnappings occurred infrequently and that the motive was usually political or business-related and not an organised kidnap and ransom enterprise.<sup>21</sup> There are occasional media reports of extortion gangs operating in Sri Lanka.<sup>22</sup> DFAT stated in 2018 that the number of incidences of, among other things, abductions for ransom has significantly reduced since the end of the war.<sup>23</sup>

34. The applicant was not, on my findings, subject to extortion when he was living in Sri Lanka, whether because he was working as [an Occupation 1] or for any other reason. The applicant has not claimed that his family, including his brother who also worked as [an Occupation 1] for a period of time, were ever subject to extortion or threats of extortion in Sri Lanka. The applicant does not claim that the other [people] he worked with in Colombo and [City 1] from 2000 to 2013 when he left Sri Lanka, have been subject to extortion attempts or extortion threats. The country information before me does not suggest that people returning from overseas are targeted for extortion attempts.
35. Given that the applicant, his family and the other [people] he has worked with have not been subject to extortion attempts in Sri Lanka, and the country information indicates that although such incidents were not uncommon during the war and in its aftermath they have now significantly reduced, I am not satisfied that there is a real chance that the applicant will be subject to extortion, or suffer any other harm, if he returned to Sri Lanka, because of his perceived wealth.
36. I am satisfied that the applicant will not face a real chance of persecution because of his perceived wealth, if returned to Sri Lanka, now or in the reasonably foreseeable future.

#### *Returning asylum seeker and illegal departure from Sri Lanka*

37. I accept that, on his return to Sri Lanka, the applicant may be identified by the authorities as an asylum seeker who departed Sri Lanka illegally.
38. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. DFAT has been advised by the Sri Lankan government, but cannot verify, that no mere passenger on a boat has been given a custodial sentence. A guilty plea attracts a fine, which can be paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court. Anecdotally, most passengers may spend years on bail and most are free to go after paying a fine. Although fines are often low, the cumulative costs of attending court over a protected period of time can be high.<sup>24</sup>
39. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service, the Criminal Investigation Department (CID) and, at times the Terrorism Investigation Department, who check returnees' travel documents and identity information against

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<sup>21</sup> USDOS, Overseas Security Advisory Council "Sri Lanka 2015 Crime and Safety Report", 4 May 2015, CISEC96CF12840.

<sup>22</sup> "2 Extortion Gangs arrested", Sri Lanka Watch, 26 May 2016, CX6A26A6E4621; "In case of a ransom call, call Police!", Adaderana.lk, 11 June 2015, CXBD6A0DE18351; "Jaffna terror network moves to Colombo", The Island, 7 August 2017, CXC90406611724.

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

<sup>24</sup> Ibid.

immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed as a group and individuals have to remain until all returnees are processed.<sup>25</sup>

40. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.<sup>26</sup>
41. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted, photographed and have a statement taken by the police. If former LTTE members, the police will further enquire about their activities abroad. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours after arrival and should a magistrate not be available before this time, for example because of a weekend or public holiday, those charged may be detained for up to two days in an airport holding cell.<sup>27</sup>
42. I accept that the applicant may be considered a failed Tamil asylum seeker from Australia on his return. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport. There is country information containing reports of some returnees being tortured.<sup>28</sup> DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport. However, as discussed above, on my findings, the applicant is not such a person. Although the applicant was affected by the 2014 data breach, as discussed above, only some of his personal details were released. As the Sri Lanka authorities would in any event be aware of those and other personal details of the applicant, and that he sought asylum in Australia, by the circumstances of his return from Australia, I am not satisfied the data breach will in any way raise the applicant's profile with the Sri Lankan authorities or otherwise increase his chances of suffering harm.
43. Taking into account my findings about his profile, including the data breach, and the country information, I do not accept that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether at the airport or on his return home.

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Including 'LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)', Immigration and Refugee Board of Canada, 10 November 2017, OGD020B81694; UKHO, "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; "Unstopped: 2016/17 Torture in Sri Lanka", International Truth & Justice Project (ITJP), 14 July 2017, CISED50AD4849; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881; "Sri Lanka: COI Compilation", Austrian Centre for Country of Origin & Asylum Research and Documentation, 31 December 2016, CIS38A80123251; and "TID arrests another Tamil man on return from abroad – VIDEO", Ceylon News, 19 May 2016, CX6A26A6E4702.

44. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. I have found that the applicant's profile is not one that places him at a real chance of suffering harm. The applicant is from [City 1] in the Eastern Province, where his wife and two of his adult children still reside in the family home, and I am satisfied that this is the applicant's home area to which he will return. As discussed above, I am not satisfied, given his profile, there is a real chance that he will be monitored or subject to surveillance because of his absence from Sri Lanka, or as a failed Tamil asylum seeker from Australia, if returned.
45. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many face difficulty in finding suitable employment and reliable housing, and refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees may face some societal discrimination upon return to their communities, and that continued surveillance of returnees contributes to a sense of mistrust.<sup>29</sup>
46. The applicant has lengthy experience working as [an Occupation 1] in Sri Lanka. He has shown himself to be resourceful and generally resilient by adapting to life in Australia. The applicant will be returning to his home area where some of his immediate family reside, including a daughter who is [working]. His siblings also live in other parts of the Eastern Province. He has remained in contact with his immediate family in Sri Lanka. He does not claim that his family have been unable to support themselves in Sri Lanka since he has been in Australia or otherwise had difficulty in subsisting. Given those factors, I am satisfied that the applicant will be able to re-establish himself in [City 1] without suffering harm in relation to any housing and employment difficulties that he may encounter. I accept that he may face some social stigma on his return as a returned/failed asylum seeker. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
47. I am not satisfied that there is a real chance that the applicant would face serious harm as a returned Tamil asylum seeker from Australia. I accept that the applicant may be processed under the IE Act at the airport and may face court action and a fine under the IE Act as well. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. 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>30</sup> In this case, 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 the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
48. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a returned Tamil asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
49. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of

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<sup>29</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>30</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

### **Refugee: conclusion**

50. 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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51. 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**

52. 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.
53. I accept that, if he returns to Sri Lanka, while re-integrating the applicant may face some level of societal discrimination as a returned Tamil asylum seeker from Australia, in the form of social stigma. As acknowledged above social stigma may at times be hurtful, however, I am not satisfied on the evidence that any hurt he may suffer from social stigma will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigma may be hurtful or harassing but it does not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by the applicant as a returned asylum seeker from Australia amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
54. I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, taking into account his profile and history, if he is returned to Sri Lanka. As 'real chance' and 'real risk' involve the same standard,<sup>31</sup> it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.
55. I accept that the applicant may be subject to investigation and processing under the IE Act at the airport and may also face possible action under the IE Act for his illegal departure. DFAT advises that, once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed. Returnees may be questioned for up to 24 hours at the airport and, subject to the unavailability of a Magistrate over a weekend or on a public holiday, may be detained in the airport holding cells for up to

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<sup>31</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

two days before they are taken to court. At court he may be subject to a bail surety or the magistrate may require a bail guarantor, in which case he may have to wait for a relative to attend court. If on bail the applicant may have to attend court on a number of occasions over time. A fine may be imposed. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport and assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of his illegal departure. The evidence does not suggest that the treatment and penalties the applicant may be subject to because of his illegal departure are intended to inflict pain or suffering, severe pain or suffering, or are intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis, or when considered in combination with any treatment he may experience as a returned Tamil asylum seeker from Australia.

56. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured because of his profile and history or for any other reason. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.
57. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied he faces a real risk of significant harm.

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

58. 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.