



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/02096

Date and time of decision: 10 April 2017 11:56:00  
Joanne Jennings, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil from [town1], Sri Lanka. He lodged an invalid application for a Subclass 866, Protection visa, [in] September 2013. [In] January 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He fears he has been imputed as being a supporter of the Liberation Tigers of Tamil Eelam (LTTE) because of his work in [occupation] and he will be harmed by the Sri Lankan authorities.
2. [In] February 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

### Information before the IAA

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3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act). The referred materials include the separate applications of relatives of applicant that date from a number of years ago. They have not otherwise been referred to by the delegate or considered and, on their face, appear to have no relation to the applicant's claims. I do not regard them as relevant to the matter before me and I have not had regard to this information.
4. The IAA received a submission [in] March 2017 on behalf of the applicant. The representative's submission largely addressed the delegate's decision and findings and may be referred to as argument rather than new information. I have had regard to the parts of the submission that address the delegate's decision and findings.
5. The submission referred to the matter of the applicant's claim regarding contact with his wife from the time he left [town1] in 2008. The submission stated that "calls between Sri Lanka and [country 1] were monitored as the Sri Lankan Authorities were suspicious of Tamils who were relying on their association with LTTE affiliates in [country 1]" and the applicant "was aware his wife was harassed as he was in contact with her prior to her fleeing to [country 1]". This information was not before the delegate and is new information.
6. The IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances to justify considering the new information and the new information was not and could not have been provided to the Minister, 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. The delegate asked the applicant detailed questions about this matter at the SHEV interview and the applicant consistently stated that he had no contact with his wife from the time he left [town1] in 2008; he did not state that he spoke to her between then and when she left for [country 1] later in 2008. In response to questions about when he became aware of the harassment his wife experienced he stated that this was not until they re-established contact after his arrival in Australia. When asked why he was concerned about being in contact with his wife from 2008 he did not advance the claim about monitoring of telephone calls between [country 1] and Sri Lanka. The post-interview submission addressed the concerns the delegate raised at the interview, yet it did not provide this information. I have noted the representative's comments in the submission that the applicant may find the immigration process and formal interviews difficult and he may be reluctant to speak openly to

Australian authorities. However I am not satisfied that there is any sensitivity in this information that would support a contention that he had difficulty providing this information to the delegate. I am not satisfied that any exceptional circumstances exist that justify considering the new information. I have not had regard to this information.

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

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

- The applicant is a Tamil from [town1]. When [town1] was under the control of the LTTE he assisted the LTTE by lending his [vehicle] to LTTE members.
- In 2006 he commenced work in [town1] with [NGO], an international non-government organisation conducting [specified operations] in Sri Lanka. The applicant has provided a certificate from [NGO] confirming his employment.
- The army suspected the applicant was providing [equipment], or their component parts, to the LTTE and stopped him on his way to and from work to question him about his work, what [his fellow] workers had found and the LTTE. Initially this happened on a weekly basis but, after the break of the ceasefire and the escalation of fighting, this questioning increased and he was stopped on a daily basis. The army soldiers said they knew the LTTE came to his home and collected [equipment] items. He was beaten and tortured by the soldiers on some of these occasions. At the time there were a number of deaths in the area and he was fearful for his safety. In 2008 he ceased working for [the NGO]. The army came to the family home and harassed his [age] [child] and showed [them] a [device] and asked if the applicant ever brought [this device] home. His wife telephoned him and warned him not to come home. He feared that the army had come to the home to shoot him.
- He travelled to [town 3] to stay with an [a relative]. [They] initially refused to assist him as [they were] fearful for [their] safety if he stayed with [them], however [they] allowed him to stay for short periods of time. To ensure the safety of his family he did not contact them again as he was fearful the authorities would be able to track them from his telephone calls.
- In 2009 he was offered another position working with [the same NGO] in the [town 2] area. He accepted this position and stayed intermittently with his [relative]. During this time he was promoted to a senior position in charge of a team of [number] people.
- The authorities became aware of his resumption of employment with [this NGO] in April 2012 and came to his [relative's] house in search of him. He was fearful of harm from the authorities and hid at the homes of friends and immediately quit his job with The [NGO]. He decided to leave Sri Lanka and departed, via [town1], within [number] days of the visit to his [relative's] house and quitting his job.
- After his arrival in Australia he spoke to his immigration case officer and asked for assistance to contact his [child] who was then in Australia. After he made contact with his [child] he learned that his wife and children were harassed by authorities after he left [town1] and that because of this they left Sri Lanka in late 2008 and went to [country 1]. His [child] later came to Australia and his wife and [other child] returned to [town1] in approximately 2011. He has re-established contact with his wife in Sri Lanka and she told him in November 2013 the army came to the family home in [town1], threatened his wife and dug up the land, searching for hidden [devices]. They took his special [workwear.]

- He fears that the army and the Criminal Investigation Department (CID) suspect him of being an LTTE supporter and providing the LTTE with [device]s or [equipment] from his [occupation]. [Number] people who worked for [the NGO] have gone missing. He is concerned that the authorities are sensitive to any resurgence of the LTTE or Tamil separatist activity and they will view his expertise with [specific skill] as of particular concern.
- He cannot obtain the protection of the authorities and his fear extends to all of Sri Lanka.
- His representative advanced that the applicant fears harm because of his Tamil race, his imputed and real political opinion, and his membership of a particular social group as a returnee from the west/failed asylum seeker. She stated his pro-LTTE profile is further enhanced by his race, age and area of origin and, the fact the applicant's [child] remains in Australia may enhance the chance the applicant is treated with suspicion. She stated this is further exacerbated by the fact he has resided abroad for a very prolonged period of time and as such would be returning from a western country. She states that the Tamil community continue to face persecution, harassment and discrimination in Sri Lanka.

### Refugee assessment

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8. 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

9. 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.
10. The applicant has consistently claimed to be a Tamil from [town1] and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.

11. The applicant lived in [town1] during the period of LTTE control and I accept he assisted the LTTE by lending his [vehicle] to members. The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka provides guidance on the profiles of people at risk of harm and likely to be in need of protection. The UNHCR report comments that “at the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the northern and eastern provinces of Sri Lanka. Therefore, all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives.”<sup>1</sup> I find that the level of support the applicant provided was low and indicative of that of ordinary Tamils living in LTTE controlled territory and I am not satisfied that this in itself would indicate a real chance that the applicant would face harm on return to Sri Lanka.
12. I accept that the applicant worked for [NGO] from 2006 to 2008 and 2009 to 2012 in [his occupation].
13. I take account of the applicant’s claim that [number of his NGO employees] have gone missing and I note independent reporting from [source] of the kidnap by the LTTE of [number] employees from [Agency 1] in [town1] in 2006<sup>2</sup>. Human Rights Watch reported the abduction and disappearance of a [worker] from his [town1] home in 2006 by men thought to be local Tamils. In this case [the NGO] filed a complaint with the police and raised the matter with [specified international agencies]<sup>3</sup>. [Another source], reporting in 2009, noted the murder of [number] people working for international [agencies] and the disappearance of a further [number]<sup>4</sup>.
14. I consider it plausible that the army was interested in the [identified occupation] and regularly questioned the applicant about his activities. It is also plausible that this escalated when hostilities resumed in the civil war, and I am willing to accept that this questioning may have been as frequently as daily as the civil war conflict escalated. The level of impunity with which the army operated in [town1] at the time is widely documented<sup>5</sup> and I accept that on some occasions he was physically assaulted. However I am not convinced that the army suspected him of supplying [equipment] to the LTTE. I take into account the stringent security arrangements he described at his SHEV interview that surrounded the work of [his NGO’s] employees and the handing over of any [devices] found in [their operations]. Even if it were possible for an employee to smuggle an item from [their] operation I consider that if the army had suspicions about the applicant in this regard that they could simply have visited his home and conducted a search in 2008/2009, or kept him under surveillance. I do not accept the assertion that the army may have questioned him each day in the “hope he would eventually confess to supplying [device]s”. I do not accept as plausible that the army questioned him daily for a period of approximately six months, yet did not conduct a search of his property while he was working for [NGO] in 2006-2008, if there was a suspicion he was providing items to the LTTE.
15. He claims that the army visited the family home in 2008 and harassed his [child], but there is no indication that they conducted a search for [devices] at this time. He fears that they came to the family home to kill him and he immediately left for [town 3] to avoid them. However, from his evidence the army saw him every day as he travelled to and from work and had ample

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<sup>1</sup> UN High Commissioner for Refugees, (UNHCR), “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8

<sup>2</sup> [Deleted.]

<sup>3</sup> [Deleted.]

<sup>4</sup> [Deleted.]

<sup>5</sup> [Deleted.]

opportunity to detain him, or kill him if that was their intention. As noted above, I consider if the army suspected him of supplying [equipment] to the LTTE they would have searched his home or kept him under surveillance to detect any meetings with the LTTE. I am not satisfied that the army came to his home in 2008 in search of him, or to kill him, and that as a result he left [town1] and travelled to [town 3] in fear for his safety. Moreover, I note from the information above that [the NGO] filed various complaints regarding the abduction of [an occupation] employee in 2006, yet there is no indication that the applicant sought assistance from [the NGO] in the 2006/2008 period to secure his safety, or discussed his concerns with them, or the harassment by the army.

16. The country information indicates that [his area of] operations were disrupted by both the authorities and the LTTE during the war. I note reporting that indicates [his occupation] in Sri Lanka “became increasingly [restricted by the conflict and dangerous]”<sup>6</sup>. [Another source] reported that in “government-controlled areas, the [security] situation also [impacted operations], [...]” and other difficulties such as obtaining work permits for foreign workers and moving equipment from government controlled to LTTE controlled areas resulted in some operations ceasing.<sup>7</sup> The applicant claims to have been concerned for his safety and this was the motivating factor for leaving this field of employment. However I take into consideration that the applicant ceased employment with [the NGO] in May 2008, which was a time of significant escalation of civil war fighting<sup>8</sup>. I note that the applicant accepted a similar position with the same company in 2009. He stated in his SHEV application that he “accepted the job thinking that it might be safer in [town 2] and because I needed to support myself and my family”. It is not apparent why it would have been safer for the applicant to be involved in [his occupation] in [town 2] than in [town1], although I note that the war had ceased at this time. Noting that the applicant accepted another position doing the same work with the same company 14 months after resigning in claimed fear for his safety on the basis of his past [occupation] work, and the country information that indicates [occupation] activities were hampered at times of escalated conflict I have significant doubts that he left the position in May 2008 because of fear for his safety.
17. Furthermore I am not convinced that he had no further contact with his family after he left [town1] in 2008 until his arrival in Australia in 2102 as he was concerned that the army would be able to locate his family and harm them. The applicant’s family continued to live in the family home in [town1] until they left for [country 1], the same property which he stated the army visited just prior to his resignation from his job, rendering this precaution nugatory. I accept there may have been some concern that by contacting his family by using his own telephone he may have risked his own safety, as advanced in the submission to the IAA, but there is no apparent reason in the information before me why he could not make contact via an alternative means such as his [relative]. I note his statement that he accepted the position in 2009 in part to support his family, yet he claims to have avoided all contact with them until his arrival in Australia. I note that when he arrived in Australia he was already aware that his [child] was present in Australia, indicating that he had contact with someone who was able to provide him this information. I find his account in this regard to be implausible and I do not accept his claim that he had no contact with his family after he left [town1] in 2008. I consider he has made this claim in an attempt to enhance his protection claims, and specifically his claim to have been targeted by the authorities. I also note that he has resumed contact with his wife since his arrival in Australia. When asked at his SHEV interview if he had any concerns that this contact may result in her being harassed by the authorities, his response was that she

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<sup>6</sup> [Deleted.]

<sup>7</sup> ibid

<sup>8</sup> Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

stayed with her father; there is no information before me to explain why, on the basis his wife is staying with her father, that the applicant no longer feels constrained in contacting his family, nor how this would mitigate against the claimed attention from the authorities.

18. I note his claim that his family went to [country 1] toward the end of 2008 due to harassment from the army on the basis of the applicant's [occupation]. However I also note that [town1] was highly militarised at this time and due to the stringent security regime regular cordon and search operations were conducted<sup>9</sup> and the Danish Immigration Service reported high numbers of killings and abductions from 2006 to 2008<sup>10</sup>. I accept that his family departed for [country 1] in 2008, however noting this country information and my finding that the applicant was not suspected of having providing [equipment] to the LTTE, I do not accept that this was for reason of avoiding harassment based on the applicant's [occupation].
19. I note the assertion that when he re-joined [the NGO] in 2009 the applicant "explained to them that he had concerns for his safety and therefore they made arrangements to limit the chance the Sri Lankan Authorities would not become aware of his work. Accordingly, he submits that he rarely went out and stayed within the confines of the office area." However, am not satisfied that the applicant was of interest to the authorities after he resumed employment with [NGO] from July 2009. I note that the war had ceased at this time. [Deleted.]<sup>11</sup>. The completion of [recovery] exercises facilitated the return of displaced persons to their homes and land and the indications are that the authorities worked co-operatively and in partnership with the [NGOs] at this time<sup>12</sup>. Accordingly I do not accept that in November 2012 or 2013<sup>13</sup> the authorities visited his home in [town1], nor do I accept the claim in the SHEV application that in November 2013 the authorities dug up his land looking for hidden [devices] and took his [equipment] as these could be used to implicate him as being linked to the LTTE. If the authorities had a suspicion that he was hiding [devices] from his time [in his occupation] in [town1] in 2006 to 2008 it is not plausible that they would leave it some five years before making a search of his property.
20. At this SHEV interview the applicant was unsure when he resigned from [the NGO] on the second occasion, stating it may have been in May or June 2012. The applicant expressed his concern that over the passage of time since many of these events occurred he has forgotten exact dates of events and he may be mistaken in recounting his experiences and I note the delegate had regard to the applicant's concerns about inaccuracy in recounting exact dates. I take into account that an applicant may have difficulty recalling the exact dates of events and minor inconsistencies in themselves would not necessarily cast doubt on an applicant's claims.
21. The delegate asked the applicant how long was it after the visit to his [relative's] house by the authorities, and his subsequent resignation from [the NGO], that he left Sri Lanka; the applicant responded [number] days. In his SHEV application and in his Arrival interview with an immigration officer [in] January 2013 the applicant has consistently stated that he departed Sri Lanka [in] July 2012 and he repeated this date at his SHEV interview. The certificate from [the NGO] states that the applicant ceased employment [on a date in] April 2012. This was noted at

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<sup>9</sup> Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

<sup>10</sup> Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

<sup>11</sup> [Deleted.]

<sup>12</sup> UN Human Rights Committee 2013, "Consideration of reports submitted by States parties under article 40 of the Convention: Fifth periodic reports of States parties due in November 2007: Sri Lanka",

31 January 2013, CXC28129413714; Asian Tribune, "Ensuring national security through reconciliation & sustainable development" - A keynote address by Secretary Defense Mr. Gotabaya Rajapaksa", 23 August 2012, CX293666

<sup>13</sup> The applicant's 866 application, dated [in] September 2013, refers to a visit in "November". The SHEV application makes specific reference to a visit in November 2013 when the land was dug up.

his SHEV interview and the applicant's response was that he remembered leaving Sri Lanka [in] July 2012 and he did not offer an explanation as to why the employment certificate stated he left his employment six weeks prior to his departure, nor was this inconsistency addressed in the post-interview submission.

22. I note the comments in the submission to the IAA that "it is conceivable that the applicant while trying to flee his country immediately after becoming aware the Authorities were after him he was not in a position to check the accuracy of the reference". However, the certificate is dated [in] October 2012, some three months after the applicant had departed Sri Lanka and had arrived in Australia. Furthermore, this does not account for the fact that in the statement of claims submitted with both his invalid 866 and SHEV applications he stated that the visit to his [relative's] house occurred in April 2012; and noting his claim that he resigned immediately after this visit, this is consistent with the date in the employment certificate. I also note that the invalid 866 application statement was dated [in] September 2013, approximately 19 months after the events, mitigating the concerns raised about the difficulty with precisely recollecting incidents from the distant past. I have noted that a discrepancy of a few days would not necessarily bring an applicant's account into doubt, but in this case the applicant has claimed that he was so fearful for his safety he resigned his position immediately after the visit to his [relative's] house and departed Sri Lanka within [number] days, yet the certificate shows he resigned six weeks before his departure. I am not satisfied that the applicant's claim is a genuine account of the events. I do not accept that someone came to his [relative's] home in 2012 looking for the applicant and that he immediately resigned his employment in fear for his safety and that he then departed Sri Lanka to avoid harm from the authorities.
23. I have accepted that the applicant was regularly harassed, questioned and mistreated by the authorities when working for [the NGO] in 2006-2008, noting that this was during the civil war and a period of heightened tension. I have not accepted that he was suspected of supplying [equipment] to the LTTE and I have not accepted that the authorities visited his home in 2008 or in 2012/2013, nor do I accept that they visited his [relative's] house in search of him in 2012. It follows that I do not accept that he was being pursued by the authorities when he left [town1] in 2008 or Sri Lanka in 2012.
24. I have considered whether the applicant's role as a [occupation] working for an international NGO would attract adverse attention. The post-interview submission quotes Minority Rights Group International as stating "Sri Lanka's minorities continue to be harassed and intimidated by state security forces for activism or suspected separatism" and "human rights defenders were caught up in the sweeps on suspicions of engagement with former LTTE fighters".<sup>14</sup> I note that [his work] was conducted by international NGOs in partnership with the army and I note that humanitarian workers during the conflict and its immediate aftermath, particularly those who worked with or were perceived as working with human rights or protection issues, are a profile group identified by the UNHCR as being at risk of harm<sup>15</sup>. Reporting more recently in 2016, the UK Home Office noted that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The UK Home Office reported that the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism, journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a "stop" list of those against whom

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<sup>14</sup> Post-interview submission; Minority Rights Group International, State of the World's Minorities and Indigenous Peoples 2015 - Sri Lanka, 2 July 2015

<sup>15</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

there is an extant court order or arrest warrant<sup>16</sup>. I am not satisfied that the applicant falls within one of these categories of persons. The applicant has not been outspoken on Tamil separatist or human rights issues, or critical of the Sri Lankan government. I accept that the applicant's experience with [his occupation] could be of benefit to a resurgent LTTE, but noting that the LTTE no longer exists as a military force and that the applicant has not been involved in any Tamil separatist activities that would be of concern to the authorities, I am not satisfied that his skill with [his occupation] would give rise to a well-founded fear of harm on return to Sri Lanka.

25. I have noted the representative's comments that it is highly plausible [occupation] have been targeted due to their imputed political opinion as suspected LTTE affiliates, however I am not satisfied that working in this field would result in an imputed political opinion as an LTTE supporter, notwithstanding that during the war some [such] agencies worked with the LTTE.
26. In her post-interview submission the applicant's representative refers to harm the applicant may face on the basis of his real political profile. There is no indication that the applicant has been involved in politics or been outspoken on politics and that he has a real political profile that would attract adverse attention in Sri Lanka, nor do I accept he would face harm should he become politically involved on return to Sri Lanka.
27. I accept that as a Tamil the applicant has a subjective fear of arrest, detention, disappearance and mistreatment at the hands of the Sri Lanka authorities and I note the concern that he is not able to live freely. I note his concern that the Sri Lankan authorities view all Tamils with suspicion and with being linked to the LTTE and his fear that his risk of harm is exacerbated by his claimed pro-LTTE profile and his experience with [his occupation]; and is further enhanced by his race, age and area of origin, his extended absence overseas in a western country, his asylum claim and his [child]'s ongoing residence in Australia.
28. Since the applicant left Sri Lanka in 2012 there has been an improvement in the security situation has resulted in a decrease in Tamils held in detention and the election of the Sirisena government in 2015 has led to greater political cooperation. The Department of Foreign Affairs and Trade (DFAT) reports that the Sirisena government has adopted a more proactive approach to human rights and reconciliation and has been engaging constructively with the Tamil political parties. DFAT reports that the security situation in the north and east has greatly improved since the end of the conflict and assess that the monitoring and harassment of Tamils has decreased under the Sirisena government<sup>17</sup>. I have noted the concerns outlined in the post-interview submission that "country information from a variety of sources included ... clearly indicates that the situation in Sri Lanka remains precarious". I note the applicant's concerns about ongoing arrests and disappearances in Sri Lanka and I accept that there continue to be reports of arbitrary detention and harm perpetrated by the security forces in Sri Lanka, particularly of Tamils, and the reports from Human Rights Watch, Minority Rights Group International and Freedom from Torture<sup>18</sup> are amongst those that detail claimed abuses. However, I find that country information does not support this fear as being well-founded. Since the end of the civil war and the 2011 lifting of the Emergency Regulations that had

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<sup>16</sup> UK Home Office, "Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

<sup>17</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>18</sup> Post-interview submission; Human Rights Watch, World Report 2016 - Sri Lanka, 27 January 2016; Minority Rights Group International, State of the World's Minorities and Indigenous Peoples 2015 - Sri Lanka, 2 July 2015; Freedom from Torture, Tainted Peace - Torture in Sri Lanka since May 2009, August 2015

provided the security authorities broad powers to arrest and detain suspects<sup>19</sup>. I have also regard to the current UNHCR Eligibility Guidelines which state being of Tamil ethnicity alone does not give rise to protection needs, nor does being from a former LTTE controlled area<sup>20</sup>. I have not accepted that the applicant was imputed as being an LTTE supporter.

29. Advances by the Sirisena government since its election in 2015 include working toward greater demilitarisation by returning land held by the military, establishing a commission to investigate civil war abuses and the Human Rights Commission of Sri Lanka has unveiled a program to address human rights issues at the regional level<sup>21</sup>. The US State Department, reporting on events in 2015, noted the closure of the Omanthai military checkpoint, which previously divided government-held territory from former LTTE controlled territory; adopting the constitution's 19th amendment, which limits the powers of the presidency and begins a process of restoring the independence of government commissions; the government cosponsored a resolution on human rights at the UN Human Rights Council and welcomed visits by the UN special rapporteur on transitional justice, the UN Working Group on Enforced and Involuntary Disappearances, and the UN Office of the High Commissioner for Human Rights (OHCHR) Office of Legal Affairs team; the establishment of the Office of National Unity and Reconciliation to play a key role in reconciliation efforts and the Ministry of National Dialogue to further advance reconciliation. Other advances have been made in assisting families to access government benefits in the absence of death certificates and the government signed the International Convention for the Protection of All Persons from Enforced Disappearances. The government removed the ban on eight Tamil diaspora organizations and 267 individuals on the previous government's watch list<sup>22</sup>.
30. The US State Department continued to report human rights abuses in 2015 and noted cases of harassment, arbitrary arrest, detention and torture of civil society activists, journalists, and LTTE sympathisers. I have also noted country information cited by the representative reporting on human rights abuses, however overall the reports of harm relate to people with LTTE connections or who are otherwise Tamil separatist activists.
31. The applicant's representative stated that the Tamil community faces ongoing discrimination, however no claims of feared harm on this basis have been specified. I accept that there is low level societal discrimination in Sri Lanka for Tamils<sup>23</sup>. I note that the applicant was able to study until Year [number] and has been in regular employment in Sri Lanka, with the exception of the period in 2008/2009. I note he was employed in what he described as a well-paying job with [the NGO] and was promoted to a senior position with the company. I find that the level of societal discrimination the applicant would face on return to Sri Lanka would not amount to serious harm or systematic and discriminatory conduct. There are no official laws or policies that discriminate against Tamils in relation to access to education, employment or access to housing. There is no threat to the applicant's life or liberty, or physical harassment or ill treatment, or significant economic hardship, denial of access to basic services to capacity to earn a livelihood that threatens the applicant's capacity to subsist, or other form of harm that

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<sup>19</sup> UK Home Office, "Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

<sup>20</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>21</sup> South Asia Terrorism Portal, "Sri Lanka Timeline - Year 2015", 19 October 2015, CISEC96CF13618

<sup>22</sup> US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

<sup>23</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

may be considered serious harm. I find that the applicant does not have a well-founded fear of serious harm on this basis.

32. I accept that, on his return to Sri Lanka, the applicant would be considered by the authorities to be a failed asylum seeker returning from a western country without a passport after a very prolonged period whose [child] remained in Australia, and who departed Sri Lanka illegally.
33. Information before the delegate indicates that entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act 1949 (I&E Act) and under this Act it is an offence to depart other than from an approved port of departure. DFAT reports that penalties for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 2,000). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine<sup>24</sup>.
34. Involuntary returnees are processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS) and the CID who agencies check travel document and identity information of returnees against the immigration database, intelligence databases and records of outstanding criminal matters. For returnees travelling on temporary travel documents, an investigative process to confirm identity is conducted and may involve interviewing the returnee, contacting local police, contacting neighbours and family and checking criminal and court records which can take several hours to complete. As involuntary returnees are processed en masse further delays may occur until all returnees are processed. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport<sup>25</sup>.
35. As a returnee, I accept that applicant may be questioned by police at the airport and charged under the I&E Act. As part of this process, most returnees will be fingerprinted and photographed, then transported to the nearest Magistrates Court at the first available opportunity. However, returnees may be required to remain in police custody at the CID Airport Office for up to 24 hours a Magistrate is not available before this time, such as a weekend or public holiday, may be held at a nearby prison<sup>26</sup>.
36. The US Department of State reports that general prison conditions in Sri Lanka are poor due to gross overcrowding and poor sanitary conditions<sup>27</sup>.
37. DFAT reports that as a deterrent fines rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis and payable by instalment if the returnee face difficulty with payment<sup>28</sup>.
38. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, although DFAT understands that conditions are rarely applied, and a person will only

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<sup>24</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>25</sup> ibid

<sup>26</sup> ibid

<sup>27</sup> US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8

<sup>28</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

need to return to court when the case against them is being heard. DFAT assesses that ordinary passengers, such as the applicant, are generally viewed as victims.

39. The applicant was only a passenger on the boat. Based on country information I find that the applicant may be detained and questioned at the airport for up to 24 hours, be fined for breaching the I&E Act and, may face a period of time held in prison.
40. The High Court endorsed in *MIBP v WZAPN*<sup>29</sup>, that whether a risk of loss of liberty constitutes serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied the applicant would face only a brief period in detention. Even having regard to general poor prison conditions, I do not consider that a brief period in detention would constitute the necessary level of threat to his life or liberty, or to significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.
41. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine under the I&E Act, to constitute a threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm.
42. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. 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 investigation, prosecution and punishment of the applicant under the I&E Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
43. I accept that the applicant will be considered a failed asylum seeker on his return. DFAT reports that there have been thousands of asylum seekers returned to Sri Lanka since 2009 with relatively few allegations of torture and mistreatment and assesses the risk of harm for the majority of returnees as low<sup>30</sup>. I do not accept the assertion that as part of an ethnic minority, and as he has been abroad for a prolonged period of time, that it is highly likely he would be subjected to ill treatment upon return. I accept that a returning asylum seeker with actual or perceived links to the LTTE may be at risk of harm when processed at the airport. However, based on my findings, I have not accepted that the applicant would be perceived as having links to the LTTE. Taking into account those findings and the country information, I do not accept that the applicant will be at risk of adverse attention from the Sri Lankan authorities when scrutinised on arrival in Sri Lanka. I am not satisfied that there is a real chance that the applicant would face harm on his return as a failed Tamil asylum seeker. I accept that the applicant, if returned to Sri Lanka, will face action under the I&E Act. The country information confirms that the applicant is likely to be detained and questioned at the airport, possibly up to 24 hours, before being taken by the police to the nearest Magistrates Court.
44. I have not accepted that the applicant's employment in [occupation] with an international NGO would result in him being perceived as being an LTTE supporter and I have not accepted that he was suspected of having provided [equipment] to the LTTE. I have considered the

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<sup>29</sup> *MIBP v WZAPN*; *WZARV v MIBP* (2015) 254 CLR 610

<sup>30</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

applicant's claims individually, and the cumulative basis of his ethnicity, his origins from a former LTTE area, his support to the LTTE by lending his [vehicle], his age, his real political opinion, his expertise in [his occupation] and work in [occupation], his very prolonged residence abroad in a western country, his [child]'s continued residence abroad, his illegal departure and his asylum claim, and I am satisfied that there is not a real chance he would experience harm in the foreseeable future in Sri Lanka.

### **Refugee: conclusion**

45. 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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46. 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**

47. 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.

48. I accept that the applicant will be returning to Sri Lanka as a person of Tamil ethnicity and he fears discrimination on this basis. However there are no official laws or policies that discriminate against Tamils in relation to access to education, employment or access to housing<sup>31</sup>. I am not satisfied on the evidence before me that any discrimination the applicant may face will involve deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. Taking into consideration DFAT's assessment that there are currently no official laws or policies that discriminate on the basis of ethnicity or language, the improved security situation, and the significant changes to country conditions since the applicant left Sri Lanka, I am not satisfied the applicant would face a real risk of significant harm in Sri Lanka for reasons of his Tamil ethnicity.

49. I have found that there is not a real chance that the applicant faces harm on the basis of his ethnicity, his origins from a former LTTE area, his support to the LTTE by lending his [vehicle], his age, his real political opinion, his expertise in [his occupation] and work in [occupation], his very prolonged residence abroad in a western country, and his [child]'s continued residence

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<sup>31</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

abroad. Noting that the Full Federal Court<sup>32</sup> has held that the “real risk” test for complementary protection is the same standard as the “real chance” test, and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

50. I accept that the applicant will be identified on return as a person who departed illegally and an asylum seeker and that there is a real risk that the applicant will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I am not satisfied that this treatment, either during the investigation process or while being held at the airport, amounts to significant harm. As noted above returnees may, in some circumstances, be held for a short time in prison while waiting to appear before a magistrate. However, even if the applicant is required to spend a period of time in person while waiting to appear before a magistrate, I am not satisfied that he will face significant harm as defined.
51. I accept that the applicant may be subjected to poor prison conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources. I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally and fined as a result but that he is unlikely to face a custodial sentence. This does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that questioning, or the imposition of a fine, or the poor prison conditions to which the applicant may be subject constitute significant harm as defined under ss.36(2A) and 5 of the Act. Accordingly, I am not satisfied the applicant will face a real risk of significant harm during any possible brief period in detention.
52. I accept there are reports of mistreatment of asylum seekers who have been returned to Sri Lanka, however DFAT reports that the risk of torture or mistreatment for the majority of returnees is low including for those suspected of an offence under the I&E Act<sup>33</sup>. I do not accept the assertion that as part of an ethnic minority and because he has been abroad for a prolonged period of time that it is highly likely he would be subjected to such ill treatment upon return. I have found above the applicant is not a person of interest to the Sri Lankan authorities. I am therefore not satisfied that there is a real risk that the applicant would be subjected to mistreatment during any possible brief period in detention on return to Sri Lanka.

#### **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.

#### **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

<sup>33</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

...

***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.

#### **91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

**91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  - (b) either:
    - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...