



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06433

Date and time of decision: 3 April 2019 15:02:00
D Corrigan, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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 Sri Lankan national. She arrived in Australia [in] May 2013. On 14 November 2016, she lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. In a decision dated 28 February 2019 a delegate of the Minister refused to grant the visa. The delegate found that the applicant did not face a real chance of serious harm or significant harm on account of his being a Tamil from the north, her first husband's links to the Liberation Tigers of Tamil Eelam (LTTE), her being a woman, her lack of a national identity card or her being a failed Tamil asylum seeker who departed illegally and who has spent significant periods of time in countries with large Tamil diasporas, namely India and Australia.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA received a submission from the applicant's representative. To the extent that they discuss the findings of and other matters before the delegate this is not new information for the purpose of s.473DC(1) of the Act.
5. The submission includes a number of items of new information relating to her "first interview". This included a statement that the general talk in the camp she was living was that all the detainees would be returned to Sri Lanka and that all the information that was taken from them would be shared with Sri Lankan authorities and that she had no idea that this was just a rumour and she was reluctant to divulge all information. It was also stated that the interpreters did not interpret properly and that the interpreters used tended to be either Tamil Malays or Tamil who had been born in Australia and therefore did not have a proper understanding of the Tamil that she was speaking, as there are varying Tamil dialects. The delegate in her decision did not draw any adverse conclusions from any previous interview (and neither have I in making this decision) and accepted the applicant's claims. It is also stated that there were no independent legal advisors to provide them with any legal advice. The applicant was represented at the SHEV interview and the delegate did not make her decision for five months after this but this information was not provided. I am not satisfied that there are exceptional circumstances to justify considering this new information. I am not satisfied that this new information is credible, personal information, which was not previously known, and had it been known, may have affected the consideration of the applicant's claims. Nor am I satisfied that it could not have been provided to the delegate before she made her decision.
6. The submission also includes a statement that it will take six months for the applicant to be issued an identity card as she needs to reside in Sri Lanka for six months to become eligible. This is new information. However, no source has been cited to support this statement and the country information referred to by the delegate does not refer to it, so I consider the statement to be totally lacking in probative value. The applicant was represented at the SHEV interview and the delegate did not make her decision for five months after this. I am not satisfied that there are exceptional circumstances to justify considering this new information. I am not satisfied that this new country information is credible, personal

information, which was not previously known, and had it been known, may have affected the consideration of the applicant's claims. Nor am I satisfied that it could not have been provided to the delegate before she made her decision.

7. The submission further includes new information about the circumstances relating to the applicant's lack of relationship with relatives in Sri Lanka. The delegate took these relatives into account in making her decision and found that it would be reasonable for the applicant to contact her relatives in Sri Lanka with the assistance of her mother to organise living arrangements for herself upon her return and that her relatives could assist her with support and protection. The applicant had stated that she was not in contact with her relatives in Sri Lanka but the delegate did not ask any follow up questions about them. The delegate did not make any adverse credibility findings against the applicant and she has presented as a credible witness. I am satisfied that there are exceptional circumstances to justify considering this new information. I am satisfied that this new information is credible, personal information, which was not previously known, and had it been known, may have affected the consideration of the applicant's claims.
8. The submission includes several items of country information that substantially predate the delegate's decision and are new information. No reasons have been advanced as to why there are exceptional circumstances to justify considering this new information and I am not satisfied that they are. The applicant was represented at the SHEV interview and the delegate did not make her decision for five months after this. There is other more recent information about the treatment of women that the delegate relied upon. I am not satisfied that this new country information is personal information, which was not previously known, and had it been known, may have affected the consideration of the applicant's claims. Nor am I satisfied that it could not have been provided to the delegate before she made her decision.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - She is a Tamil from Northern Province in Sri Lanka.
 - Her family had to regularly move in the late 1980s and 1990s due to the conflict.
 - Her husband was a driver for the LTTE and active member and he was killed in fighting in [1994]. His [relative] was also a driver for the LTTE and was killed.
 - The security forces harassed her because she was a widow and people in her village told them about her husband's involvement in the LTTE. She tried to get away from the harassment of the police and security forces by moving to different locations in [Town 1] but by 1998 [Town 1] was under government control.
 - In October 1998, she travelled by boat illegally with [relatives] to India and resided in refugee camps until 2013.
 - In the refugee camps there were thousands of Sri Lanka Tamil refugees who had fled Sri Lanka and lots of people knew about her husband's involvement with the LTTE and his subsequent death. People started telling the authorities and Q branch in India she was involved in the LTTE and they started harassing her and asking for bribes.
 - She has spent a significant time in a country with a large Tamil diaspora in Australia and India.

- She does not have, and has never had, a Sri Lankan identity card which will cause difficulties on her return.
- She will be harmed, vulnerable and her life would be in danger as a single female without a male protector or guardian if she returns to Sri Lanka.

Refugee assessment

10. 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

11. 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.
12. The applicant has provided translated copies of her Sri Lankan birth certificate and marriage certificate and she has consistently maintained that she is a Sri Lankan national. I accept that she is a Sri Lankan national and I find that Sri Lanka is her receiving country.
13. The applicant has given consistent and credible evidence about her and her family’s history in Sri Lanka and India. Her claims are also supported in country information referred to in the delegate’s decision that many Tamil men were involved in the LTTE in the 1990s, that the authorities intimidated and harassed widows connected to former LTTE members and that some Sri Lankan Tamils living in Tamil Nadu in India were subjected to intimidation, extortion and arbitrary detention by Q Branch.
14. I accept that the applicant and her family had to regularly move in the late 1980s and 1990s due to the conflict. I accept that her husband was a driver for the LTTE and also a member and that he was killed in fighting in [1994] and that his [relative] was also a driver for the LTTE and was killed. I accept that the security forces harassed her because she was a widow and people in her village told them about her husband’s involvement in the LTTE. I accept that she tried to get away from the harassment of the police and security forces by moving to different locations in [Town 1] but by 1998 [Town 1] was under government control. I accept

that in October 1998, she travelled by boat illegally with [relatives] to India and resided in refugee camps until 2013. I accept that in the refugee camps there were thousands of Sri Lanka Tamil refugees who had fled Sri Lanka and lots of people knew about her husband's involvement with the LTTE and his subsequent death. I accept that people started telling the authorities and Q branch in India she was involved in the LTTE and they started harassing her and asking for bribes.

15. The applicant has given credible evidence about her family to the delegate and to the IAA. She left Sri Lanka over 20 years ago and all of her living immediate family members either reside in India or Australia. Her new husband is a permanent resident of Australia and her youngest child is a citizen of Australia. She has consistently given evidence that though her mother has relatives in Sri Lanka she has not been in contact with any of them and she does not know their whereabouts. Her deceased father's siblings are in [another country]. She has a step-brother who lived in [Town 2] but there have been problems between him and her mother and she has not had any communication with him. She cut off all contacts with relatives of her first husband and she is now remarried and has a child. I accept that the applicant has no family members (male or female) in Sri Lanka who she could call on for assistance or protection.
16. I have carefully considered all the country information referred to in the delegate's decision and that referred to by the representative. In making my assessment, I have given the greatest weight to the latest report of DFAT concerning women in Sri Lanka because it is authoritative and recent and is based on DFAT's on the ground knowledge and discussions with a range of sources as well as taking into account relevant and credible open source reports including those of the UNHCR, western governments and human rights organisations and Sri Lankan non-governmental organisations. Furthermore, it has been specifically prepared with regard to the current caseload for decision-makers in Australia.
17. DFAT have stated that violence against women occurs throughout Sri Lanka: the 2017 Report of the UN Secretary-General on Conflict-Related Sexual Violence reported gender-based crimes in all nine provinces. The United Nations Population Fund reported in 2016 that one in four women in Sri Lanka are sexually abused by the time they are 18 years old. The *Prevention of Domestic Violence Act* (2005) criminalises rape and domestic violence, but marital rape is considered an offence only in cases where the individuals are legally separated. Sexual harassment is an offence under Section 345 of the *Penal Code* with a maximum penalty of five years' imprisonment. In October 2016, the National Police Commission designated provincial senior female law enforcement officers to respond to sexual harassment claims. According to police statistics, 294 cases of rape of women over 16 years were recorded in 2017, a slight decrease from 2015 and 2016. According to the UN Committee on the Elimination of Discrimination Against Women, the majority of cases of gender-based violence are likely to go unreported due to inadequate legislation, women's limited access to justice including fear of reprisals, limited trust in the police and judiciary, delays in the investigation of cases, and very low conviction rates. Few cases of gender-based crimes involving a member of the security forces result in convictions, though seven men were sentenced in the Jaffna High Court in September 2017 for the abduction, rape and murder of a schoolgirl in 2015. Only one case of post-war sexual violence by military personnel has proceeded to the courts, in Jaffna in 2015.¹
18. The government has committed to prevent the abuse of women, and in November 2016 launched a national action plan to address sexual and gender-based violence. Civil society

¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

organisations in Sri Lanka note, however, that no ministry is responsible for monitoring the implementation of the plan. The Ministry of Health, in partnership with non-government organisations, maintains district hospital-based medical services for sexual assault victims. The gender-based violence desk at a base hospital (smaller than a district level hospital) in the Eastern Province reported 82 cases to the end of November 2017, 84 cases in 2016 and 28 cases in 2015.²

19. DFAT's assess that women throughout Sri Lanka, including in the north and east face a moderate risk of societal discrimination, including violence, and that few support mechanisms are available to women in these circumstances. DFAT describe a moderate risk as being that they are aware of sufficient incidents to suggest a pattern of behaviour.³
20. International and local observers attribute the higher prevalence of sexual violence and domestic abuse in the north and east compared to other parts of Sri Lanka to the conflict and militarisation in these regions. The 2011 UN Secretary-General's Panel of Experts and the 2015 OHCHR investigation report outlined allegations of sexual violence against Tamil women that would constitute war crimes. DFAT considers credible allegations of sexual violence against women held in detention camps in 2009 and 2010, and in military-run rehabilitation centres for an estimated 3,000 female LTTE fighters. In 2017, the UN Special Rapporteur on minority issues reported a decrease in the incidence of sexual assault by the military as it drew down in the north and east, but Tamil women continue to fear sexual assault in locations where the military presence remains.⁴
21. High male death rates during the conflict have left a large number of female-headed households in Sri Lanka. The latest Household Income and Expenditure Survey of 2016 estimated 1.4 million female-headed households in Sri Lanka (representing 25.8 per cent of the population), mostly in the north and east. The definition of a female-headed household in Sri Lanka varies, but can include war widows, never married, disabled and elderly women, and family members of the missing or disappeared. The 2012 census found that widows led 50 per cent of female-headed households.⁵
22. Female-headed households are vulnerable to poverty, gender-based violence, exclusion from inheritance and property rights, access to services and employment opportunities. Government agencies and domestic and international NGOs provide some livelihood, housing and psychosocial assistance to female-headed households, but local sources claim that on-the-ground support is minimal and under-resourced. The Sri Lankan Cabinet is yet to approve the National Action Plan for Women Headed Households, but the 2018 budget included a LKR 250 million (approximately AUD 2.1 million) allocation for a salary subsidy of LKR 10,000 (approximately AUD 80) for war widows (and former combatants). Women in the community described the National Centre for Empowerment of Women Headed Households established in Kilinochchi in 2015 as ineffective. Observers have criticised many home-based income generation programs for female-headed households for failing to match market needs and existing skills to train women. Women reported difficulties in gaining access to government services targeting female-headed households, due to a lack of awareness and to experiences of harassment and exploitation when seeking services. The social stigma of widowhood also reportedly impedes access to government and non-government services. The UN Special Rapporteur on minority issues assessed that war widows, female family members of the disappeared and female activists who advocate on behalf of other women

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

faced particular risks. Some women reported requests for money or sexual services from local officials in exchange for information. The UN Special Rapporteur cited allegations that members of the Criminal Investigation Department intimidated and harassed these groups of women, particularly those connected to former LTTE members.⁶

23. DFAT assesses that female-headed households are vulnerable to societal discrimination and official harassment and exploitation. Authorities continue to monitor those believed to have family links to the LTTE.⁷
24. Female-headed households are vulnerable to poverty, gender-based violence, exclusion from inheritance and property rights, access to services and employment opportunities. Government agencies and domestic and international NGOs provide some livelihood, housing and psychosocial assistance to female-headed households, but local sources claim that on-the-ground support is minimal and under-resourced. The Sri Lankan Cabinet is yet to approve the National Action Plan for Women Headed Households, but the 2018 budget included a LKR 250 million (approximately AUD 2.1 million) allocation for a salary subsidy of LKR 10,000 (approximately AUD 80) for war widows (and former combatants). Women in the community described the National Centre for Empowerment of Women Headed Households established in Kilinochchi in 2015 as ineffective. Observers have criticised many home-based income generation programs for female-headed households for failing to match market needs and existing skills to train women. Women reported difficulties in gaining access to government services targeting female-headed households, due to a lack of awareness and to experiences of harassment and exploitation when seeking services. The social stigma of widowhood also reportedly impedes access to government and non-government services.⁸
25. I note that the applicant ran her own [business] for 15 years whilst in India and has worked since coming to Australia. She stated that at the SHEV interview that the only reason she could not return to Sri Lanka was that she was that her former husband was in the LTTE. She said that she did not have any money problems and did not need much money. I am not satisfied that her capacity to subsist will be threatened.
26. A considerable period of time has elapsed since the applicant's husband and [his relative] were involved in the LTTE and when she was harassed by the security forces. However, I note DFAT's assessment that women throughout Sri Lanka, including in the north and east face a moderate risk of societal discrimination, including violence, and that few support mechanisms are available to women in these circumstances. The applicant would be returning to Sri Lanka alone as the war widow of man who was involved in the LTTE and without any (male or even female) protection or support. The country information indicates that female-headed households and widows of those connected to the LTTE are vulnerable to official harassment, intimidation, violence, exploitation at the hands of the Sri Lankan authorities and officials as well as societal discrimination and social stigma.
27. Considering the country information as a whole and her particular circumstances, I find that the applicant faces a real chance of serious harm on account of her membership of a particular social group consisting of "Widows of LTTE members who are without male protection". Given the country information before me, I am satisfied that this constitutes a particular social group under s.5L of the Act. I find the persecution would involve serious harm (significant physical harassment and significant physical ill-treatment) and systematic and discriminatory conduct.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

28. DFAT state that Sri Lankan security forces maintain effective control throughout Sri Lanka and individuals are unlikely to be able to relocate internally with anonymity.⁹ The country information considered as a whole indicates that the applicant would be at risk of serious harm from state actors throughout Sri Lanka and I find that the real chance of persecution relates to all areas of Sri Lanka.
29. DFAT have commented that Sri Lanka has no laws or government policies that hinder access to state protection on the basis of religion or ethnicity. All citizens have access to avenues of redress through the police, judiciary and the Human Rights Commission of Sri Lanka. They state that in practice, these avenues may be limited by linguistic barriers and by a lack of resources. Very few police officers are female. Thirty-six police stations across Sri Lanka have “Women and Child Bureaus”, but local sources claim there are not enough female officers to staff the bureaus, reducing the ability of women to report crimes and seek support. The majority of cases of gender-based violence are likely to go unreported due to inadequate legislation, women’s limited access to justice including fear of reprisals, limited trust in the police and judiciary, delays in the investigation of cases, and very low conviction rates. Few cases of gender-based crimes involving a member of the security forces result in convictions.¹⁰ Considering the country information as a whole and her particular circumstances, including that her fear of harm is from state actors, I find that effective protection measures are not available to the applicant. Her fear of persecution is well-founded.

Refugee: conclusion

30. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

⁹ Ibid.

¹⁰ Ibid.

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.