



**Australian Government**  

---

**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

---

SRI LANKA  
IAA reference: IAA20/08583

Date and time of decision: 27 August 2020 10:53:00  
J Maclean, Reviewer

**Decision**

---

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

---

### Visa application

1. The referred applicant (the applicant) claims to be a Tamil who was born in the Northern Province of Sri Lanka. In September 2015 the applicant lodged a valid application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration refused to grant the visa on 4 October 2016. On 28 April 2017 the IAA affirmed the delegate's decision not to grant the applicant a protection visa. The decision was appealed to the Federal Circuit Court, and on 3 February 2020, by consent, the Court quashed the IAA's decision and remitted the matter for redetermination according to law.

### Information before the IAA

2. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. By way of background I note the applicant's SHEV application was prepared with assistance of a registered Migration agent, who is also a legal practitioner. That representative attended the SHEV interview with the applicant, made oral submissions at the conclusion of the interview, and provided written submissions and various country information reports after the interview. Although the same representative assisted the applicant by sending emails to the IAA on the applicant's behalf in October 2017, the applicant is unrepresented before the IAA.
4. On 21 July 2020 the IAA sent a letter and email to the applicant at addresses recorded for him by the department, as notified to the IAA on the same date. The applicant was advised that the Federal Circuit Court had remitted the case to the IAA for reconsideration on 3 February 2020, and the IAA had been notified of the remittal on 20 July 2020. The applicant was also advised to act quickly in any dealings with the IAA and that a decision could be made at any time. On 29 July 2020 the letter was returned to the IAA. The email did not bounce back, and appeared to have been delivered. Following enquiries the Department of Home Affairs advised the last known contact details for the applicant were the same as those used by the IAA. Attempts to contact the applicant by phone were also unsuccessful, one number was disconnected, and the other number no longer belonged to the applicant. On 31 July 2020 the IAA sent a further email to the applicant, advising him the letter regarding his IAA review, sent on 21 July 2020, had been returned to sender, and asking him to contact the IAA as soon as possible to update his contact details. There has been no further contact with the applicant. Reasonable attempts have been made to contact the applicant to advise him of the current review. I am satisfied the applicant has had a meaningful opportunity to present his claims and address the matters in issue in this review, including in his SHEV application and associated declaration, at the SHEV interview, and in the additional information provided after that interview with the assistance of a registered migration agent/solicitor, and in submissions made on the applicant's behalf when the matter was first referred to the IAA, and that it is appropriate to proceed to a decision on the basis of the information before me.
5. On 19 October 2016 the IAA received an email on behalf of the applicant requesting the IAA consider his familial links to persons who have successfully claimed asylum in [Country 1] and Australia, and attaching a number of documents. It is submitted that the applicant would face serious harm if returned to Sri Lanka due to his elevated risk profile due to familial connections, coupled with his own individual profile.

6. Copies of the following documents regarding the applicant's relatives were provided with the 19 October 2016 email to the IAA:
- A letter from [Country 1 government agency], dated 29 March 2011, addressed to the applicant's brother ([Mr A]), indicating 'an endorsement has been placed in your new passports to show that there is no time limit on your stay in [Country 1]', and providing information about Immigration Rules regarding entering [Country 1] as a returning resident;
  - The biodata page of [Mr A]'s [Country 1] passport, issued [in] 2012;
  - A document from Negombo Magistrate's Court (and English translation), listing [Mr A] as one of a number of people who were 'suspected of attempting to provide financial help to go abroad and get training in terrorist activities' and was taken into custody and presented to the Court. The document is signed by a Magistrate and dated [July] 2000, and indicates all suspects were present, that they were released 'according to further reports', and their passports were released to them. The document is also certified by the Registrar to be a true copy of the final order given by the Magistrate with regard to the court case;
  - English translation of a further document from Negombo Magistrate's, similar to the above document, dated [July] 2000, regarding the same case number, but referring solely to [Mr A]. The translation was certified correct on 21 August 2000, however the original document does not appear to have been provided;
  - Departmental letter, dated 26 September 2016, notifying the applicant's mother's sister's husband ([Mr B]) was granted a SHEV on 24 September 2016, and which was posted to [Mr B]'s representative, the same representative who represented the applicant at his SHEV interview.
7. During the SHEV interview, which was conducted on 9 March 2016, reference was made to [Mr A] being granted refugee status in [Country 1], and it was submitted the applicant would be of concern to Sri Lankan authorities for this reason on return. This claim has been considered below in the decision. The documents regarding [Mr A] and [Mr B], and any claim regarding [Mr B] however were not before the delegate and are new information. All the documents pre-date the delegate's decision, some by up to 20 years, and notably, no information has been provided about the reason [Mr A] and [Mr B] being granted asylum, to support that the applicant's profile would be heightened for that reason, or to support the familial relationship between him and [Mr B].
8. The applicant was advised at the start of the SHEV interview of the importance of giving the department all his protection claims and information to support his application for a protection visa, and that an application may be made without further contact with him. He was also advised the IAA can only consider further material in exceptional circumstances. He indicated he had read and understood the information sheet called 'Important information about your interview for a protection visa' provided to him in English and Tamil prior to the SHEV interview, and which outlines the purpose of the interview, and specifies the extreme importance of telling the truth and presenting all claims for protection during the interview, and providing all information in support, and that there may not be another opportunity to raise new claims if the application is refused. Not insignificantly, he was represented by a registered migration agent/solicitor during the protection visa process, who provided submissions during and after the SHEV interview, and would have been aware of the importance of putting forward all claims and providing all evidence. Nearly seven months elapsed between the SHEV interview and the decision being made during which there was ample opportunity to provide additional information.

9. In addition, I am not persuaded the documents in question establish what the applicant says they do. I have taken into account that the documents regarding [Mr A] appear to indicate he was under investigation by Sri Lankan authorities in about 2000, but that the investigation and associated court proceedings in 2001 resulted in the individuals being released and their passports returned. I also note the applicant has not suggested he or any family member were questioned about [Mr A] at any time, or otherwise suffered harm for any reason relating to [Mr A] or [Mr B], or that [Mr A] was of continued interest to those authorities after the court proceedings concluded. The passport material of itself establishes little beyond [Mr A]'s status in [Country 1] in 2011 to 2012. I am not satisfied there are exceptional circumstances to justify considering the information, and I have not had regard to it.
10. Further documents purporting to relate to the applicant, and English translations certified on 16 October 2016, were provided with the 19 October 2016 email to the IAA, as follows:
- A Sri Lanka Police Message Form from [Location 1] Police Station, dated [in] March 2012, requesting the applicant present himself at the police station on 15 March 2012, for the purpose of obtaining an oral statement and for other inquiry 'in connection with the acts of terrorism committed within our Police Division';
  - A Sri Lanka Police Message Form from [Location 1] Police Station, dated 15 April 2016, noting the applicant failed to present for inquiry and is requested to present on 22 April 2012 at the police station;
  - An extract from the Information Book of [Location 1] Police Station, dated [in] June 2016 stating that according to intelligence reports and investigations the applicant joined the Border Protection Force in 2001, and received training and was involved in many acts of terrorism during the war.
11. The applicant's name on these documents varies from the name he has given to the department, however, the third document refers to a National Identity Card number belonging to the applicant, and I consider the discrepancy with regard to the name is the result of transliteration. The applicant consistently referred to being detained, questioned and mistreated by the SLA in April 2012, and for the reasons explained below, I accept this occurred. However, the applicant did not make any claims regarding being requested to attend a police station, or provide any documents in support of that claim, and the claim and documents are new information that was not before the delegate. The documents pre-date the delegate's decision, in one case by several years. The applicant has given no information about when he found out the police were interested in him, about the existence of the documents, or when the documents came into his possession, or suggest this occurred only recently. Also of concern is the content of the document dated 15 April 2016, which suggests the applicant should present for enquiries on a date some four years prior, and for which the applicant has offered no explanation. Although the documents are handwritten, the dates are clearly visible on each document, including on the 15 April 2016 document, and I am not satisfied the discrepancy resulted from any error in translation. I also consider if this new information were true the applicant would have mentioned it sooner, and provided the supporting documents at an earlier time, and not waited until after his visa was refused to do so. I consider the purported timing of the renewed interest in the applicant, occurring shortly after the SHEV interview, and after an apparent four year gap, is entirely too coincidental to be believed. I am not satisfied these documents or the associated claims are credible. I am not satisfied there are exceptional circumstances to justify considering them, and I have not had regard to them.
12. On 26 October 2016 the IAA received a further email on behalf of the applicant, and attaching one further document, a letter dated [in] October 2016 from [Mr C], Justice of the Peace, [Town

1]. The writer indicates the applicant is well known to them for 'long years', and refers to the applicant's forced recruitment to the Liberation Tigers of Tamil Eelam in 2001, training in handling weapons, after which he was 'detailed for their war activities in Vanny area', and was with them till 2005, leaving without their knowledge to [Country 2]. In 2010 when he arrived to Sri Lanka to his native place he was arrested by Sri Lankan Army (SLA), detained and badly tortured, after which he was visited by members of Sri Lankan Armed Forces in day and night hours and mentally tortured and threatened. Due to fear for his life he left and is now in Australia. His father and siblings continue to receive threats from the SLA and related groups to produce the applicant, who has been advertised as a 'Wanted Criminal Terrorist with his photograph and be on alert to arrest him in early'. The writer goes on to suggest it is not advisable for the applicant to return to Sri Lanka.

13. The letter was not before the delegate and is new information. While some parts of the letter reflect the applicant's claims, for example that he was arrested by the SLA, detained and tortured, and that his family were visited by authorities since the applicant departed Sri Lanka and his whereabouts were queried, other parts of the letter do not, that is regarding the applicant having involvement with the LTTE, and being visited, tortured and threatened by armed forces after his release, his family being threatened by the SLA and related groups, and the applicant being advertised as a wanted person. The assertions being made are not insignificant. This letter is dated the same date as the delegate's decision, and to that extent the document itself could not have been provided to the delegate; however the events described in it occurred from 2001. The applicant has provided no information regarding why a similar document could not have been obtained and provided at an earlier time. Moreover, the letter provides information about claims not previously made by the applicant. The applicant made no claim to have been involved with the LTTE, and when asked at the SHEV interview if he was involved with the LTTE he specifically said 'I was not with the LTTE'. If these claimed events had actually occurred I consider the applicant would have made mention of them at some time during the protection visa process, and the fact that he did not leads me to believe the writer does not have actual knowledge of the applicant's circumstances, and the document and the claims contained within are not reliable. I am not satisfied there are exceptional circumstances to justify considering it, and I have not had regard to it.
14. The delegate's decision refers to a DFAT report published on 18 December 2015, and a UK Home Office report from 2012. DFAT and the UK Home Office have published a number of reports since the delegate's decision, and I have obtained the most recent of these.<sup>1</sup> These reports have been prepared for use in protection status determination, and are informed by on-the-ground knowledge and discussions with a range of sources in Sri Lanka, and take into account relevant and credible open source reports. They provide the best judgement and assessment of DFAT and the UK Home Office at the time of writing with regard to Sri Lanka. On 12 August 2020 the IAA sent the applicant a copy DFAT and UK Home Office reports referred to above. The applicant was invited to comment on information from the reports that may be the reason, or part of the reason for affirming the decision of the Minister for Immigration to refuse his application for a protection visa. The applicant did not provide any comments. The reports update the reports considered by the delegate, and are relevant to the applicant's claimed risk profile. They were published after the delegate's decision, and a number of years have elapsed since the delegate's decision. In all the circumstances I am satisfied there are exceptional circumstances to justify considering the new country information reports.

---

<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

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

---

15. The applicant's claims can be summarised as follows:

- If he returns to Sri Lanka he will be arrested, tortured and killed by Sri Lankan authorities because he is a single Tamil male, from an area formerly controlled by the LTTE, who does not speak Sinhala. He will be perceived to be a member of the LTTE because: he departed Sri Lanka on a number of occasions, and was deported back there on one occasion; he claimed, or attempted to claim, asylum overseas; he attended Martyr's Day events in Australia; and his brother resides in [Country 1] where he has been accepted as a refugee.
- At the end of the SHEV interview the applicant's representative also suggested there is a possibility of informers in the area falsely 'dobbing in' people when they are returned, and in a climate where there remains a high military presence in the area the applicant originates from in proportion to the civilian population, that the applicant may suffer harm.

## **Refugee assessment**

---

16. 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**

17. 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.

18. The applicant has consistently claimed he is of Tamil ethnicity and Hindu religion, and that he originates from the Northern Province of Sri Lanka. Documentary evidence has been provided to support his identity. I accept his identity is as claimed, and that he is a Tamil Hindu from the Northern Province of Sri Lanka, and Sri Lanka is the receiving country.

19. Along with his SHEV application the applicant provided a letter from the Parish Priest at [a] Church in [Town 1], [Rev. Fr D], dated 18 December 2012. The writer notes the applicant is well

known to them for a long time, that he comes from a good Hindu family of his Parish, and that due to the civil war he and his family suffered, were displaced from the Vanni area, and due to fear and tension he left the country to save his life. The writer goes on to state it is not advisable for the applicant to return to Sri Lanka as conditions have not returned to normal yet. I have taken this information into account in the decision.

20. I accept the applicant's broadly consistent evidence regarding his early life in Sri Lanka, and his family. He was born in [Year] in Jaffna District, Northern Province, where he lived in areas that were controlled by the LTTE. He and his family were displaced on a number of occasions as a result of the civil conflict, however he always lived in the Northern Province whilst in Sri Lanka. He attended various schools in the Northern Province from [year] until 2001, and after leaving school he worked with his father as a fisherman. His family were affected by the tsunami in 2004, during which his mother died, and they lost all their possessions. His father and two of his siblings remain in Sri Lanka. One of his brothers has been residing in [Country 1] since about 2001, and another brother came to Australia with the applicant.
21. I also accept the applicant's broadly consistent evidence regarding leaving Sri Lanka due to the war, travelling to [Country 2] in April 2008 where he lived as a refugee, and returning to Sri Lanka in November 2011. He left Sri Lanka by plane using a Sri Lankan passport in his name, and with a tourist visa. A copy of the biodata page from the applicant's passport has been provided, which shows the passport was issued [in] 2008. In [Country 2] the applicant registered as a refugee and worked as [an occupation], as specified in the SHEV application, and also doing labouring work, as noted at the SHEV interview. Documentary evidence has been provided to support he registered with [Country 2] Police in [City 1] on 10 October 2008, and that he was issued with an 'Exit Clearance' by the [Country 2 government bureau] in [City 1], however the precise date that document was issued is unclear. In November 2011 he returned to Sri Lanka as he believed the situation had improved, and he had intended to remain in Sri Lanka.
22. At the SHEV interview the applicant described living with his aunt in Vavuniya for two or three months on return from [Country 2]. He described being fearful of the SLA and Criminal Investigation Department (CID), who made it difficult for him to leave the house or get employment. He said he was stopped by the SLA two or three times, and at those times they accused him of having connections to the LTTE, threatened him, and asked him where he had been, and he felt there was a danger to his life. The 2015 declaration provided with the SHEV application refers to the applicant making a failed attempt to flee to [Country 3] and claim asylum there, however he was detained by authorities in [Country 4] and deported back to Sri Lanka in April 2012. In the 2015 declaration and at the SHEV interview the applicant described being detained and interrogated at the airport on return to Sri Lanka, being asked why he left the country and if he was an LTTE member or supporter, and allowed to leave after his details were recorded. Country information supports many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war and for several years after it ended, with security forces imputing LTTE support based on ethnicity because almost all LTTE members and supporters were Tamil. There was a systemic practice of detaining those suspected of any involvement with the LTTE, and most Tamils who were detained were sent to government-run rehabilitation centres.<sup>2</sup> Taking that into account, I can accept the applicant was questioned on a number of occasions, including about LTTE links, and that he may have had fears for his safety, and as a result decided to leave Sri Lanka. I can also accept he was questioned on his return to Sri Lanka in April 2012, however I consider the applicant being released after being questioned, including at the airport, and not being sent for rehabilitation or otherwise prosecuted, is indicative the treatment the applicant experienced

---

<sup>2</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

was part of the routine but troubling treatment of Tamils at the time, rather than because he was genuinely suspected of being an LTTE member or support, or otherwise considered a security threat.

23. The applicant has provided broadly consistent evidence regarding returning to live with his father in their village, and working with his father as a fisherman, on return from [Country 4]. During the SHEV interview he referred to having to pass the SLA camp to go fishing, being required to show ID every time, and being questioned by the SLA, about where he had been all this time, and whether he had any connections with the LTTE, and enquiries were also made on the way back from fishing. The applicant said he was not with the LTTE and did not have any connection, but the SLA suspected he had LTTE connections because he had lived in an LTTE-controlled area since birth. He went on to describe being arrested one day on the way to work and taken to the SLA camp, where he was questioned about connections to the LTTE and beaten and tortured for three hours before being released, after being told he needed to make himself available any time they need him for enquiries. After the SLA released him he was scared and did not go fishing, and just stayed at home. At the Entry interview, conducted on 24 January 2013, when asked why he left Sri Lanka, the applicant referred to being scared for the safety of his life after being threatened by the SLA. He said they accused him of being 'a Tiger', and arrested and beat him. The interviewer asked 'Are you a Tamil Tiger?' and the applicant said 'No'. With regard to when this occurred, he said 'after 2011', however in the 2015 declaration he refers to this incident occurring in April 2012.
24. Taking into account the applicant's evidence in the context of the country information referred to above regarding monitoring, harassment, arrest and detention of Tamils and suspicion of LTTE connections, I can accept the applicant was arrested, detained, questioned and mistreated for three hours in April 2012, as claimed in the 2015 declaration, and that he was told he needed to make himself available for enquiries if called. I can also accept he was sometimes harassed on his way to and from work, however his evidence on this issue appeared exaggerated, and he appeared to be simply repeating the same phrase regarding the questions asked of him, and I am not satisfied such harassment occurred every time he went fishing. Given the applicant was released after three hours on the one occasion he was detained, and he was otherwise allowed to continue on each occasion he was harassed or questioned, I am satisfied the applicant was not a person the Sri Lankan authorities considered had any significant connection to the LTTE, as if they had he would not have been released or allowed to leave after questioning. I accept the applicant may have had fears for his safety after being detained and mistreated by the SLA, and that he left Sri Lanka in July 2012. The applicant did not suggest during the protection visa process that Sri Lankan authorities had called him for further questioning, or that they visited his home looking for him during the months he remained at home prior to departing Sri Lanka, which I consider is significant, and not indicative that he remained of adverse interest to Sri Lankan authorities. I am not satisfied the applicant was a person of interest to the Sri Lankan authorities at the time he departed Sri Lanka, or that he had an adverse profile.
25. In a declaration made on 10 September 2013, and submitted with an invalid protection visa application, the applicant states that 'authorities have gone to my family since I have left and asked for me', and that his father told them he had gone to Australia. The applicant did not reiterate this claim in the 2015 declaration or at the SHEV interview, and he has provided no information about exactly when this occurred, how many times it occurred, the identity of the authority making the enquiries, or why they were asking. I consider if Sri Lankan authorities had actually gone to the applicant's family home making such enquiries the applicant would have mentioned this in his 2015 declaration and at the SHEV interview, and his failure to do so, along with the extremely limited and vague evidence provided in the 2013 declaration on this issue, including the lack of identification of the authority making the enquiry or the reason they were



doing so, leads me believe this claim has been fabricated. I am not satisfied Sri Lankan authorities have made enquiries about the applicant since he departed Sri Lanka.

26. The applicant claims to fear harm on return to Sri Lanka because he is a single Tamil male from an area formerly controlled by the LTTE, who will be perceived to be a member of the LTTE.
27. The applicant has provided a document titled 'Supporting Country Information – Sri Lanka', which purports to provide information about the 'current situation' in Sri Lanka including in relation to 'general and sexual violence, torture and enforced disappearances', 'targeting of perceived or actual LTTE members' and 'failed asylum seekers'. A number of other country information reports were also provided. None of the reports referred to in the document, or provided separately, were published more recently than 2016, and most were published more than five years ago. I have taken the information provided into account. However, I accord more weight to DFAT's recent assessment of the situation in Sri Lanka, which is based on on-the ground knowledge and discussions with a range of sources in Sri Lanka. DFAT indicates the report is a general, rather than an exhaustive country overview, however, I am satisfied it is an authoritative and credible document providing current and cogent information on the general situation in Sri Lanka at the current time.
28. The information before me indicates that during the civil conflict in Sri Lanka, and for several years after it ended in May 2009, more Tamils were targeted by Sri Lankan authorities than any other ethnic group. While LTTE members and supporters were targeted, there was also widespread, systematic, and discriminatory harm and mistreatment of Tamils with no connection to the LTTE, but who lived in areas formerly controlled by the LTTE during the civil war, in the north and east of the country, with LTTE support at times imputed on the basis of ethnicity.<sup>3</sup>
29. The LTTE were comprehensively defeated in 2009, however both DFAT and the UK Home Office confirm the Sri Lankan government remains sensitive to the potential re-emergence of the LTTE and maintains sophisticated intelligence on former LTTE members and supporters. In contrast to their prior focus on identifying anyone with real or perceived LTTE links, the Sri Lankan government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil Diaspora. Former LTTE leaders and former members suspected of committing serious criminal acts during the conflict are most at risk. The UK Home Office and DFAT have also confirmed the UNHCR position that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.<sup>4</sup> High-profile former LTTE members would continue to be of interest to the authorities and subject to monitoring, as would close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities.<sup>5</sup> However, the country information does not indicate Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, or that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age, marital status, or place of origin.

---

<sup>3</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>4</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

<sup>5</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

30. The delegate referred to a number of credible reports of returned Tamil asylum seekers being mistreated after return to Sri Lanka.<sup>6</sup> The applicant also provided a number of online media reports, published in 2015 and 2016, regarding Tamil returnees being arrested on return at the airport, including after 'tip offs'. At the conclusion of the SHEV interview the applicant's representative suggested there is a possibility of informers in the area falsely dobbing in returnees. Notably the majority of the arrests on return involved people who were LTTE members or had significant involvement with the LTTE, or those who had been critical of the government. The applicant did not indicate he or any family member had any involvement with the LTTE, or that he or they had any involvement with Tamil separatist activities in Sri Lanka or overseas, including being critical of the government. Taking into account the country information regarding the more limited groups of people who would now be of interest to Sri Lankan authorities, I am not satisfied there is a real chance the applicant has a profile that would be of adverse interest to Sri Lankan authorities on his return, or that he would be imputed with being an LTTE member as a result of a report by an informer, such that he would be at risk of harm for those reasons.
31. The country information before me indicates the situation for Tamils more generally in Sri Lanka has changed considerably since the applicant left the country in 2012. DFAT reports official and societal discrimination on the basis of Tamil ethnicity is low and being of Tamil ethnicity, in itself, is not sufficient to warrant international protection. There are no official laws or policies that discriminate on the basis of ethnicity or language in Sri Lanka, which includes education, employment or access to housing, and laws and policies are generally implemented without discrimination.<sup>7</sup>
32. At the end of the SHEV interview the applicant's representative referred to the applicant fearing harm in a climate where there continues to be a quite high military presence in the area he originates from, in proportion to the civilian population. Notably the applicant provided no evidence to support any of his relatives in Sri Lanka had been impacted by the purported military presence.
33. DFAT and the UK Home Office indicate the security situation for Tamils, particularly in the north and east, has improved significantly since the end of the civil war in May 2009, changing notably during the period of the former Sirisena government.<sup>8</sup> The government exercises effective control over the entire country, including in the predominantly Tamil-populated north and east of the country, and no longer restricts travel to the north and east. Although the military continues to have a significant presence in the north, most military personnel are confined to the Security Forces Cantonment on Jaffna Peninsula and smaller surrounding military camps, and military involvement in civilian life has decreased. There has been significant progress on returning land appropriated by the government during and after the civil conflict. Security has been heightened across Sri Lanka following the Easter Sunday terrorist attacks of 21 April 2019, and at the time of the DFAT report there was a gazette issued by the President at the time, President Sirisena, allowing the military to remain deployed across the country to assist police in maintaining law and order upon request, however the power of security forces under the gazette are more limited than permitted under the Emergency Regulations introduced shortly after the Easter attacks.<sup>9</sup>

---

<sup>6</sup> DFAT, 'DFAT Country Information Report: Sri Lanka', 18 December 2015, CISEC96CF14143; UK Home Office, "Sri Lanka – Bulletin: Treatment of Returns", 1 December 2012, CIS28615

<sup>7</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>8</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

<sup>9</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

34. During the SHEV interview the applicant said he had attended two Martyr's Day events in Sydney in December 2014 and 2015. He said he had forgotten the name of the place, but it was at a park close to [Suburb 1], and there were about 400-500 people there both times. There is information in the review material regarding Maaveerar Naal ceremonies held on 27 November 2014 and 2015 near [Suburb 1]. Maaveerar Naal, or Great Heroes' Day, commemorates those who died fighting for the LTTE. DFAT reports that the Sri Lankan government has relaxed some restrictions on the public commemoration of events associated with the Tamils' armed struggle for statehood, and although sources told DFAT there is monitoring by the authorities, Tamils have been free to hold ceremonies marking Great Heroes' Day since 2016, and Tamils are increasingly comfortable marking such events. I can accept the applicant attended the claimed Martyr's Day events.
35. I am satisfied the overall security situation in Sri Lanka has improved since the applicant departed, and in particular that the security environment for Tamils has improved. Monitoring of Tamils in day-to-day life decreased significantly under the Sirisena government, however surveillance of Tamils in the north and east continues, particularly those associated with politically-sensitive issues.<sup>10</sup> Taking into account the applicant's profile, and country information supporting that commemorative events are celebrated in Sri Lanka, I am not satisfied the applicant would attract the adverse attention of Sri Lankan authorities as a result of him having attended commemorative events in Australia a number of years ago, or that he would be imputed with a Tamil separatist or anti-government political opinion for having attended those events. Although I accept it is possible he may attend similar events if returned to Sri Lanka, and that he may be monitored if he did so, I am not satisfied such monitoring would amount to serious harm for this applicant. I acknowledge there is an ongoing military presence and military occupation of some land, including in the north, however I am not satisfied the applicant would be at risk of harm for that reason, now or in the reasonably foreseeable future.
36. At the end of the SHEV interview the applicant's representative submitted that the applicant's brother, [Mr A], has been granted refugee status in [Country 1], and because [Country 1] is one of the main countries where pro-LTTE Tamil diaspora is active, and many people claim they have suffered harm in the past after they have been returned from [Country 1], that the applicant, who has the 'same name' as [Mr A], would be of concern to Sri Lankan authorities for this reason on return. The applicant gave consistent evidence, at the Entry interview, in his 2015 declaration, and during the SHEV interview, regarding his brother ([Mr A]) leaving Sri Lanka for [Country 1] in 2001. The 2015 declaration refers to the area the family lived in being shelled, and his brother leaving in 2001 'because of the war'. I can accept [Mr A] left Sri Lanka in 2001, that he has been residing in [Country 1] since that time, and has been granted refugee status there. I acknowledge the country information supports that there are large numbers of Sri Lankan Tamils in [Country 1], with [location] being one of the diaspora activity hotspots, and that returnees who are members of diaspora groups advocating for a separatist Tamil state are likely to be of adverse interest to Sri Lankan authorities, including those returning from [Country 1].<sup>11</sup> Noting the applicant did not suggest his brother had ever been involved in pro-LTTE activities in Sri Lanka or [Country 1], or that he or any family member, including those who continue to reside in Sri Lanka, have ever been questioned about or been of adverse interest for any reason relating to [Mr A], I am not satisfied the applicant would be of interest to Sri Lankan authorities for having the same family name as [Mr A], because [Mr A] was granted refugee status in [Country 1] and has resided there since 2001, or that the applicant's profile would be heightened for any reason relating to [Mr A], or that he would be harmed for this reason on return to Sri Lanka.

---

<sup>10</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>11</sup> [Source deleted]

37. In his 2017 declaration the applicant raised the issues of not speaking Sinhala, and not having any relatives or family members outside the Northern Province, in the context of being unable to relocate to another area of Sri Lanka on return, and the authorities causing problems for him wherever he lived in Sri Lanka. I can accept the applicant does not speak Sinhala. However, there is nothing in the information before me to support that he experienced any harm in the past because he could not speak Sinhala, nor did he provide any further information about the nature of the problems he claims he would experience. In all the circumstances, I am satisfied the applicant would be able to return to live in the Northern Province, and I am not satisfied the issue of relocation arises, or that there is a real chance the applicant would be harmed because he is unable to speak Sinhala.
38. I have not accepted the applicant was of adverse interest to Sri Lankan authorities at the time he departed Sri Lanka, or that he has been of interest since that time. I accept as a Tamil from a former LTTE-controlled area it is possible the applicant may experience some societal or official discrimination, albeit a low risk, and at a low level. I have also accepted he may experience some monitoring should he attend commemorative events. I am not satisfied any monitoring, or societal or official discrimination he may face would threaten his capacity to earn a livelihood, cause him significant economic hardship, deny him access to basic services, threaten his capacity to subsist, or otherwise amount to serious harm, whether considered separately or together. Considering his background and experiences, and noting a continued military presence in Sri Lanka, including in the Northern province, I am not satisfied the applicant has a profile such that he would be imputed with being an LTTE member or supporter or be suspected of engaging in Tamil separatist activities in the diaspora, or that there is more than an extremely remote chance he would be considered a security risk on his return to Sri Lanka, such that he would be detained and be at risk of mistreatment in the reasonably foreseeable future. This includes considering that: he is a [age] year old unmarried Tamil male from the Northern Province; he was harassed and questioned by Sri Lankan authorities on a number of occasions and once detained for three hours during which he was mistreated; his brother has lived in [Country 1] for several years, and been granted asylum there; and that he attended commemorative events whilst in Australia, and may do so on return to Sri Lanka.
39. I accept the applicant's consistent evidence that he departed Sri Lanka on the last occasion, in July 2012, illegally by boat, and without using his Sri Lankan passport. The biodata page of the applicant's Sri Lankan passport shows the document expired on [in] 2018. Country information indicates Sri Lankans without passports can re-enter the country on temporary travel documents.<sup>12</sup> I consider it highly likely as a result of the manner of his return to Sri Lanka, the applicant will also be identified as a failed asylum seeker returning from Australia.
40. As the applicant departed Sri Lanka illegally he will be subject to the provisions of the *Immigrants and Emigrants Act (I&E Act)* on return. As he is likely to return to Sri Lanka using temporary travel documents, I find he will be subject to an investigative process to confirm his identity, and to identify persons trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This may involve interviewing the returnee, or checking with police in the returnee's home area, or with neighbours and family in their claimed hometown. These checks may take several hours to complete. DFAT advises that at the earliest opportunity after investigations are completed, police transport individuals charged under the *I&E Act* to the closest Magistrate's Court. Those charged can remain in police custody at the CID office at the airport for up to 24 hours after arrival, and in cases where a magistrate is not available, for example because of a weekend or public holiday, they may be detained in an airport holding cell for up to two days. DFAT assesses that all returnees are subject to standard procedures,

---

<sup>12</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

regardless of ethnicity and religion, and are not subject to mistreatment during airport processing.<sup>13</sup>

41. Sri Lankan authorities maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' databases. 'Stop' lists comprise a list of those against whom there is an extant court order or arrest warrant. 'Watch' lists include names of those individuals Sri Lankan authorities consider to be of interest, including for suspected separatist or criminal activities.<sup>14</sup> I am satisfied the authorities will be able to determine the applicant's identity based on his identity documents. I have not accepted the applicant was of adverse interest to Sri Lankan authorities at the time he departed Sri Lanka, and I am also not satisfied he has any outstanding court orders or arrest warrants. Although I have accepted the applicant attended Martyr's Day events in Australia, I am not satisfied that would give rise to an adverse profile. I have found the applicant has had no involvement with Tamil separatism in Australia, and I am not satisfied Sri Lankan authorities would impute him with a profile of interest for that or any other reason, including taking into account that he was detained on one occasion in Sri Lanka, that he departed Sri Lanka on a number of occasions to seek asylum, that he lived as a refugee in [Country 2], and that his brother is living in and has gained asylum in [Country 1]. I accept Sri Lankan authorities will know about the applicant's previous attempts to leave Sri Lanka, given the manner of his return on each occasion, and also that they may presume the applicant sought, or intended to seek asylum overseas, including in Australia. The applicant contends he would be of concern to Sri Lankan authorities as a result of his persistence in trying to leave the country. The country information does not support that Tamils who have sought asylum overseas are imputed with a pro-LTTE opinion, or that they are suspected of having connections with the LTTE, or are otherwise of interest for seeking asylum or spending time overseas, including in [Country 2] or Australia, and I am not satisfied the applicant's profile would be heightened on return for having left Sri Lanka to seek asylum on a number of occasions. Overall, I am not satisfied the applicant would be of adverse interest on return to Sri Lanka, other than in relation to his illegal departure.
42. There is nothing in the information before me to suggest the applicant would plead not guilty in relation to the illegal departure, and I find he will plead guilty. The country information indicates that a person who pleads guilty will be fined and released. The penalties under the *I&E Act* for leaving Sri Lanka illegally include imprisonment and fines. However, in practice the penalties are applied on a discretionary basis, and are almost always a fine. The Sri Lankan Attorney-General Department advises no fare paying passenger of a people smuggling venture has been given a custodial sentence, but rather that such passengers are issued with fines as a deterrent, which are usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163), and can be paid by instalments. I am satisfied on return the applicant is likely to be subject to questioning, he may be detained in an airport holding cell for a period of time until seen by the Magistrate, and he will likely receive a fine. Taking into account all the information before me, I am not satisfied the applicant would be of particular concern to Sri Lankan authorities, that he would be mistreated during processing at the airport, or that the processes and penalty he may experience on return, amounts to serious harm.
43. On a separate basis, I am satisfied the *I&E Act* provisions relating to illegal departure are not discriminatory on their face, and they are not discriminatory in intent or implemented in a discriminatory manner. I find that the investigation, detention, prosecution or punishment of

---

<sup>13</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>14</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

the applicant under the *I&E Act* for his illegal departure would not be the result of systematic and discriminatory conduct, and does not amount to persecution within the meaning of s.5J(4).

44. I am satisfied the applicant would return to live in the Northern Province, where he always resided in Sri Lanka, and where a number of his family members continue to reside. DFAT understands that some returnees, including returnees to the north with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to the returnees' homes and telephone calls by the CID. However, most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis, and DFAT is not aware of such people being treated in 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. Failed asylum seekers have also reported social stigma on return to their communities, however DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers, and some Tamils who had failed to secure asylum in Australia and returned to the Northern Province told DFAT they had not experienced societal discrimination, and they were able to reintegrate into their communities and find employment. DFAT understands reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face.
45. Considering my finding above, that the applicant does not have an adverse risk profile, and the country information before me, I accept on return there is a low chance the applicant may be subject to a degree of monitoring by authorities, such as a visit or phone call. I am not satisfied the applicant has a profile such that he would be subject to ongoing monitoring on return, including taking into account his illegal departure and return as a failed asylum seeker. I also accept he may encounter some challenges reintegrating to society, and may experience some social stigma. I am not satisfied any monitoring, social stigma or reintegration difficulties the applicant may experience, rises to the level of serious harm, whether considered separately or together. I am not satisfied the applicant faces a real chance of persecution in Sri Lanka, as a result of his illegal departure, or for being a returning failed asylum seeker from Australia.
46. In all the circumstances, I am not satisfied the applicant faces a real chance of persecution now or in the reasonably foreseeable future for any of the reasons claimed, even when those reasons are considered together.

#### **Refugee: conclusion**

47. 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**

---

48. 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**

49. 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.

50. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

51. I accept on return to Sri Lanka it is likely the applicant will be subject to administrative processes, including being questioned at the airport, and receiving a fine which can be paid by instalments. I have not accepted the applicant was a security concern at the time he departed Sri Lanka, or that he would be a person of interest to the authorities on return for any reason, or that there is a real risk he would be mistreated during processing at the airport or any associated brief period of detention. I am not satisfied the conduct of the Sri Lankan authorities, or the procedures or penalty he may face on return amounts to significant harm, within the meaning of s.36(2A), for this applicant. I accept the applicant may face some challenges re-establishing himself in Sri Lanka, as a returning asylum seeker who has been overseas for a significant period of time, and it is possible he may experience some social stigma and monitoring, and he may also experience monitoring should he attend commemorative events, such as Martyr's Day. As a Tamil he may also experience a degree of social stigma and discrimination on return to the country. Although it may be stressful and hurtful for the applicant to experience monitoring, social stigma and discrimination, I am not satisfied the limited monitoring, or any low level discrimination or social stigma he may face on return would amount to significant harm, as defined in the Act, for this applicant, including considering these matters cumulatively, and together with the processes and penalty he may be subject to on return.

52. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka for the reasons claimed, now or in the reasonably foreseeable future. For the same reasons, I am also not satisfied there is a real risk of any harm on return, including significant harm.

### **Complementary protection: conclusion**

53. 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**

---

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

## 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.