



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07583

Date and time of decision: 29 January 2020 16:48:00  
J Bishop, 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) is now [age] years old and claims to be a national of Sri Lanka. He identifies as a Hindu Tamil. He travelled by boat from India to Australia and arrived [in] April 2013.
2. On 3 May 2017 the applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). On 25 November 2019 a delegate for the Minister for Immigration (the delegate) refused the applicant's visa. The delegate determined the applicant did not have a profile of interest and did not face a real chance of serious harm or a real risk of significant harm now or in the foreseeable future in Sri Lanka.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
4. Section 473DB of the Act provides that, subject to Part 7AA, the IAA must review decisions by considering the review material without accepting or requesting new information and without interviewing the applicant. Section 473DC provides that the IAA may obtain new information – defined to mean information that was not before the delegate when the decision was made and I consider may be relevant – but it does not have a duty to get, request or accept any new information, whether the IAA is requested to do so by an applicant, or in any other circumstances. If I get or accept new information, I must not, pursuant to s.473DD of the Act, consider that new information unless I am satisfied that there are exceptional circumstances to justify its consideration. In relation to new information given to the IAA by the applicant I must also be satisfied that it:
  - was not, and could not have been provided before the delegate's decision was made; or
  - is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
5. On 23 December 2019 the applicant's representative provided submissions about the omissions and errors in the delegate's decision based on the information that was before the delegate. I have had regard to those submissions.
6. On 23 December 2019 the applicant's representative provided an article from the Guardian dated 17 November 2019, an article from the Telegraph dated 17 November 2019, an article from the BBC dated 17 November 2019, an article from Aljazeera dated 23 November 2019 and an article from the Associated Press dated 2 December 2019. Part of the IAA submissions contained arguments about the risks facing the applicant because of the recent change of government in Sri Lanka and referred to the new country information provided (as outlined above). Apart from the article dated 2 December 2019 that post-dated the delegate's decision and could not have been provided sooner, all the other articles pre-dated the delegate's decision. The delegate's decision was made nine days after the political conditions in Sri Lanka changed but it was not considered in her decision. In the context of a short timeframe between the change of government in Sri Lanka and the delegate's decision and an unrepresented applicant, I am satisfied that he could not have provided the new country information pre-

dating the delegate's decision before the decision was made. And I consider the new information and - the submissions related to it - are relevant to the applicant's claims. I am satisfied there are exceptional circumstances to justify considering this new information and related submissions and have had regard to them.

7. The applicant's representative provided an article from the Colombo Telegraph dated 3 December 2016 and titled "June 1983: Anarchy Loosed". The article was about the specific discrimination against Indian Tamils and the additional suspicion they have faced in the past and are likely to face in the future. The applicant could have provided the article before the delegate made her decision and as outlined below, I have found the applicant is a Sri Lankan Tamil not an Indian Tamil. The article has no relevance to the applicant's claims and I am not satisfied that there are exceptional circumstances that justify considering it. I have not had regard to it.
8. The applicant's representative provided a redacted copy of a delegate's decision (purportedly from the same delegate) - for a Tamil who had entirely different claims to the applicant - and submitted that the decision contained wording that was identical to the wording in the applicant's decision. The representative submitted that the delegate did not genuinely engage with the applicant's claims given her decision was pre-written. The role of the IAA is to undertake a review of the delegate's decision based on the information that was before the delegate and, in exceptional circumstances as outlined above, accepted new information. The redacted copy of the delegate's decision is not relevant to my assessment of the applicant's claims. I am not satisfied there are exceptional circumstances to justify considering it. I have not had regard to it.
9. The applicant's representative provided a copy of a letter dated 14 March 2014 from the Department that confirmed the applicant's privacy had been breached in January 2014. That letter was provided to the delegate during the SHEV interview but was not included in the review material. On 17 January 2020 I requested the Department provide the letter to the IAA and it was received on 20 January 2020. The data breach letter was before the delegate and is not new information. I have had regard to it.
10. The applicant's representative submitted that the delegate relied upon the 2018 Department of Foreign Affairs and Trade (DFAT)<sup>1</sup> report even though a 2019 DFAT<sup>2</sup> report had been released prior to her decision being made. The delegate's decision referenced the 2019 DFAT report at footnote 27. The 2019 DFAT report<sup>3</sup> was before the delegate and is not new information. I have had regard to it.
11. The applicant's representative submitted that the IAA would fall into jurisdiction error if it were to make any adverse findings on the basis of any new information without scheduling an interview. The applicant has taken the opportunity to provide new country information and submissions to the IAA and, as outlined above, I have considered that new information – which is 'prescribed' for the purposes of s.473DE(3)(c).<sup>4</sup> The applicant is aware of that information and I have no other new information before me. The applicant's representative also submitted that the short length of the SHEV interview couldn't be considered sufficient for an applicant to have his claims accorded full and proper weight. I have listened to the applicant's SHEV interview and am satisfied the applicant was given ample opportunities to put forward all his claims for protection to the delegate. Taking into consideration all the information before me

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

<sup>2</sup> "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>3</sup> Ibid

<sup>4</sup> See regulation 4.41 of the Migration Regulations 1994

and given my findings as outlined in the decision below, I have decided not to exercise my discretion to invite the applicant to provide further information whether at an interview or otherwise.

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

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12. The applicant's claims to fear harm if he is returned to Sri Lanka for the following reasons:

- His actual or perceived links to the Liberation Tigers of Tamil Eelam (LTTE) – Tamil, being from [Town 1], location of family home not far from the LTTE camps, providing food and/or supplies to the LTTE prior to 1990, time spent in India and/or a Western country (Australia), protesting in India in 2009 and relatives with suspected LTTE connections
- He speaks a different dialect of Tamil. The Tamils and Sinhalese will know he has spent a long time in India and he will have problems
- Appropriation of familial lands
- His time spent in a western country
- His personal details being accessible on an Australian government website
- His mental health
- His religion – Hindu
- He will be returning as a failed asylum seeker
- His illegal departure of Sri Lanka in 1990
- The new Sri Lankan government

### **Consideration**

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13. 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**

14. 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.
15. The applicant claims to be a Sri Lankan citizen and identifies as a Hindu Tamil. He was born in [Town 1] which is located in the North East of Sri Lanka. The applicant provided his Government of Tamil Nadu Sri Lankan Refugee Card issued [in] March 2007 for a name similar to the applicant's name but with one different letter. His date of birth is incorrectly listed as [date]. He provided his Sri Lankan Refugee Identity Card, his birth certificate and its translation. His original birth certificate was sighted at the applicant's SHEV interview as was his marriage certificate. Although there are discrepancies regarding his name and date of birth in some of the identification documents provided by the applicant, I am prepared to accept, for the purposes of this decision, the applicant is who he claims to be and is a citizen of Sri Lanka. I find the receiving country is Sri Lanka.
  16. The applicant claims that the majority of the population in [Town 1] is Sinhalese and Tamils make up about 20%. In 1983 the applicant and his family moved to Jaffna after fighting broke out between the LTTE and the Sri Lanka military in their region. The applicant and his family moved a further three times to avoid the conflict. In 1987, around the time of the peace accord, the applicant and his family returned to [Town 1] and stayed with their grandmother. When the Indian Peacekeepers withdrew from Sri Lanka in 1990, fighting between the LTTE and Sri Lankan military recommenced. The applicant and his family then fled to India.
  17. The applicant claims he will be branded by the Sri Lankan authorities as a supporter of the LTTE as a Tamil from [Town 1]. His home was not far from the forest where the LTTE would set up their camps. When he was growing up the LTTE would come to 'our' homes and villages for food and supplies in the night. Their lives would have been at risk if they refused an LTTE's fighter's demands and they would be viewed as part of the LTTE support base. They faced an equal threat from the Sinhalese authorities. The applicant did not provide details about how often he and his family provided food and/or supplies to the LTTE or what supplies were provided. He has not claimed and there is no evidence before me to indicate that he and/or any member of his family were ever harmed by the Sri Lankan authorities or anyone else because of their limited assistance to the LTTE. I accept the applicant is a Tamil from [Town 1] and there home was close to LTTE camps. I accept that the applicant and his family, prior to 1990, provided food and supplies to the LTTE when asked.
  18. The applicant said Indian Tamils have helped the LTTE for many years and there is 'a thought' that Tamils who have lived in India helped the LTTE. When the delegate asked the applicant what help he provided to the LTTE he responded that 'we' didn't help but it is the mindset that Indian refugees have helped the LTTE.
  19. The applicant said he was involved in protests in India and if he returned to Sri Lanka he will be easily identified as helping the LTTE because it was in the newspapers. When the delegate asked what protests he was involved in he said he went to the "collector's office" and protested about all the people being killed and "did the fasting" as well. This was in 2009. The applicant has not provided details about what his involvement in the protests was, how many people participated in the protests, what the protesters did, how long the protests continued for, whether the protests were organised and sanctioned by the Indian authorities and/or whether his photograph appeared in the newspapers. The delegate asked the applicant if he had evidence of being identifiable from the newspapers and he responded that he didn't. I am prepared to accept the applicant attended two protests about "people being killed" in 2009.

20. The applicant states that last year (in 2016) his uncle's son was arrested and he 'thinks' he was accused of being connected to the LTTE. He was taken by the Sri Lankan authorities to Colombo where he was interrogated on the "Forth Floor". The applicant understands that his uncle's son was released but he does not know where he is or whether he is safe. The applicant did not provide details about how he knows his uncle's son was arrested, when his uncle's son was arrested, who arrested him, how long he was detained for, why he thinks he was accused of being connected to the LTTE and why he was released. The applicant did not repeat this claim during his SHEV interview. Based on the evidence before me, I am not satisfied the applicant's uncle's son was ever arrested and accused of being connected to the LTTE in 2016.
21. DFAT assesses<sup>5</sup> that Tamils are the second largest ethnic group in Sri Lanka with concentrated populations in the Northern and Eastern Provinces. The 2018 and 2019 DFAT reports indicate that the majority ethnic group in the Eastern Province of Sri Lanka (where the applicant's village is located) is Tamil.<sup>6</sup> Tamils have a substantial level of political influence and there are no barriers to Tamil political participation. The UK Home Office Report<sup>7</sup> on Tamil separatism stated that a person being of Tamil ethnicity would not in itself warrant international protection.
22. The 2019 DFAT report<sup>8</sup> indicates that about 95,000 Sri Lankan Tamils live as refugees in Tamil Nadu and about 60,000 of these live in camps run by the Tamil Nadu government. The Sri Lankan government has encouraged all Sri Lankans to return to invest in Sri Lanka. DFAT assesses that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE in Sri Lanka<sup>9</sup>. And the Sri Lankan authorities may monitor Tamils returning to Sri Lanka – including those returning from Tamil Nadu - depending upon their risk profile. Those who held leadership positions in Tamil diaspora groups, those who held a high profile role with the LTTE, or were suspected of raising funds for the LTTE or held views perceived as presenting a risk to the unitary Sri Lankan state or the Sri Lankan government would be of interest to the Sri Lankan government.<sup>10</sup> The applicant has not claimed and there is no evidence before me to indicate that he has ever held or would be perceived to have held a leadership position in the Tamil diaspora and/or that he holds radical views. He was [a young age] when he left Sri Lanka. I do not accept the Sri Lankan authorities will brand the applicant as an LTTE supporter because he is a Tamil from [Town 1], because his home was close to LTTE camps, because three decades ago he provided food/supplies to the LTTE when asked and/or because he lived in India from 1990 to 2013. I do not accept the Sri Lankan authorities have a mindset that Indian refugees have helped the LTTE. The applicant's representative submitted that he will be imputed with LTTE connections because he left Sri Lanka and he will be a Western returnee. I have no country information before me to indicate that merely spending time abroad is viewed adversely by the Sri Lankan authorities. I do not accept the applicant will be viewed with suspicion for spending a significant period of time abroad in Australia. I do not accept the applicant faces a real chance of any harm on this basis. I accepted the applicant attended two protests in 2009. But on his own evidence, he did not provide any help to the LTTE when he was in India. I do not accept the applicant would be perceived as presenting a risk to the unitary Sri Lankan state or would be of interest to the Sri Lankan government because he

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<sup>5</sup>"DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>6</sup> Ibid

<sup>7</sup> UK Home Office, "Sri Lanka: Tamil separatism v 4", 31 March 2017, CISED50AD3779; UK Home Office, 15 June 2017, OG6E7028826

<sup>8</sup> "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>9</sup> "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>10</sup> Ibid

attended two protests over a decade ago. Based on all the evidence before me, I am not satisfied that the applicant faces a real chance of any harm from the Sri Lankan authorities because of his claimed actual or imputed LTTE connections now or in the foreseeable future.

23. The applicant's representative submitted that since the recent election of Gotabaya Rajapaksa (the brother of former president Mahinda Rajapaksa and former Defence Secretary) as President of Sri Lanka, Tamils have an increased fear of harm.<sup>11</sup> It was submitted that the new President was seen as responsible for 'white van abductions' during the previous Rajapaksa government and, even though the new government returned to control a few weeks ago, abductions bearing the resemblance of white van abductions have already recommenced<sup>12</sup>. In support of that submission the applicant's representative referenced an article that stated a female Swiss Embassy employee was allegedly forced into a car and ordered to produce embassy information. The article indicated the SLP did not support the sequence of events of the alleged incident and said the employee needed to be interviewed. I do not accept the article is evidence of white van abductions recommencing since the recent election.
24. The articles provided by the applicant state that the new President has assured fair treatment for all and said that he understood he was the President for people who voted for him and also for people who voted against him. He stated that he would serve "you as a Sri Lankan disregarding race and religion".<sup>13</sup> He has promised to discharge his duties in a fair manner and called for unity in Sri Lanka.<sup>14</sup> Basil Rajapaksa – another brother of Rajapaksa – said there would be a departure from the oppression under Mahinda and they would "respect media freedom and civic organisations".<sup>15</sup>
25. I accept Tamils in Sri Lanka are concerned about what will happen since the recent election of Gotabaya Rajapaksa. However, at the time of this decision, it is pure speculation that the election of Gotabaya Rajapaksa will lead to a deterioration of conditions for Tamils in Sri Lanka and/or increase the risks for people in Sri Lanka with the applicant's particular profile. And the new President's statements indicate his intention is not to return to the oppression of his brother's presidency. Based on the evidence before me, I am not satisfied the applicant cannot be returned to Sri Lanka because of the recent change of government. I am not satisfied that the applicant faces a real chance of any harm now or in the foreseeable future from the Sri Lankan authorities because of the recent change of government.
26. During the SHEV interview the applicant said he will have problems from the Tamils and the Sinhalese because he speaks an Indian dialect of Tamil and they will know he has spent a lot of time there. When the delegate asked why he responded that the Tamils will say to him that he has lived in India for 30 years and now that all the problems are over he has come back. He said the Sinhalese will say that now they have got their country back he has come back to share it with them. He will be discriminated. The applicant was born in Sri Lanka and spent the first [number] years of his life there. He lived in India for [many] years. I accept the applicant speaks an Indian dialect of Tamil and that Tamils and the Sinhalese will know he has spent a lot of time in India. However, DFAT states<sup>16</sup> that credible sources are not aware of returnees

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<sup>11</sup> The Telegraph: Qadijah Irshad, "Former defence chief who led brutal suppression of Tamil Tigers wins Sri Lanka presidential election", 17 November 2019; The Guardian: Hannah Ellis-Petersen, Gotabaya Rajapaksa elected president of Sri Lanka, 17 November 2019; Aljazeera: Bernard Smith, "Sri Lanka's election results worry ethnic Tamils, 23 November 2019; BBC: "Sri Lanka election: Wartime defence chief Rajapaksa wins presidency", 17 November 2019

<sup>12</sup> Associated Press: "Sri Lanka wants to query Swiss Embassy worker over threat", 2 December 2019

<sup>13</sup> The Telegraph: Qadijah Irshad, "Former defence chief who led brutal suppression of Tamil Tigers wins Sri Lanka presidential election", 17 November 2019

<sup>14</sup> BBC: "Sri Lanka election: Wartime defence chief Rajapaksa wins presidency", 17 November 2019

<sup>15</sup> The Guardian: Hannah Ellis-Petersen, Gotabaya Rajapaksa elected president of Sri Lanka, 17 November 2019

<sup>16</sup> "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

from Tamil Nadu being subjected to monitoring or harassment by the Sri Lankan authorities.<sup>17</sup> DFAT assess that returnees from Tamil Nadu have reported being glad to have returned and would recommend it. There is some social stigma attached to returnees from Tamil Nadu but locals were generally welcoming and returnees did not feel they were treated differently. Returnee Tamils who have returned to the Eastern Province have told DFAT that they have no protection concerns and had not experienced harassment by the Sri Lankan authorities or received monitoring visits.<sup>18</sup> I accept the applicant – as a returnee who speaks with an Indian dialect of Tamil - could be subjected to some social stigma from Tamils or the Sinhalese because he speaks with an Indian dialect.

27. The applicant's representative submitted that the applicant is from a specific ethnic background referred to in the DFAT report<sup>19</sup> as an Indian Tamil – also known as a Plantation Tamil, Hill Country Tamil and/or Up-Country Tamil. Indian Tamils are descendants from Tamils of Indian origin who were brought to Sri Lanka in the 19<sup>th</sup> and 20<sup>th</sup> centuries to work on coffee, tea and rubber plantations<sup>20</sup>. The translation of the applicant's birth certificate indicates that both his parents were Sri Lankan Tamils and his grandfather was born in Sri Lanka. The applicant has not claimed to be an Indian Tamil (as defined above) and there is no evidence before me to indicate he has Indian origins. I find the applicant is not an Indian Tamil. He is a Sri Lankan Tamil. DFAT states<sup>21</sup> that credible sources are not aware of returnees from Tamil Nadu being subjected to monitoring or harassment by the Sri Lankan authorities.<sup>22</sup>
28. The applicant's written evidence is that his brother (M) returned to Sri Lanka in 2010 but the situation was so bad he had to return to India. M said their land in Sri Lanka was now occupied by Sinhalese residents and their rice fields have been appropriated. They would like to get their familial land back but it is not safe to do so. If they reported the misappropriation of their land they would be accused of causing trouble and the Sri Lankan authorities would arrange to have them killed. However, during the SHEV interview the applicant said M returned to Sri Lanka in 2010 and when he went to get his land back he was asked why he had come back after living in India for 20 years and told he should have stayed there. He said M was spoken to in a derogatory way. The applicant did not mention M attempting to get their familial lands returned to them in 2010 (20 years after they left Sri Lanka) in his written evidence. Indeed, his evidence was that it was not safe to do so. I do not accept M attempted to have their familial lands returned to him in 2010.
29. The applicant's written evidence also stated that M returned to Sri Lanka in 2015 because he had to provide support to his wife's family who continued to live in [City 1]. However, during the SHEV interview the delegate put to the applicant that his brother M returned to Sri Lanka in 2015 and he responded that M returned in 2010. During the applicant's arrival interview (in September 2013) he said his brother M returned to Sri Lanka after he got married. Based on all the evidence before me, I find that M returned to Sri Lanka in 2010 and remained there. I do not accept M returned to India soon after his arrival in 2010 because it was so bad or that he returned to Sri Lanka in 2015.

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<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>20</sup> Sri Lanka: COI Compilation, "Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD)", 31 December 2016, CIS38A80123251

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

<sup>22</sup> Ibid



30. The delegate put to the applicant that M has remained in Sri Lanka for a long period of time and asked what had happened to him. The applicant responded that M lived in the city and then decided to move back to their village at the end of 2018. M returned to their village with some village leaders and asked for his land back. The people on the land told M that they have been farming the land for 30 years and refused to return it. 'Those' people complained to the Sri Lankan police (SLP) that M had brought people with him to attack them. M was remanded in prison for [a period] and cannot live in Sri Lanka. He returned to India in February 2019. The applicant said the same thing will happen to him if he returned to Sri Lanka. When the delegate asked the applicant if he had any evidence of this he responded that he didn't. The delegate asked the applicant if M was charged but the applicant did not answer the question. He said the Sinhalese people who are holding their land complained that M came with sharp weapons to attack them. The applicant said M's family are still in Sri Lanka but M fled to India. He had a passport and used that.
31. The applicant has not claimed and there is no evidence before me to indicate that M used a fraudulent passport and, if he used a passport to exit the country, then he must have exited Sri Lanka legally. The 2019 DFAT report<sup>23</sup> indicates that the Sri Lankan authorities maintain sophisticated intelligence and have stop and watch electronic databases. Stop lists include those people who have extant court orders, arrest warrants or orders to impound their Sri Lankan passport. Watch lists includes names of individuals of interest – including suspected separatists, minor offenders and/or former LTTE cadres. If the applicant's brother M was of any interest to the Sri Lankan authorities – enough to require him to flee the country – then he would have been stopped when he attempted to exit Sri Lanka using his passport. Based on the evidence before me, I am not satisfied M was remanded in prison for [a period] because he attempted to have his familial lands returned. Nor am I satisfied that M has returned to India. I am of the view that M is residing in [City 1] with his family.
32. The applicant's written evidence is that his [sister] remained in Sri Lanka when the rest of the family went to India because she had married a Sinhalese man and was able to live as part of the Sinhalese community. However, during the applicant's arrival interview he said his [sister] returned to Sri Lanka after she got married. I find the applicant's [sister] resides in Sri Lanka with her family.
33. The delegate put to the applicant that M has lived in Sri Lanka for a long period of time and asked why he couldn't live in the city. The applicant responded that if he went to the city he would have to rent a house and his job is farming in Sri Lanka. The applicant's SHEV application indicates that he has worked as a labourer from 1998 to 2011 and then as a labourer and [another job] from 2011 to 2013. In Australia he has worked as [two further roles] and rents his accommodation. The applicant has never worked as a farmer and I note his birth certificate indicated his father was a labourer. I am prepared to accept the applicant's family had a house and an adjacent rice field. I am prepared to accept that the applicant's familial land has been appropriated. However, I am not satisfied it was their main source of income and I do not accept the applicant is a farmer. I am not satisfied the applicant would be unable to find accommodation and/or employment in Sri Lanka because his familial lands have been appropriated.
34. The applicant has consistently claimed to be a Hindu and I accept that claim. His written evidence is that Hindu temples have been destroyed and replaced with Buddhist shrines. His brother M told him that if they go and pray they must remember to remove the Hindu religious markings from their children's foreheads before they leave the temple so that there are not

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<sup>23</sup> "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

easily identified as Tamil. Once his brother visited a temple in Colombo but forgot to remove the markings from his children's forehead. His family were harassed by the authorities and his children were hit from behind. The applicant states that M would never have returned to Sri Lanka if it wasn't for his wife's family situation. During the applicant's SHEV interview he said he is a Hindu and 'they' are saying everyone should be Buddhist in Sri Lanka. He said he won't be able to put ash on his head and walk out of his home. The delegate put to the applicant that his sister is living in Sri Lanka and asked what has had happened to her. The applicant responded that she is living as a Sinhalese person and not a practising Hindu. The applicant did not mention his brother's children being hit after attending a temple in Colombo and the claim lacks specific details. I do not know what Sri Lankan authorities were involved or when the incident purportedly occurred. Based on the evidence before me, I am not satisfied that M has to remove the markings from his children's forehead after temple and/or that his children were hit from behind because of those markings.

35. Hinduism is practised by about 12.6% of the population in Sri Lanka. Most Hindus are Tamils from the Northern and Eastern Provinces. The DFAT report indicates the majority of the population around [City 1] in the Eastern Province - an area close to where the applicant is from - are Muslim, about 25% are Buddhist, about 25% are Hindu and a small percentage are Christian. DFAT reports<sup>24</sup> that Hindus are able to practise their faith freely in Sri Lanka. Sri Lanka recognises religious Hindu holidays and students are able to study Buddhism, Hinduism, Muslimism or Christianity in religious classes. However the DFAT report also states that the former Rajapaksa government sanctioned religious discrimination and has continued to do so in opposition. The Bodu Bala Sena (BBS) was founded in 2012 and is an extremist Buddhist group. The BSS has engaged in acts of violence and hate speech against religious minorities and, in particular, Muslims. DFAT reports<sup>25</sup> that there is a lack of political will to confront Buddhist extremism. DFAT assesses – and I accept - that people who practise religions other than Buddhism face a low risk of official discrimination from government authorities which can affect their ability to practise their faith freely. DFAT assess a low risk as being aware of incidents but has insufficient evidence to conclude they form a pattern.
36. The applicant's representative submitted that the report from the applicant's psychologist advised that the applicant suffers from post-traumatic stress disorder (PTSD). The letter from [Psychologist A] (clinical psychologist) dated 23 October 2019 does not state that the applicant suffers from PTSD. The letter states that the applicant has symptoms of depression and PTSD. There is no evidence before me to indicate that the applicant has ever been given the formal diagnosis of PTSD or depression. However, I accept he has symptoms of those mental health conditions.
37. [Psychologist A] identified in his letter that the applicant has been struggling with issues around the long standing separation from his wife and children, the trauma and torture he underwent in Sri Lanka and the uncertainty of his future. However, if the applicant returned to Sri Lanka he would no longer have an uncertain future (with regards to his protection claims) and his wife and children – who continue to live in India – would be physically closer to him. The applicant has not claimed and there is no evidence before me to indicate that he could not travel to India to visit his family or his family could not travel to Sri Lanka to visit him. The applicant has not claimed that he has ever experienced physical torture when he lived in Sri Lanka but I accept he could have witnessed and experienced traumatic events given he was living in a war zone. On its face, if the applicant returned to Sri Lanka the issues he has been struggling with in Australia would potentially be reduced and/or eliminated.

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<sup>24</sup> "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>25</sup> Ibid

38. [Psychologist A] states the applicant continues to experience anxiety about the possibility of returning to Sri Lanka and his mental health symptoms could deteriorate if he is returned - due to the applicant's experience of persecution, his fear of ongoing discrimination, the oppression towards the Tamil speaking minority, his fear of retribution due to the location of his village and the political situation. I accept the applicant has symptoms of depression and PTSD. I accept the applicant could be anxious about returning to Sri Lanka. However, I do not know what symptoms the applicant suffers from, when he suffers from them or how those symptoms impact on his day to day life. [Psychologist A] has not indicated how often he has seen or sees the applicant or what treatment the applicant has received or is receiving. And, as discussed above, the issues the applicant is struggling with in Australia would potentially be reduced and/or eliminated if he returned to Sri Lanka. Even if I accepted the applicant's mental health symptoms did become worse upon his return to Sri Lanka, I am not satisfied that such deterioration would amount to serious harm. Free health care is available to all Sri Lankans via the public health system. The 2018, 2019 DFAT reports indicate that despite some improvements, mental health services remain inadequate and there are ongoing challenges in accessing mental health care. The 2019 DFAT report reiterates that mental illness is not widely discussed and carries a stigma at the community level. I accept that mental health services in Sri Lanka are – compared to Australia – scarce. However mental health services are available in Sri Lanka, if the applicant wishes to engage with them, and there is no suggestion that the applicant will intentionally be denied access to treatment on the basis of any of the reasons specified in s. 5J(1) of the Act. I accept the applicant could experience some stigma at the community level because of his mental health symptoms.
39. I accept that, by the manner of the applicant's return to Sri Lanka, the applicant may be identified by the Sri Lankan authorities as a returning asylum seeker. I accept the applicant's personal details were accessible on an Australian government website.
40. 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 immigration databases, intelligence databases and the records of outstanding criminal matters. Processing can take several hours and returnees are processed as a group. Individuals have to remain until all returnees are processed.<sup>26</sup> 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 his or her claimed home suburb or town.<sup>27</sup>
41. In February 2014, over a short period of time, the names, gender, nationality, date of birth and details about a person's detention (when a person was detained, the reason and where) and if a person had other family members in detention were inadvertently published on the Department of Immigration and Border Protection's (DIBP's) website.<sup>28</sup> No contact information, information about a person's protection claims and/or health information was published. I accept that limited details about the applicant as outlined above were capable of being accessed on the DIBP's website for a short period. However, even if the data breach had not occurred, and whether or not his details were in fact accessed – apart from details about how he arrived and when and where he was detained – those details would have been

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<sup>26</sup> "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>27</sup> Ibid

<sup>28</sup> Letter about breach dated 14 March 2014

otherwise evident to the Sri Lankan authorities upon his return to Sri Lanka. I am not satisfied the applicant faces a real chance of any harm now or in the foreseeable future because he will be subjected to the procedures outlined above upon his return to Sri Lanka and/or because of the DIBP data breach.

42. I accept the applicant left Sri Lanka illegally in 1990 by boat and went to India. 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 that no fare-paying 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. Bail conditions are discretionary and can involve monthly reporting. Although fines are often low, the cumulative costs of attending court over a protected period of time can be high. The Sri Lanka government claims no returnee from Australia has been charged under the Prevention of Terrorism Act but DFAT cannot verify this claim.<sup>29</sup>
43. The applicant claims he will be arrested and detained because he didn't leave Sri Lanka with a passport. I note the applicant was only [a young age] when he left during the civil war three decades ago. However, when an illegal departure is suspected, the returnees can be 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 a person is a former LTTE member, the police will make further enquiries about his or her 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>30</sup>
44. The applicant's representative submitted that the likely interrogation and surveillance of the applicant on return to Sri Lanka when the applicant has established ongoing mental health concerns would cause him such mental harm that this would reach the level of significant harm. I have accepted that the applicant symptoms of depression and PTSD. And, I accept there is the potential that his mental health symptoms could be impacted adversely by the administrative processes as outlined above and/or a short period of detention. However all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. 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 upon his return to Sri Lanka would be the result of a law of general application and not discriminatory and therefore does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

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<sup>29</sup> "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

<sup>30</sup> Ibid

45. DFAT assesses that some returnees may face re-integration issues in relation to employment and accommodation and states that some failed asylum seekers have reported social stigma from their communities on return.<sup>31</sup>
46. The applicant is from the Eastern Province and I have found his brother M and M's family are living in that province. I was not satisfied the applicant would be unable to find accommodation and/or employment in Sri Lanka because his familial lands have been appropriated and, despite having mental health symptoms, he has continued to work in Australia. Based on all the evidence before me, I am not satisfied the applicant will be unable to access housing and employment on his return to Sri Lanka. I accept that he may face some social stigma on his return as a returnee who speaks an Indian dialect of Tamil, as a failed asylum seeker and as a person who suffers from mental health symptoms. I accept the applicant faces a low risk of official discrimination from government authorities because he is a Hindu. However, I am not satisfied such social stigma and/or official discrimination amounts to significant ill treatment or any other types of harm that may be regarded as serious harm.
47. I am not satisfied that the applicant faces a real chance of persecution on the basis of any of his claims now or in the reasonably foreseeable future.
48. 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 persecution now or in the reasonably foreseeable future for any of his claimed reasons. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

49. 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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50. 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**

51. 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.

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<sup>31</sup> "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

### **Qualifications to the real risk threshold**

52. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

53. 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>32</sup> it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka now or in the foreseeable future.

54. I accepted the applicant's mental health symptoms could deteriorate if he returned to Sri Lanka. However, based on the evidence before me, I am not satisfied that any deterioration as defined would amount to significant harm as defined. I accepted the applicant may face some level of societal and/or official discrimination as a returnee Hindu asylum seeker who speaks with an Indian dialect and experiences symptoms of mental illness. The applicant has M and M's family living in Sri Lanka and I was not satisfied he would be unable to find employment or housing if he returned. I am not satisfied that societal and/or official discrimination/stigma and/or being subjected to a series of administrative processes and/or being subject to procedures and penalties would amount singularly or cumulatively, to significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Sri Lanka now or in the foreseeable future.

55. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm if he returned to Sri Lanka now or in the foreseeable future for any of his claimed reasons.

### **Complementary protection: conclusion**

56. 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>32</sup> *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law  
**Migration Act 1958**

**5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

**5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

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

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

...

## 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (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.