



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07565

Date and time of decision: 14 January 2020 09:21:00  
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] April 2013. On 24 April 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 25 November 2019 a delegate of the Minister for Immigration (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 17 December 2019 the applicant's representative provided information to the IAA. The information comprised two separate submissions, a legal submission and a "new information" submission, a Statutory Declaration made by the applicant on 17 December 2019 (the December declaration) and three items of country information said to be relevant to the applicant's claims for protection. Both the legal submission and the December declaration, for the most part, reiterate the bases of the applicant's claims for protection, address the delegate's findings and takes issue with them and to that extent may be considered argument (including legal argument) not new information for the purposes of ss.473DC(1) and 473DD.
4. In addition, the legal submission and the December declaration contain new claims and further detail in relation to existing claims which I find to be new information: the birth of his son on [date]; that since the election of G Rajapaksa as President new restrictions on freedom of movement and curfews have been imposed in Tamil areas as well as more army personnel being placed in Tamil areas; and some new claims around his and his family's detention in India and his father's imprisonment.
5. His representative has provided a number of reasons why, if the IAA concludes it is new information, it should consider the information including that considering it may make a material difference to the outcome of the decision and not doing so may expose the applicant to harm, the IAA's extremely limited form of review, the fact he has not been able to access ongoing immigration assistance, the limited form of assistance he has received, his lack of awareness of the delegate's findings in relation to his case and his limited English language skills. I have taken these matters into account. However, in my view, these circumstances are not out of the ordinary and would apply to most, if not all, applicants for protection.
6. In regard to the information about the birth of his son, I accept it is credible personal information which could not have been provided to the delegate before the decision was made (his son was born after the delegate's decision). However, while it is clearly a change in the applicant's circumstances, it is not clear how it is material to the case before me and I am not satisfied there are exceptional circumstances to justify its consideration.
7. Given that the Presidential election occurred only around a week before the delegate's decision, I accept that the information regarding recent developments in Tamil areas since the election of G Rajapaksa could not have been provided to the delegate. No specific sources for the assertions made by the applicant are named nor is it corroborated by any credible, independent in-country sources provided to the IAA. In my view, it amounts to no more than anecdotal stories from friends who he says have told him about these developments which, in my view,

calls into question the reliability of the information. I am not satisfied that exceptional circumstances exist to justify its consideration.

8. The new information around his and his family's detention in India and his father's imprisonment relates to matters that occurred while the applicant was still living in India and well before the date of the delegate's decision on 25 November 2019. He had previously claimed in information provided to the Department in support of his SHEV application that his father was imprisoned for [a number of] years from December [year] until 1996, that they lived with him in jail between [year] and [year] ([date] until [date] in [Jail 1]; [date] to [year] at [Jail 2]) and that his father was released in 1996, after which they left the jail to live in the [Named] refugee camp in 1996. He gave evidence in his SHEV interview that after his father was released in 1996 because he was found innocent, he did not experience any further interest from the Indian authorities. The new information that he and his family lived with his father in [Jail 1] and [Jail 2] 'special camps' and jails until around 2005 or 2006, that it was only then that his father was found innocent, and they went to live in the [Named] refugee camp after that in around 2005 or 2006, contradicts that earlier evidence. He also claims that after his father was released from prison in 1996, he was harassed in the special camps, prisons and regular camps and was subjected to additional and separate questioning over and above that to which all camp inmates were subject which is also not consistent with what he told the delegate in his SHEV interview.
9. The applicant states that he wishes to clarify his family's living situation and the order of events surrounding his father's imprisonment and detention. However, the new information goes well beyond a clarification of claims which were before the delegate and purports to give different dates for events canvassed in some detail in his SHEV interview as well as to make new claims about his and his family's detention. It is clear from the December declaration and from the delegate's questions to him in the SHEV interview that the delegate had concerns about his claim to be of adverse interest to the Sri Lankan authorities because of his father's detention and release more than 20 years ago in India. No explanation has been provided as to why this information is only being provided now. In my view, if this new information was true, he would have provided it to the delegate at his SHEV interview either when he was asked if there was anything he wished to add or change to his statement of claims or when his claims about his father and their own living conditions were being discussed. I have taken into account that the applicant was not represented before the Department. However, his partner was present as a support person and I note the applicant stated on his SHEV application form that he speaks, reads and writes English. He was advised of the importance of providing all his claims to the delegate, was given the opportunity at the end of his interview to add anything he wished to, and was told that anything he wished to provide before the decision was made could be considered. He did not provide anything further. I accept that the applicant was very young at the time of these claimed events. However, he was able to recall earlier events and does not claim that he has only recently been advised by his mother of new facts about his father and their own living situation before 2005/2006 in India and it seems to me that the applicant is now attempting to provide new evidence to suggest a much greater interest in his father (and by association himself) as a suspected LTTE member than his previous evidence indicated.
10. Overall, I am not satisfied that there are exceptional circumstances to justify considering this new information.
11. In regard to the country information provided under cover of the submission and other country information cited in the submission, the Committee against Torture report was before the delegate and the extract is not new information. His representative has provided arguments as to why the new information should be considered under s.473DD. I have considered those arguments. However, the new material largely pre-dates the decision. The delegate's decision

was made quite recently (25 November 2019) and much of the contents of the material cited and/or provided was either been expressly considered by the delegate from other sources (including the election of R Rakapaksa) or updated by more recent information from the same sources (Freedom from Torture). Overall, and with one exception, I am not satisfied that exceptional circumstances exist to justify considering the new country information which pre-dates the delegate's decision. I take a different view of the article dated 25 November 2019 from the Hindustan Times. Given its date, I accept it could not have been provided to the delegate before she made the decision. It provides some updated information on the situation in Sri Lanka since the election, related to the situation to which the applicant will return. I am satisfied that exceptional circumstances exist to justify its consideration.

12. The submission makes the additional claim that the applicant will face serious harm from pro-government paramilitary groups including the Tamil Makkal Viduthalai Pulikal (TMVP). The claim to fear harm from paramilitary groups including the TMVP has not previously been made by the applicant. There is no explanation in the submission as to why this claim is only being made now. Moreover, no detail about this claim has been provided which suggests it has no credible basis. I am not satisfied the information could not have been provided before the delegate's decision was made or that it is credible personal information that if known may have affected consideration of the applicant's claims. On that basis, I am unable to consider it.
13. Finally, the applicant requests that he be given an opportunity to explain in person what he has said in the December declaration and the submission argues that it would be legally unreasonable not to consider exercising its power under s.473DC(3) to invite the applicant to give oral evidence at an interview. The applicant was interviewed by a delegate of the Department during which he was questioned in some detail about his claims, was given an opportunity at the end of the interview to raise any further claims, and was notified that anything further he wished to provide before the s.65 decision was made would be considered. The applicant specifically stated at the end of his protection interview that he had already provided all the details of his claims and had nothing further to provide. He did not provide any further information to the Department before the decision was made. I acknowledge that the applicant was unrepresented in his dealings with the Department. However, I do not consider that by itself this warrants inviting the applicant to an interview. Neither the submission nor the December declaration identify what additional information the applicant may be able to give that has not already been provided. The submissions and some new information provided to the IAA have been taken into consideration and in my view, the applicant has had a meaningful opportunity to present his case and respond to the issues identified in the delegate's decision. In the circumstances, I have decided to proceed to making a decision without asking the applicant to an interview or otherwise to provide further information.

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

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14. The applicant's claims can be summarised as follows:
  - The applicant grew up in [District 1] with his parents and [a sibling]. In 1989, when he was [a certain age], his family fled Sri Lanka due to the civil war.
  - They fled to Tamil Nadu, India and lived in a series of camps. His mother continues to live in a refugee camp in Tamil Nadu.
  - His father was Muslim and his mother is Hindu. His father died from a [medical condition] in November 2012.

- His father was not a member of the Liberation Tigers of Tamil Eelam (LTTE). However, he understands his father provided [assistance] to LTTE soldiers during the war whilst living in their village in Sri Lanka.
- His father was arrested by Indian police in December [year] because they suspected him of being a member of the LTTE. He was imprisoned from December [year] until 1996.
- The Indian authorities would have advised the Sri Lankan authorities that they imprisoned his father on suspicion of being a LTTE member and this information along with details of his father's family members would be known to the Sri Lankan authorities.
- Life in the refugee camps in India was very hard. They were mistreated by the Indian authorities. They had no rights and had few opportunities. On one occasion he was accused of stealing a vehicle from his employer although he was innocent.
- The applicant was involved in protests in India against the Sri Lankan government and President M Rajapaksa. The protest was reported in many Indian newspapers and television news programs and his involvement in these protests would be known to the Sri Lankan government; he fears he would be seen as against the Sri Lankan government.
- He cannot return to Sri Lanka as he fears being killed by the Sri Lankan authorities as a Tamil who has been involved in public protests against the Sri Lankan authorities. He is also the son of someone imprisoned on suspicion of being a LTTE member.
- Asylum seekers who have returned to Sri Lanka from Australia have gone missing and are feared dead or imprisoned.
- He does not know anyone in Sri Lanka as he left the country when he was [a certain age] and has never returned there.
- He cannot return to India either as he has no legal right to reside there.
- His father was Muslim, he carries his name as do his children. Muslims are not safe in Sri Lanka.
- He was affected by the Department of Immigration's data breach in 2014.

### **Refugee assessment**

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15. 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**

16. 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.

### *Identity and background*

17. The applicant has provided evidence of his identity and nationality, including a copy of his Sri Lankan birth certificate (original and translation). He has referred in some detail to the problems he experienced living as a refugee in a camp in India. He states, and I accept, that he has no legal right to reside there. For the purposes of this decision, I accept his identity as claimed and that Sri Lanka is his receiving country.
18. The applicant's evidence about his background and personal circumstances has been presented consistently since his arrival in Australia. Overall and except as discussed below, I accept his evidence regarding his family's experiences in Sri Lanka, prior to their departure. I accept his claims regarding his family's decision to travel to India and their lives there, and his family's current situation.
19. The applicant repeatedly referred to his Tamil ethnicity as the main reason why he was unable to return to live in Sri Lanka and that his mother had emphasised consistently throughout his life that, notwithstanding the difficulties of living as refugees in India, it was unsafe to return to Sri Lanka.

### *Father and LTTE connections*

20. While I found the applicant a generally credible witness, there are some aspects of his claims concerning his father which I consider he has sought to exaggerate. In his written SHEV statement he claimed his father, although not a member of the LTTE, provided [assistance] to LTTE soldiers during the war. However in his SHEV interview, while confirming his father was not a member of the LTTE, he said his father didn't support them either he just cared for people in the village who were affected. This aspect of his claims was tested in his SHEV interview but he continued to state that his father was neither a member nor a supporter of the LTTE. This is hard to reconcile with his written claim that his father provided LTTE soldiers with assistance.
21. In assessing his evidence about his claims regarding his father's involvement with the LTTE and subsequent imprisonment in India, I have taken into consideration that the applicant was very young at the time and is likely to be relying less on his own recollections than on what he has been told by other members of his family. Nonetheless, as his interview evidence about his father's involvement with the LTTE in Sri Lanka was very clear and was repeated more than once, I do not accept that his father provided [assistance] to LTTE soldiers during the war.
22. I also have some reservations about the claim that his father was imprisoned in India from around [a certain year] for [a number of] years on suspicion of LTTE involvement. Information before me regarding the political environment prevailing at that time in India, immediately after

the assassination of Prime Minister Rajiv Gandhi, indicates that all Sri Lankan immigrants and refugees arriving from Sri Lanka were subjected to scrutiny at the Mandapam transit camp where the applicant and his family arrived. Any suspicion about a person resulted in him or her being quarantined in a separate camp at Mandapam after which, if suspicion continued, the person would be transferred to a “special camp”. Others were identified later on by Q branch officials as suspected of involvement in a crime (including offences under India’s *Foreigners Act* 1946 such as illegal entry into India) or of holding membership of the LTTE and were similarly transferred to one of the special camps, including [specified], although this category included many camp refugees who simply displeased the Q-Branch officials in any one of a myriad of ways determined by the needs of such officials.<sup>1</sup>

23. These “special camps” administered by Q branch were virtual prisons, with their internal arrangements sometimes surpassing the security inside regular prisons.<sup>2</sup> Inmates were denied any contact with family members and were kept insulated from the outside world through extraordinary security measures on the basis they represented a threat to national security.<sup>3</sup>
24. In his SHEV interview the applicant’s evidence was that his father was arrested under suspicion of being a member of the LTTE and was put in prison because they were Sri Lankan Tamils. He said the family wanted to be with him because nobody would care for them so they went to where he was detained and they were taken inside as well. He said his father was released in 1996 because they found him innocent. His SHEV application form indicates that from around [date] until [date] he (the applicant) lived at [Jail 1] and from around [date] to [year] he lived at [Jail 2]. The fact that from [a certain year] he and his family were permitted to live with his father in what appears from the photographs provided to be a very relaxed, open environment, tends to indicate that whatever facility or facilities that they lived together as a family from [year] until [year], it was not one of the Indian government’s “special camps” for LTTE suspects which the information before me indicates were essentially closed prisons.
25. I am prepared to accept that sometime after they arrived in India, the applicant’s father was detained separately from his family for around two years but the country information before me indicates that this could have been for a number of reasons unrelated to LTTE suspicion, including breaches of the *Foreigners Act* and there is no credible evidence before me that it was related to any suspicion on the part of the Indian authorities that his father was a member of the LTTE. Overall, while I accept that the applicant’s father was detained in some type of camp other than an ordinary refugee camp for around [a number of] years until his release in 1996, on the evidence before me, I am not satisfied that his father was arrested and imprisoned for [a number of] years on suspicion of being a member of the LTTE.
26. It follows that I am not satisfied that the Sri Lankan authorities would have been advised that his father was imprisoned on suspicion of LTTE membership or that information about his suspected involvement with the LTTE and details of his family members including the applicant would be known to the Sri Lankan authorities today.

*Protests in India/Tamil ethnicity/imputed political opinion generally*

27. The applicant claims that from around 2012 he was involved in a number of protests in India against the Sri Lankan President, M Rajapaksa. He provided a copy of a newspaper article dated [date] (copy and translation) and told the delegate he and his [sibling] were [in it]. He claims his

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<sup>1</sup> Sreekumar Panicker Kodyath and Sheethal Padathu Veetil, Refugees Survey Quarterly “Invisible people: Suspected LTTE members in the special refugee camps of Tamil Nadu”, February 2017 CIS20191003141715

<sup>2</sup> *ibid*

<sup>3</sup> *Ibid*

involvement would be known to the Sri Lankan authorities and that his life would be in danger as he would be seen as someone who is against the Sri Lankan government.

28. In his SHEV interview, the applicant said he couldn't remember how many protests he'd been involved in and was able to recall specifically just two protests – the one covered in the newspaper article and a hunger strike. He said he wasn't an organiser of the protests. I am prepared to accept that the applicant took part in two protests/hunger strikes while he was in India in support of Tamils and that the one in [date] was reported in a [newspaper]. He did not claim he was ever arrested or charged by the Indian authorities for his involvement. Country information indicates that the Sri Lankan authorities have been known to monitor diaspora events and activities.<sup>4</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 any member of the Tamil diaspora returning to Sri Lanka depending on their profile.<sup>5</sup>
29. The applicant left Sri Lanka when he was [a certain age]. He has no profile with the Sri Lankan government. While I accept his photo may have appeared in the media and that the protest(s) was also covered by [other media outlets], the applicant does not claim he was personally identified by name and the article translation provided does not indicate that he was. There is no suggestion he was other than a participant or that he would be viewed as anything more than one. I am not satisfied that his involvement in those activities seven years ago in India, even if it came to light, would raise his profile with the Sri Lankan authorities.
30. The applicant told the delegate that his parents had always told him that if he went back to Sri Lanka he would be killed and the reason for that was because he is Tamil. The submissions refer to recent political developments in Sri Lanka, in particular, the return of the Rajapaksas which, given the applicant's protest activity in India, his Muslim name, his Tamil ethnicity, and his suspected connection to the LTTE will increase the risk of harm to him.
31. For the reasons set out above, I do not accept that the applicant's father was detained on suspicion of LTTE membership and I am not satisfied any suspicion would attach to him on that basis. I do not accept he has any profile with the Sri Lankan authorities because of his limited protest activity in India. In relation to the other matters, I have considered the information in the submissions, the new country information provided to the IAA, the latest DFAT report and other country information cited in the delegate's decision about the situation in Sri Lanka.
32. I can accept that growing up, he heard many stories of what was going on in Sri Lanka, particularly for Tamils, and that this has led to a subjective fear that as a Tamil he would not be safe there. However, it is now nearly 30 years since his parents fled the country and over ten years since the war ended in the defeat of the LTTE. It is apparent on the country information before me that much has changed in that time, in particular, the situation for Tamils has vastly improved in recent years.
33. The initial stages of the Sirisena government elected in 2015 resulted in a number of steps towards the restoration of democratic governance including the introduction of a two term limit for the President (which had been removed by the former President), a devolution of executive powers exercised by the President to the Prime Minister, the Cabinet and Parliament, and the creation of independent commissions to oversee the judiciary, police, elections, human rights

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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> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105



and the office of the Attorney-General; the government also re-established a Constitutional Council to make appointments to the new commissions.<sup>6</sup> The constitutional amendment to strengthen the independence of the Sri Lankan Human Rights Commission is said to have increased the effectiveness of existing oversight and monitoring responsibilities.<sup>7</sup> A number of Tamil international diaspora organisations were de-proscribed, and the government reviewed cases of those held under the *Prevention of Terrorism Act* (PTA) and released some detainees held under the PTA.<sup>8</sup>

34. The security situation, particularly in the north and east, has improved significantly since the end of the war in 2009. Security measures such as military checkpoints and restrictions on travel to the north and east have been lifted and while the military maintains a significant presence in the north, most military personnel are confined to the Security Forces Cantonment on Jaffna Peninsula and smaller surrounding military camps.<sup>9</sup> The number of incidents of extrajudicial killings, disappearances and abductions for ransom (including white van abductions) and incidents of violence involving former LTTE members, has significantly reduced since the end of the war.<sup>10</sup> Whereas many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war and under the previous government on the basis of imputed LTTE support based on ethnicity, the monitoring of Tamils has decreased significantly, although surveillance of Tamils in the north and east continues, particularly those associated with politically-sensitive issues. Physical violence against those being monitored is, however, not common.<sup>11</sup>
35. The government relaxed some restrictions on the public commemoration of events associated with the Tamils' armed struggle for statehood. While some monitoring by the authorities occurs, Tamils have been free to hold public ceremonies marking Maaveerar Naal (Great Heroes' Day) since 2016 and local source told DFAT the atmosphere at war commemorations was 'constructive' and Tamils were increasingly comfortable marking such events.<sup>12</sup>
36. While the government remains sensitive to the potential re-emergence of the LTTE (or similar pro-separatist group) its focus has changed to identifying those who pose a threat to the unitary Sri Lankan state rather than identifying those who had any links to the LTTE.<sup>13</sup> Although the country information points to some ongoing monitoring and surveillance in the Tamil community, overall the security situation is markedly different than it was in the immediate aftermath of the war. As to the situation for Tamils more generally, DFAT has reported for a number of years that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015 and generally, Tamils face a low risk of official or societal discrimination based on ethnicity or caste including in their ability to access education, employment or housing.<sup>14</sup>

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<sup>6</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5 15 June 2017, OG6E7028826

<sup>7</sup> Freedom from Torture "Too Little Change: Ongoing Torture in Security Operations in Sri Lanka" 22 February 2019, 20190227113604

<sup>8</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5 15 June 2017, OG6E7028826

<sup>9</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", Version 5, 15 June 2017, OG6E7028826

<sup>14</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

37. I note the delegate's reference to the recent election of Gotabaya Rajapaksa as President and the appointment of his brother, former President Mahinda Rajapaksa as Prime Minister, and the concerns expressed in many quarters about the return of the Rajapaksa brothers to power. I accept, as the submission and supporting country information refers to, that the Rajapaksas are highly controversial figures, particularly among the minority populations in Sri Lanka. Both have been accused of atrocities committed at the end of the war and the former President's term in office was known for tightly centralized power and the spread of a strident Sinhalese Buddhist nationalism that has inspired attacks against the country's large minority communities.<sup>15</sup> He was also criticised for authoritarian instincts and clan-based politics, of bullying the press and judges and tried to remain in office by amending the constitution, among other disturbing tactics.<sup>16</sup>
38. Some country information before me indicates concern that persistent ethnic and religious tensions could dangerously sharpen under G Rajapaksa's presidency and that a number of moves to address Tamil and civil society concerns are certain to go nowhere or be dropped and that the constitutional amendment which introduced a raft of reforms under the previous government will be revoked.<sup>17</sup>
39. I accept that the return to power of the Rajapaksas has led to concern on the part of Tamils in particular and that the international community will be keeping a close eye on those developments, given their previous records in office. However, I consider much of the commentary around the return to office of the Rajapaksas and what it might mean for Tamils, conjecture, noting that the new President pledged to make no distinction between the various ethnicities and religious communities.<sup>18</sup>
40. Information from a Indian newspaper provided to the IAA by the applicant's representative reports that the president of an Indian Tamil political party observed that the new President has passed orders to increase armed forces in Tamil areas of the island nation and that the Rajapaksa brothers had also started to change the Tamil names of streets in the Northern and Eastern Province.<sup>19</sup> This information is not corroborated by any other recent country information before me and no other details of the actions complained of by the DMK president were outlined or otherwise provided. In the absence of evidence of any significant changes to government policies and practices, I consider it speculative to suggest that the recent change in government will lead to a changed attitude by the government towards the Tamil population, a reversal of reform measures, result generally in a deterioration of conditions in Sri Lanka, or more particularly, that those with profiles like the applicant or Tamils in general face a real risk of adverse attention from the security forces or generally.
41. He does not claim he participated in diaspora activities in Australia and I am not satisfied that the applicant will face a real chance of harm from the Sri Lankan authorities due to his participation in a couple of demonstrations in India, if he is returned to Sri Lanka, now or in the reasonably foreseeable future. The applicant does not claim nor is there evidence before me that he participated in activities in Australia (protests or memorial events) which the authorities have been known to monitor. Overall, I am not satisfied that there is a real chance the applicant would face harm if he returns to Sri Lanka either on the basis of his protest activity in India, his

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<sup>15</sup> The New York Times, "Gotabaya Rajapaksa Wins Sri Lanka Presidential Election", 18 November 2019, 20191119105229

<sup>16</sup> The Economist "The Rajapaksa brothers are back in Sri Lanka", 17 November 2019, 20191118105643

<sup>17</sup> International Crisis Group (ICG), "Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure", 18 November 2019, 20191119144914

<sup>18</sup> Asian Tribune, "In A Clearly Emerged Ethnic Division – Gotabhaya Rajapaksa Declared Winner", Asian Tribune, 18 November 2019, 20191118110207

<sup>19</sup> Hindustan Times, "Stalin opposes 'militarisation' of Lankan Tamil areas, urges PM Modi to raise issue", 25 November 2019

Tamil ethnicity and imputed political opinion, any suspected connection to the LTTE, his extended absence from Sri Lanka (considered in more detail below) or any of the other claims he has made, by themselves or in combination.

*Fears due to Muslim name*

42. A matter raised by the applicant in his SHEV interview and which it is submitted was not properly assessed in the Department's decision was the fact that the applicant bears his father's name, a Muslim name, and that this may expose him to attacks and discrimination of the sort which followed the 2019 Easter Sunday terrorist attacks in Sri Lanka.
43. The applicant did not raise this as one of his claims in his SHEV application but only referred to fears about having a Muslim name in his SHEV interview. This may be because the application was made before the events of April 2019. From the information before me it appears that it was only after submitting his application for protection that the applicant requested to change the surname listed on his ImmiCard to "[a different name]" which I note is listed on the applicant's own birth certificate as one of his father's names and which he stated on his SHEV application form was his father's given name.
44. The submission to the IAA states that while the applicant is not a Muslim, his Muslim surname may mean he is vulnerable to the kind of attacks and discrimination against members of the Muslim community in Sri Lanka reported on by DFAT in its latest report.
45. There are long-running tensions in Sri Lanka between the various ethnic communities. The Easter 2019 attacks set in motion a new wave of Islamophobia which spread rapidly due to social media, particularly by the Sinhalese Buddhists.<sup>20</sup> DFAT is aware of reports of Muslims being subjected to discrimination on the basis of their religion since those attacks.<sup>21</sup> Greater freedom of expression under the Sirisena government and growth in social media use have enabled an increase in hate speech against Muslims and other religious minorities.<sup>22</sup>
46. The Muslim community has also been the subject of reprisal attacks including physical assault and property damage since April 2019. In May, scores of Muslim-owned businesses, mosques, houses and vehicles were targeted by Sinhalese mobs in several towns and cities across the North Western Province; many properties were torched and destroyed or badly damaged and one Muslim businessman was killed. Many were arrested in connection with the violence, the most serious since March 2018 when the government declared a state of emergency. Muslims have been questioned and in some cases detained for 'extremism' on the basis of limited evidence and have reportedly been targeted for vehicle searches at military checkpoints briefly reintroduced following the Easter Sunday bombs.<sup>23</sup>
47. DFAT assesses that, in the current environment, Muslims face a moderate risk of violence. DFAT further assesses that Muslims face a low – but increasing – risk of official discrimination and a moderate risk of societal discrimination, including a growing threat to their freedom of religion. A 'moderate risk' is one where DFAT is aware of sufficient incidents to suggest a pattern of behaviour.<sup>24</sup>

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<sup>20</sup> The Hindu "An elusive reconciliation in Sri Lanka", 19 November 2019, 20191119143848

<sup>21</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*

48. Implicit in the submission to the IAA is that any Tamil with a Muslim name is at risk of harm in the current environment in Sri Lanka. I do not accept that and it is not corroborated by the country information before me. I accept DFAT's overall assessment that Muslims face a moderate risk of harm in the current environment. Notwithstanding that assessment, however, with the exception of the anti-Muslim violence of March 2018 and May 2019, attacks on the Muslim community have been of a low-level nature and the government has taken action against those suspected of perpetrating violence against the Muslim community.<sup>25</sup>
49. Significantly, in my view, the applicant does not identify as a Muslim but as a Tamil and a Hindu and does not claim he would attend mosque or practise Islam thereby risking being identified as Muslim, or that in any way he would identify himself in Sri Lanka as a Muslim. He told the delegate in his SHEV interview that his only concern was his name. I accept that it is possible that he may be identified as a Muslim if people become aware of his name. However, I do not accept that simply on that basis, there is a real chance this would result in the authorities (or any other group or person) taking an interest in him or that it would otherwise involve harm and I am satisfied any risk to him as a result of his Muslim name does not rise to a real chance.
50. I note the applicant claimed his children also have his own father's Muslim name and seemed to suggest that this might be problematic for them also. The information provided to the Department (including the birth certificate of his elder son) does not bear this out and I do not accept that his children might be at risk of being identified as Muslim.
51. I accept that life in the refugee camps of Tamil Nadu is very hard. The applicant referred to not having any rights in India, the lack of education and employment opportunities as non-citizens, and mistreatment by the Indian authorities including on one occasion when he was detained and beaten on suspicion of stealing a motor vehicle from his employer although he was innocent. I accept all this. However, apart from the matters discussed above, these experiences do not appear to have any repercussions for his claims for protection in relation to Sri Lanka.
52. Turning to the applicant's return, he left Sri Lanka when was very young. He says he doesn't know anyone in Sri Lanka and doesn't know where he would live or how he would find work. I accept this is possible although I note from his evidence at the SHEV interview, it appears his mother has some contact with somebody in Sri Lanka (it was not clear if it was a friend or a relative) who was able to obtain and provide a copy of his birth certificate from the Divisional Secretariat in [Town 1] and I do not accept that he would be entirely without contacts in Sri Lanka. Nonetheless, I accept that if he returns he may find himself alone and thrown onto his own resources. However, I have also taken the following matters into account. The applicant is [a certain age]. He speaks, reads and writes English and has a history of employment in both India and Australia. It seems to me he has demonstrated considerable resourcefulness firstly, in obtaining work in India (notwithstanding the claimed difficulties associated with that) and then in relocating to Australia and establishing a life for himself here and I do not accept he would be unable to find work. I accept that as he has lived the majority of his life in India he is likely, initially, to face a number of challenges in returning to Sri Lanka (see further below). It is estimated, however, that 200,000 Tamils have returned from India with the assistance of UNHCR, which has provided them with relief measures to start up businesses on return; there have been no reports of ill-treatment on return.<sup>26</sup> I am not satisfied there is a real chance that if he is returned to Sri Lanka he would be denied the capacity to earn a livelihood, that he would be subject to economic hardship such that it would threaten his capacity to subsist, that he

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<sup>25</sup> *ibid*

<sup>26</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)", March 2017, CISED50AD3780/OGD7C848D112

would be denied basic services, or would otherwise suffer treatment that may be considered serious harm within the meaning of s.5J of the Act.

53. Overall, for the reasons discussed above I am not satisfied that the applicant will face a real chance of harm for any of these reasons now or in the reasonably foreseeable future.

*Data breach/Illegal departure/returning asylum seeker*

54. The delegate's decision refers to the Departmental data breach in February 2014 and notes the applicant was included in the list of detainees inadvertently published by the Department. The delegate states the applicant was advised of this by letter on 14 March 2014 and further notes that the applicant has not raised any claims of harm arising from this incident. The submission to the IAA takes issue with this aspect of the decision and states that regardless of whether the applicant raised this issue in his SHEV interview, the release of his information heightens his profile and risks bringing him to the attention of the Sri Lankan authorities on return.
55. I accept that, assuming his personal information was accessed, that the Sri Lankan authorities may assume that the applicant had sought asylum in Australia. However, I do not accept the submission that this places him at a real risk of being identified as a person with an anti-government opinion. Firstly, as the submission notes, only some personal information was released not details of his claims for protection and I do not accept that the Sri Lanka authorities would be aware of the contents of his claims or any complaints he has made about the Sri Lanka government. Secondly, all that could be inferred from the release is that he was possibly seeking asylum and that is likely to be surmised by the authorities in any case on his return to Sri Lanka, from his lack of travel documents. I am not satisfied that the disclosure of his personal information will either result in, or increase the likelihood of, him being harmed on arrival or that there is a real chance of him being harmed when he arrives as a result of that disclosure.
56. The applicant's evidence is that his family left Sri Lanka on a boat to India. I accept this is the case. He told the delegate he had never held a Sri Lankan passport. Given this, I accept it is likely he left Sri Lanka illegally without travel documents, and this means he is likely to be subjected to scrutiny at the border on his return.
57. A number of sources have commented on the arrival process at Colombo International Airport. Returnees are subject to a number of entry checks against immigration databases, intelligence databases and records of outstanding criminal matters, and the police check returnees who are travelling on temporary travel documents to confirm the person's identity. This might involve interviewing the returning passenger, contacting their hometown police, contacting claimed neighbours and family, and checking criminal and court records. These are standard procedures and apply to all returnees regardless of ethnicity.<sup>27</sup> DFAT understands that detainees are not subject to mistreatment during processing at the airport.<sup>28</sup>
58. His representative submits that in this process, he would be exposed to serious harm given his suspected connection to the LTTE. I have not accepted that his father was arrested and jailed on suspicion of LTTE membership, or that he himself would be imputed with such connections and I reject the suggestion that the applicant is at a real risk on that basis. The applicant was a child when he left Sri Lanka. The country information before me does not indicate that his long residence in India is a matter that itself would attract suspicion over LTTE or separatist links. Country information indicates that participating in diaspora activities such as attending

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<sup>27</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>28</sup> *ibid*

demonstrations is also not evidence that a person will attract adverse attention on return.<sup>29</sup> Something more is required in the person's profile such as 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>30</sup> The applicant does not fit the profile of a person with a significant role in post-conflict Tamil separatism or a renewal of hostilities.

59. Refugees and failed asylum seekers can face a number of practical challenges to successful return to Sri Lanka including finding suitable employment and reliable housing.<sup>31</sup> Some refugees and failed asylum seekers also reported social stigma from their communities upon return, although DFAT understands that societal discrimination is not a major concern for returnees including failed asylum seekers.<sup>32</sup> DFAT understands that some returnees have been the subject of monitoring by the authorities but understands that most returnees are not actively monitored on an ongoing basis; it wasn't aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities nor received monitoring visits.<sup>33</sup>
60. I accept that the applicant may face some challenges in reintegrating into life in Sri Lanka and there is a possibility he may be monitored for a period but as discussed above, on the evidence before me, I am not satisfied that there is a real chance that his circumstances on return to Sri Lanka would be such that his capacity to subsist would be threatened, or that the treatment he may experience would otherwise amount to serious harm.
61. Nor am I satisfied that the way he left Sri Lanka many years ago gives rise to a real chance of persecution. In cases where an illegal departure is suspected, the person may be arrested and charged at the airport with an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act).<sup>34</sup> On that basis, the delegate found that the applicant may face charges, brief detention and a fine for his illegal departure. I have come to a different view. DFAT's most recent advice is that people in the situation of the applicant, that is, returnees who were under the age of criminal responsibility (12 years) at the time of their illegal departure are not liable to be charged if they were younger than 12 at the time of the alleged offence.<sup>35</sup>
62. On the basis of the above information, I am satisfied that the applicant will be investigated at the airport on his return and will be identified as a person who left Sri Lanka illegally. However, on his own evidence, he was [a certain age] at the time his family fled Sri Lanka for India. I am not satisfied that the applicant will be regarded as liable to be charged under the I&E Act for leaving Sri Lanka illegally in around 1989/1990 when he was a child under the age of 12. He is in possession of a number of documents to support his identity and I am satisfied that during processing he will quickly be able to establish his identity if required and is unlikely to face legal action as a consequence of leaving illegally. For the reasons set out above, I am not satisfied there is real chance of him being identified as a person of interest to the authorities and I find that this will quickly be established during this investigative process. Contrary to his representative's submission, the applicant does not have an adverse profile, the investigative

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<sup>29</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", Version 5, 15 June 2017, OG6E7028826

<sup>30</sup> *ibid*

<sup>31</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> *ibid*

process is likely to be brief and I am not satisfied that there is more than a remote chance of him being detained for any longer than the time it will take to establish his identity or that there is a real chance he would be mistreated during this re-entry process.

63. Overall, I am not satisfied that there is a real chance the applicant would face persecution on the basis that he is a returning asylum seeker or refugee, or an illegal departee.
64. Taking into account what I consider his lack of profile and country information about the changed in-country conditions in Sri Lanka, and having regard to my findings above and the evidence before me, I am not satisfied that there is a real chance that if he returns to Sri Lanka he would be persecuted for any of the reasons in s.5J(1).

### **Refugee: conclusion**

65. 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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66. 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**

67. 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.

68. I accept that the applicant will undergo processing at the airport. However, I am not satisfied that the treatment to which he is likely to be subjected at the airport amounts to significant harm. His profile indicates that he would not be a person of interest to the authorities for any reason and I am not satisfied there is a real risk he will be mistreated while being processed at the airport. As discussed above, I am not satisfied that he is at a real risk of being charged and processed under the I&E Act, or that he might face detention other than while being investigated at the airport to confirm his identity and the circumstances in which he left Sri Lanka as a child approximately thirty years ago. I am not satisfied that the conduct of the Sri Lankan officials in this process amounts to significant harm within the meaning of s.36(2A). I accept that while re-integrating the applicant may face some initial practical challenges and possibly some social stigma, in addition to the possibility of some monitoring visits. However, I am not satisfied on the evidence that such treatment amounts to significant harm as defined in the Act.

69. I have otherwise found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future for any other reason. As 'real chance' and 'real risk' involve the same standard<sup>36</sup>, it follows that I am also satisfied that there is no real risk of him suffering significant harm for any of the other reasons claimed if he is returned to Sri Lanka.

**Complementary protection: conclusion**

70. 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.

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<sup>36</sup> *MIAC v SZQRB* (2013) 210 FCR 505.



## 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.