



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/07739

Date and time of decision: 12 February 2020 18:53:00
N Micallef, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be Tamil from Mannar District in the Northern Province of Sri Lanka. He arrived in Australia [in] May 2013 from India. On 31 May 2017 he lodged an application for a sub-class XE-790 Safe Haven Enterprise Visa (SHEV), claiming that he will be harmed in Sri Lanka on the basis of ethnicity and imputed political opinion. After interviewing the applicant on 30 October 2019, a delegate of the Minister for Immigration (the delegate) refused to grant this visa on 9 January 2020, on the basis that she was not satisfied that the applicant would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
3. I have also obtained new information announcing the result of the November 2019 Sri Lankan Presidential election.¹ This information is relevant to the applicant's claim in his SHEV application Statutory Declaration that the (then) current government in Sri Lanka was a coalition and, as such, very unstable, and that despite apparent peace in Sri Lanka danger is possible. Although publication of this new information pre-dated the delegate's decision, the delegate did not, in her decision, address this issue or refer to the recent change in government in Sri Lanka. I am satisfied that there are exceptional circumstances to justify considering this new information.
4. On 6 February 2020 the applicant sent an email to the IAA in which he reiterated his claimed fears of harm in Sri Lanka and repeated information already before the delegate. This is not new information.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan citizen of Tamil ethnicity and Roman Catholic faith, who was born in a village in Mannar District in the Northern Province of Sri Lanka in [year].
 - During the civil conflict the Sri Lankan Army (SLA) believed he and his family were members or supporters of the Liberation Tigers of Tamil Eelam (LTTE) because they were Tamils and particularly because the LTTE had camps near his house and set up a base camp on his land, using his [equipment] and his [vehicle], which the SLA traced back to him by its registration plate.
 - In SLA area raids the family escaped to the jungle but the SLA killed his grandmother. In 1989 the SLA burned his [vehicle] and began targeting the family by coming to their home. Their home was burned down in a targeted petrol bomb attack after which the family had to live and hide in the jungle. The SLA searched for the family, asking villagers about their whereabouts, carrying their photographs.

¹ Voice of America (VOA), "Rajapaksa Sworn In As Sri Lanka's New President", 19 November 2019, 20191119104937

- In 1990 he and his family left Sri Lanka by boat to India, with no passport. He remained living as a refugee in India until he left to come to Australia in May 2013, leaving his wife and [children] in India.
- In Sri Lanka he will be targeted and found by the authorities, and detained, interrogated, tortured and killed by the SLA and the Criminal investigation Department (CID), for being LTTE, and because the CID torture and kill Tamils. He will not be safe anywhere in Sri Lanka. His sister and [Relative A] had returned to Sri Lanka in the peacetime between 2004 and 2006. Both were killed - his sister shot by the SLA looking for his family and his [Relative A] in an aerial bombardment by the SLA.
- His life will be in danger from the moment he arrives at the airport. As a failed asylum seeker who has lived overseas, including in India, for many years, he will be suspected of working against the Sri Lankan government or the SLA. He will be interrogated, tortured, killed or disappeared.
- The current coalition government in Sri Lanka is very unstable so there is danger to returnees.
- He has no connections or relatives in Sri Lanka and has not been there in over 30 years. Another sister who had returned to Sri Lanka from India is not in contact. He has no home to return to as it was destroyed and landmines placed in the ground. The SLA still reside in his village. He has no work or support network in Sri Lanka and does not speak Sinhalese.

Refugee assessment

6. 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

7. 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.

8. The applicant provided a copy of a Sri Lankan birth certificate and translation, and a certified copy of a family 'Identity Card for Refugees from Sri Lanka' issued by the Government of Tamil Nadu in India, in support of his identity and claimed origins and citizenship, which I accept and, on his evidence given in Tamil which has been consistent on this matter, I accept the applicant's identity as claimed and that he is [an age] year old Tamil from Mannar District in the Northern Province of Sri Lanka. I accept that he was living in India as a refugee, however he has left that country and there is no evidence before me to indicate or support that the applicant is a citizen of India or that he has any current rights of return or entry to India. I accept that the applicant was born in Sri Lanka and is a citizen of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.
9. I have accepted the applicant and his family were from Mannar, northern portions of which I note became part of the Vanni, the northern area of Sri Lanka which, at least by 2000, was controlled by the LTTE.² I accept that LTTE military units operated in Mannar during the civil conflict. However, I have some concerns about the level of LTTE interaction claimed by the applicant. His claims that when leaving for India his family first had to leave the SLA-controlled area to non-SLA-controlled territory and his evidence of checkpoints on all the roads leading from his village indicate that at that time (1990) his village was in SLA-controlled area and not a fully LTTE controlled area; and I consider this to conflict with and be incompatible with a claim that the LTTE set up their base camp on his family's land in the village. Moreover, the LTTE consolidation of their controlled territory occurred by 2000, and his claims of their occupation of his village during the war conflict with his claims that when his sister, C, returned to Sri Lanka the SLA were then living on their family land. I consider it improbable that if the LTTE had an established base camp on the family land that the SLA would be able to come to the family home and remove photographs from the walls.
10. I also have some concerns about the claims that the applicant (or his family) was specifically targeted by the SLA, and I consider these claims were embellished. Claims that it was "my [vehicle]" used by LTTE, of the SLA assumption that "I" was involved in LTTE, and that SLA were targeting "me" and the family and "I" decided to leave Sri Lanka conflict with the SHEV interview evidence that the [vehicle] belonged to his father and that it was his father who decided to take all the family and leave Sri Lanka for their safety. Moreover, his claim that the SLA personally targeted him and his family, including by throwing a petrol bomb at the house were not made out by his contradictory evidence at the SHEV interview that the SLA had a pattern that they would go into a village and shoot dead 20 to 30 people, they would come to search for the LTTE and those who could, ran and hid, and those left behind got shot, and this happened in his village; and moreover, that their house had burned after being hit in an aerial bombardment by airplane.
11. I do not accept that the LTTE ever established their base camp on the family land. I accept the applicant's evidence of jungles near the village and their land, and I accept that during the conflict there were LTTE camps and militants in the jungles in the vicinity near the applicant's village. Noting the country information indicating the significant influence of the LTTE exerted over Tamil populations (including in Mannar, and including over those adjacent to areas under full LTTE control), including in forced recruitments and forced labour extracted, I accept that by this close proximity of LTTE militants, they exerted a strong degree of control and influence and threat over the local Tamils and that there were times when the LTTE came and used and

² ASRC Country Information Package: Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358; United Nations High Commissioner for Refugees ("UNHCR"), "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

took resources from the village.³ I accept the applicant's family experienced the LTTE demanding or taking resources from their [land], or occasionally making the applicant drive the [vehicle] for them, for food supplies or transporting people. I accept his evidence that they were forced to do this, and afraid to refuse. I accept the applicant's evidence that neither he nor any family members ever joined the LTTE or were supporters, and tried to avoid providing any LTTE assistance, by keeping the [vehicle] tyres deflated, to no avail. Noting the country information, I am not satisfied that this use of their resources by the LTTE was confined only to the applicant's family, but was similarly experienced by many if not most of the local villagers. I consider the applicant's association to the LTTE was very long ago, was occasional, forced and very low-level, and was similar to that extracted from many Tamils in areas under significant pressure of LTTE influence at that time.

12. Noting the proximity of LTTE camps to their village, I accept that there were occasions when the SLA raided their village and local area to flush out LTTE militants and aurally bombed the area for the LTTE camps and that the civilians became caught up in that destruction. I accept that the applicant had family members killed by such incidents. However, I do not accept that the applicant or his father or family were specifically wanted or targeted by the SLA as LTTE suspects or that the SLA were searching for any of them with family photographs of them.
13. I accept that the applicant and his family were taken by their father to India for safety in 1990, where, likewise, many tens of thousands of refugees from the Sri Lankan civil conflict also went.⁴ This was a time of armed conflict, in which many Tamils reported being harassed and detained under the *Prevention of Terrorism Act (PTA)* and the *Emergency Regulations* on suspicion of LTTE support, with sometimes such attribution arising merely from being Tamil or being from the LTTE-associated areas, and when many young Tamil men were being forcibly recruited to the LTTE, and I note the evidence that the family were not LTTE supporters.⁵ On the evidence before me as I have found, it is plausible and reasonable to conclude and I find that the family left Sri Lanka to escape the general danger of the war, and fear of being assumed to be LTTE supporters, and fear of LTTE recruitment noting the family then included the applicant and his [siblings]. Whilst I accept that the family may have feared being imputed to be LTTE supporters, by the proximity of their village to LTTE camps and the LTTE demands that I have accepted, I do not accept that the family, or any of them, had been specifically targeted by or were being sought by the SLA when they left Sri Lanka in 1990.
14. I accept that the applicant's sisters and [Relative A] returned with their families to Sri Lanka during the time of the ceasefire and peace talks.⁶ He stated in interview that his sister, C, was shot by the SLA in 2007 on her land whilst her husband was out. His [Relative A] was killed in aerial bombing. His sister, K, lives with her family in [City 1]. I have not accepted that the applicant or his father or any other family members were being specifically searched for by the SLA as LTTE. Were the SLA searching for them as LTTE, as claimed, I consider it improbable and implausible that they would shoot his sister rather than detain and interrogate her for LTTE intelligence under their broad powers of the PTA and the *Emergency Regulations*. Moreover, there is no claim or evidence in the SHEV application or interview that his other sister, K, was ever interrogated by the SLA or any other authorities since returning to Sri Lanka, in effort to find or locate the applicant or any family members, and I consider this also undermines his claims that he or they were, or are, being searched for in Sri Lanka. The civil war resumed and

³ Ibid.; OHCHR, "Report of the OISL (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

⁴ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁵ OHCHR, "Report of the OISL (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

⁶ Department of Foreign Affairs and Trade ("DFAT"), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

had escalated in 2007/2008, until its brutal end in May 2009. The conflict resulted in the deaths of thousands of Tamils, including many thousands of civilians. I accept that the applicant's sister C and [Relative A] died in the war. I do not accept that they were personally or specifically targeted by the SLA or any other authorities for any reasons claimed.

15. I have had regard to the submissions made on behalf of the applicant in the ASRC 'Sri Lanka (Tamil) Country Information Package', provided with the SHEV application, concerning still continuing human rights abuses in Sri Lanka, particularly targeting Tamils, including returnees from the diaspora, as with suspected LTTE associations and an ongoing culture of impunity for such abuses by the security and law enforcement agencies. I note that most, if not all, of the country reports referred to therein are not current.⁷ Whilst having regard to those submissions, I place greater weight on more recent information in the review material, including the DFAT 2019 report, which reflects a broad range of credible local and international sources reporting on Sri Lanka, including inter alia human rights groups and United Nations bodies, and which has been prepared specifically for protection status determination purposes. I accept that with his experience of leaving Sri Lanka in time of conflict, of family deaths, and hearing of news or incidents of people kidnapped and killed in Sri Lanka after the war, the applicant has some fear of return to Sri Lanka, however, I do not accept that such fears are well-founded.
16. I accept that during the civil conflict and in the aftermath years, the Sri Lankan authorities concentrated on a punitive regime in which a stringent security climate prevailed and in which arbitrary detention and mistreatment of many Tamils was regularly reported, with impunity for human rights abuses by security forces, as indicated by the submissions and the reports referred to.⁸ LTTE fighters and members were subject to prosecution for security offences and detention in rehabilitation for reason of their involvement and support of the LTTE; and DFAT observed that many Tamils were viewed with suspicion of LTTE involvement or support simply based on ethnicity, with *Emergency Regulations* at times applied in a discriminatory manner. In this environment, the UNHCR Guidelines referred to by the applicant, assessed in 2012 as potentially qualifying for international protection, certain persons whose actual or perceived links to the LTTE, beyond originating from an area formerly controlled by the LTTE, included those with a profile of being LTTE supporters involved in sheltering or transporting LTTE personnel, or the supply or transport of goods for the LTTE. However, even then the Guidelines noted that the nature of the links giving rise to such a profile depended upon the specifics of the individual case. Moreover, seven years have now passed since those Guidelines were issued, with significant changes and improvement in Sri Lanka since then addressed below, such that those Guidelines are no longer of considerable weight, particularly regarding people with very low-level links to the LTTE.
17. The LTTE have been long defeated for over a decade. Country information before me indicates that in the years since then, there have been significant changes in Sri Lanka, such that the situation for Tamils has substantially improved, both politically and socially.⁹ Since 2015, a reformist national government prioritised human rights and reconciliation, and

⁷ Also, previous Tribunal findings about country information or specific circumstances of an unrelated individual in a 2015 AATA decision are not binding upon or informative of the review of the applicant's specific circumstances before me.

⁸ ASRC Country Information Package: Including OHCHR, "Report of the OISL, (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358; United Kingdom ("UK") Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77; 2015-published reports by Freedom House, Freedom from Torture, Amnesty International

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; United States ("US") Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333; ASRC Country Information Package: including: UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77

although some reforms have been criticised as too slow or have stagnated, including transitional justice and devolution of centralised power, there has nevertheless been significant progress. The US Department of State reported the Sri Lankan government has a variety of ministries and presidentially appointed bodies designed to address the social and development needs of the Tamil minority, and has implemented a number of confidence-building measures to address grievances of the Tamil community. The north and east has been significantly demilitarised, with civilian governors appointed since the war ended, and continued release of military-held land back to civilians. Security checkpoints on major roads have been removed.¹⁰ The UK Home Office cited sources from UNHCHR and Human Rights Watch noting the restoration of the independence and legitimacy of the Human Rights Commission in Sri Lanka and of the judiciary. Tamils have a substantial level of political influence and their inclusion in the political dialogue has increased since 2015, with numerous Tamil political parties. There has been review and processing and release of detainees, including Tamils, held under the PTA, and, bar isolated and publicised incidents of arrest under the PTA and its use after the ISIL-inspired terrorist attack of 21 April 2019 by local Islamist groups, it has been effectively suspended prior to that, pending planned reform.¹¹ Moreover, apart from a brief period of renewed *Emergency Regulations* in the aftermath of that Islamist terror attack, at which time it was Islamist extremists and the Muslim community that came under scrutiny, since August 2019 the *Emergency Regulations* (previously repealed in 2011) are no longer in force. Overall, I note that DFAT considers Tamils now face a low risk of official or societal discrimination on the basis of their ethnicity.

18. Although sensitive to the potential re-emergence of the LTTE, the country information indicates that the focus of the Sri Lankan security authorities has changed from the post-war scrutiny for apprehension of all former suspected LTTE members for prosecution or rehabilitation, and is now more concerned to identify activists who are or are perceived to be a threat to the integrity of Sri Lanka as a single state because they have or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and /or a renewal of hostilities within Sri Lanka. Even at the time of issue of the UNHCR Guidelines in 2012 the indication was that the Sri Lankan authorities recognised the pervasive contact and exertion of influence by the LTTE in the daily lives of all people from areas under former LTTE control or their fringes, such that the UNHCR assessed that originating from such an area did not itself and without more give rise to a need for international protection.¹² At similar time assessment consistently endorsed by the UK Home Office indicated that in post-conflict Sri Lanka an individual's past history (with the LTTE) would only be relevant to the extent that it was perceived to indicate a present risk to the Sri Lankan government or the unitary state of Sri Lanka.¹³ Moreover, UK Home Office reports and DFAT further indicate that Sri Lankan officials maintain sophisticated intelligence on former LTTE members and supporters; individuals of interest to the security authorities, including for suspected separatist or criminal activities, are included on 'watch' lists, which comprise of minor offenders and former LTTE cadres. DFAT assesses people on watch lists are likely to be monitored by authorities. Depending upon their profile and LTTE role, and primarily affecting former LTTE members, DFAT further assesses that

¹⁰ Some returned in the wake of the 2019 bombings, with some since removed again - DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹¹ Ibid.; Sunday Observer, "Assassination plot against Sumanithiran: Indictments to be served in Colombo High Court tomorrow", 29 July 2018, CXBB8A1DA36303; Daily Mirror, "CID permitted to detain Indian national under PTA", 27 September 2018, CXBB8A1DA36347

¹² OHCHR, "Report of the OISL (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358; UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

¹³ ASRC Country Information Package: UK Home Office, "Operational Guidance Note: Sri Lanka (July 2013)", 1 July 2013, CIS29708; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77

Tamils with (real or imputed) links to the LTTE may be monitored but are generally able to live without concern for their security due to past LTTE association. People subject to extant court or arrest orders or passport impound orders may be on a 'stop' list.

19. The applicant was not an LTTE cadre, member or supporter. His only low-level links to the LTTE were that he came from Mannar where the LTTE exerted significant influence and control, and that the LTTE occasionally by force used resources and transport labour from the family farm, which I have found were similar associations many Tamils in his community would have shared. There is otherwise no claim or evidence before me that he has had any involvement of any kind with any pro-Tamil separatist or anti-government of Sri Lanka groups or activities, whether in Sri Lanka or in India, or since being in Australia, and I find that he has not. I am not satisfied that the applicant's very low-level links to the LTTE were or would be, upon return or in the reasonably foreseeable future, of any concern to the SLA, CID or any Sri Lankan authorities. I am not satisfied that the applicant has been or would be imputed to be an LTTE member, supporter or cadre, or a pro-separatist or anti-Sri Lanka-unity activist or to have any adverse political opinion or profile, on the basis of his very old and low-level links to the former LTTE, or on any imputed grounds arising from being a Tamil male from Mannar, and I am not satisfied that there is a real chance that this would occur. I am not satisfied that he has otherwise been involved in any criminal activities or is on any watch or stop list for any reason.
20. Whilst the US Department of State and DFAT note reports that surveillance and monitoring of Tamils continues, the indications are that this is particularly of former LTTE members, or Tamils associated with politically sensitive issues including public gatherings and protests related to disappeared persons, land release and memorial or LTTE commemorative events, or linked to elements of the diaspora considered by the Sri Lankan Government to be radical. People on a 'watch' list may be monitored. DFAT reported in 2019 that monitoring is subtle, by questioning, and did not involve violence. DFAT assesses that monitoring of Tamils in day-to-day life has decreased significantly since 2015. On the information before me I am not satisfied that the applicant comes within any of these factors. There is no indication before me that the applicant desires to or would become involved in any such activities described above if returned to Sri Lanka and I am not satisfied that he would do so.
21. I accept that the applicant is concerned about reports of mistreatment of Tamils in and returnees to Sri Lanka, and reports in the ASRC country package addressed such issues. I note that many of the reports referred by the applicant were of incidents in the years of or closely following after the civil conflict and predominantly involved people with an LTTE profile (actual or imputed) or who were activists or journalists, and mostly pertain to a very different political and security environment, pre-dating the reforms in Sri Lanka and the significantly improved security situation.¹⁴ I accept that during the civil conflict and its aftermath many Tamils, particularly from LTTE areas, were particularly vulnerable to abuse, arbitrary arrest and detention, disappearance and physical mistreatment, particularly under the PTA and *Emergency Regulations*. I accept that some reports of such human rights abuses continue to be made, and DFAT cites such reports documented in recent years by International Truth and Justice Project (ITJP) and Freedom from Torture, however, DFAT observed it was unable to verify the recent claims reported by the ITJP, including from several local sources. I am satisfied from the country information (including from DFAT's citing (2019) of similar report by the UK Home Office in 2017) that such incidents have significantly reduced in Sri Lanka over recent years, as have so-called 'white van' abductions and disappearances. I note DFAT's assessment

¹⁴ ASRC Country Information Package: Including 2015-published reports by Freedom House, Freedom from Torture, Amnesty International, Canada: Immigration and Refugee Board of Canada (Canada IRB)

that Tamils, including those with imputed links to the LTTE, are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links.

22. Sources cited in the UK Home Office report (2016) and Canada IRB inferring imputation of LTTE sympathy arising or increasing on the basis of having gone abroad from Sri Lanka or from time spent in the Tamil diaspora, or concerning torture of returnees, were not recent and the reports indicate that many of the returnees arrested on return from abroad were ex-LTTE members or activists in demonstrations. As noted previously the Sri Lanka authorities maintain intelligence about former LTTE members and as adverted in the submissions, and I accept, this includes informants and surveillance of Tamil protest activities overseas. DFAT assesses that the Sri Lankan authorities may monitor returnees from the Tamil Diaspora, however this depends upon their risk profile, with the authorities likely to be particularly interested in leaders of Tamil diaspora groups especially groups deemed to hold radical views, and those leaders who come to attention from participation in pro-separatist demonstrations overseas; or people formerly part of the LTTE; or suspected war-time fund-raisers for the LTTE; and those actively advocating for Tamil statehood. I have already found that the applicant was not a member of the LTTE and was not part of it or in it. The evidence does not indicate and I am not satisfied that the applicant has ever been involved in any such diaspora activities described, either in India or Australia that would impute any such profile of risk to him. I am not satisfied that there is a real chance that the applicant would be imputed with any anti-government or separatist or other adverse political opinion or profile by any Sri Lankan authorities on the basis of having departed Sri Lanka with all his family in 1990 during the conflict, or from time spent living as a refugee in India or an asylum seeker in Australia.
23. The country information before me does not support a finding that Tamil ethnicity itself imputes LTTE membership, support or opinion, or any other adverse political opinion or profile even when combined with other factors such as gender, age or place of origin. Considered overall, I am not satisfied that the applicant would face a real chance of harm in Sri Lanka in the reasonably foreseeable future for any reasons of race or ethnicity, originating from the Northern Province, imputed political profile, previous forced low-level links to the LTTE, or time spent overseas.
24. I have had regard to the fact that the Sri Lankan government under President Sirisena has now changed, with the election to president of Gotabaya Rajapaksa, of the opposition Sri Lanka Podujana Peramuna (SLPP) party.¹⁵ Gotabaya Rajapaksa is the former Defence Secretary who oversaw the end of the civil war, and is brother of former president Mahinda Rajapaksa (leader of the SLPP). Both DFAT and the VOA article note the concerns of ethnic minority communities, including Tamils, about the return to government power of the Rajapaksas and its consequences for recent human rights achievements. However, it is important to note that the Rajapaksas were in government in the era of the last years and aftermath of the long-standing civil war. I am satisfied on the information before me that the significantly improved security situation in Sri Lanka since then, and the substantial, if incomplete, reforms and ethnic reconciliation mechanisms introduced in recent years, have resulted in a democratic landscape in Sri Lanka that is now more robust. DFAT notes reports that the Tamil community had abandoned militancy and was committed to addressing its grievances through political means. The significant changes in Sri Lanka have extended beyond government administrative measures, with DFAT assessing in 2019 that any risk faced by Tamils of official or societal discrimination based on ethnicity was low.

¹⁵ VOA, "Rajapaksa Sworn In As Sri Lanka's New President", 19 November 2019, 20191119104937; Department of Foreign Affairs and Trade ("DFAT"), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

25. Mahinda Rajapaksa, SLPP's leader and nominated candidate for new prime minister, declared in October 2018 that he would protect the human rights of all citizens, and President Rajapaksa in his inaugural address, invited all minority Tamil and Muslim communities who had voted against him to work with him. DFAT reports that since February 2018 the SLPP has been the single largest party in Sri Lanka, having performed strongly in council elections, and there is no indication before me that this ongoing political influence of the SLPP since then has adversely impacted the Tamil community at large. Although the new president promoted national security as a priority, I note that this follows the Islamist terrorist bombing of April 2019. The applicant does not have any profile that would impute him with any association to Islamic extremism. I am not satisfied on any information before me that the new government in Sri Lanka has or intends to introduce repressive policies that would impinge on the Tamil population in general or Tamils with a profile similar to that of the applicant, or that this change in government would otherwise result in the applicant facing a real chance of harm.
26. The applicant gave as background information that he is of Roman Catholic faith, however, raised no claim to fear harm on this basis in Sri Lanka. DFAT noted some reports of Hindu and Buddhist mobs preventing Christians from burying their dead in public cemeteries in some provinces, although not in the Northern Province where the applicant is from, and some incidents of violence and disruption of faith practice against Christians. However, overall the indication is that such risks are greater for evangelical Christians, and DFAT assesses that Roman Catholic Christians in Sri Lanka face only a low risk of any discrimination. Whilst the Islamist terror attacks in 2019 on various targets included Christian churches at Easter, the Government and security forces responded decisively with security measures. I consider the chance of repeat of such an attack to be random and no more than remote. I am not satisfied that the applicant would face a real chance of harm in Sri Lanka in the reasonably foreseeable future on the basis of his religion.
27. I accept that the applicant departed Sri Lanka without a passport as a passenger on a boat to India in 1990. I note that DFAT (2019) indicates that departures without passport and from places other than approved ports may amount to offences under the *Immigrants and Emigrants Act* (I&E Act). As a returnee to Sri Lanka on temporary travel documents it is possible that he may be identified upon return as a failed asylum seeker and as having departed illegally.
28. Returnees travelling on temporary travel documents are subject to an investigative process to confirm identity on arrival, and checks are made by various immigration and security agencies at the airport to identify those suspected of concealing identity or a criminal or terrorist background.¹⁶ This process may involve interviewing the returnee or making checks with local police or others in the returnee's home area and with official databases and records. These checks may take several hours to complete as returnees are processed in groups and can only leave the airport once all group members have been processed. DFAT reports that returnees are free to speak to each other and go to the bathroom whilst awaiting finalisation of the group processing.
29. I note the applicant has his Sri Lankan birth certificate to assist in identification. DFAT notes that people suspected to be former LTTE members may be questioned about activities abroad during this returnee process. I consider it extremely remote that the applicant would be suspected of this, but even if he were asked about his background in Sri Lanka and his activities since leaving Sri Lanka, nevertheless, I have found that he is not on any "stop" or "watch" list and I am not satisfied that the applicant has a profile of any adverse interest or concern to Sri

¹⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

Lankan authorities or would be imputed with one. I am satisfied that these routine returnee enquiries would not extend beyond the several hours that a group process enquiry might normally take. All such returnees are subject to these standard procedures, regardless of ethnicity and religion, and DFAT understands that they are not subject to mistreatment during processing at the airport. I do not accept that the applicant will be tortured or that his life or safety will be in danger during this process.

30. For persons charged at the airport under the I&E Act, DFAT reports that at the earliest possibility after investigations are complete police transport persons charged under the I&E Act to the closest Magistrate's court. Persons can remain in police custody at the Criminal Investigation Department office at the airport for up to 24 hours after arrival and in cases where a magistrate is not available, such as a weekend or public holiday, may be detained at an airport holding cell for two days. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.
31. The penalties under the I&E Act 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 1,633). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine and the Sri Lankan Attorney-General's Department advises no fare-paying passenger on a people smuggling venture has been given a custodial sentence. 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.
32. DFAT advises that the Attorney-General's Department has directed that passengers of people smuggling ventures be charged under the I&E Act and appear in court. 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. I note the applicant's claim of limited support in Sri Lanka and that he has no contact with his sister, but as discussed below there is no indication of any estrangement with his sister and moreover he has remained in contact with his [Relative A], with no indication that family support of any kind would be denied to him. Moreover, bail conditions are imposed on persons who departed illegally on a discretionary basis, and may include reporting to police at the returnee's expense.
33. Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The frequency of court appearance depends on the Magistrate and DFAT understands that most persons charged under the I&E Act appear in court every three to six months. Cases are only progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.
34. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, or during processing of any bail should it arise, I am satisfied he would face only a brief period in detention. I do not accept that the applicant will be tortured or disappeared or that his life or safety will be in danger during this process. Even having regard to general detention conditions, I do not consider that a brief period in detention would amount to serious harm for the applicant for the purposes of s.5J of the Act. 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, to constitute serious harm.

35. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. That law is not discriminatory on its terms, and 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, punishment or detention of the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
36. As previously discussed, whilst there have been some reports of mistreatment of Tamil returnees and failed asylum seekers, as previously discussed, I do not accept these reported incidents are informative of the circumstances that would or could be faced by the applicant upon return. I am not satisfied that the applicant would or might be imputed with any adverse profile or political opinion now or in the reasonably foreseeable future as a returning Tamil asylum seeker. Overall the country information before me does not indicate that the fact of a person having departed Sri Lanka, or having claimed asylum in Australia would lead to any imputation that they are a supporter of the LTTE or separatism or of any other adverse risk to the state country information, nor does it support, and I do not accept, that all returnee Tamils are now, or would be in the reasonably foreseeable future, being sought for abduction detention and torture by authorities. DFAT (2019) noted reports from Tamil returnee failed asylum seekers in the north that they had not experienced harassment and had no protection concerns.
37. As previously discussed, former LTTE members, or activists, may be subjected to monitoring in Sri Lanka, depending upon their profile and DFAT reports that some returnees are similarly monitored. DFAT reports that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis and that it is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. I have not accepted that the applicant has a profile that would expose him to any real chance of being monitored by any Sri Lankan authorities and I am also not satisfied that his status as a returnee or failed Tamil asylum seeker would lead to a real chance of this or of arrest or detention (other than under airport processing and I&E Act procedures as discussed above) or of torture, mistreatment or death or any such harm claimed.
38. I accept that with his family moved to India, the applicant no longer has immediate family members living in his local village. However, the applicant would not be without any family network in Sri Lanka noting his evidence that his sister lives in [City 1], and his SHEV interview evidence (contrary to his claims of no other relatives in Sri Lanka) that his [Relative A] lives with her family near his own family village in Mannar. Whilst I accept that he is not in contact with his sister, I have considerable doubt that he does not know, or at least would not be able to ascertain, his sister's whereabouts from any family members either in India or Sri Lanka, and I do not accept that no family member knows where she is. There is no indication of deliberate estrangement between them. On his evidence he maintains contact with his [Relative A] and I am not satisfied that the applicant would be without any family support of any kind.
39. Whilst I accept that the family home was destroyed during the war, I do not accept that his family land remains an occupied SLA camp, as claimed in the SHEV interview, noting DFAT's report in 2019 that the military forces cantonment is on Jaffna Peninsula with smaller surrounding camps. I consider his claim that it is an occupied SLA base to be incompatible with and improbable given the claims that it is also covered in land mines and the SLA destroyed the [equipment]. I also do not accept those claims. I accept that the applicant may experience some initial challenges in resettling in Sri Lanka and finding reliable employment or housing, however, the applicant has consistently supported himself throughout his adult life with work

in the [specified] industry in both India and Australia and has demonstrated life and work skills and experience to offer. Bureaucratic delay rather than official discrimination can delay provision of official identity documentation necessary for access to social welfare schemes and services,¹⁷ but I note the applicant has his Sri Lankan birth certificate to assist this process. Overall, I am not satisfied the applicant would be denied employment or shelter or welfare or services or be unable to work or access services in Sri Lanka or for a reason specified in s5.J. Although there may be some discrimination in employment opportunities in Sri Lanka affecting Tamils, particularly in relation to government jobs, and access to services may be stretched in Tamil areas the country information does not support a finding that Tamils are denied employment or shelter or denied access to basic services or the capacity to earn a livelihood of any kind which threatens the capacity to subsist.¹⁸

40. Considered overall, I am not satisfied that there is a real chance that the applicant would be persecuted in Sri Lanka on any of the bases claimed, considered either individually or cumulatively. I am not satisfied that the applicant has a well-founded fear of persecution.

Refugee: conclusion

41. 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

42. 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

43. 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.

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

45. I have found that whilst the applicant will be required to undergo returnee processing at the airport, any period of detention at the airport that would occur while investigations into identity and criminal background clearance are ongoing will be brief and would not exceed the

¹⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹⁸ US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333; DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

several hours that group processing might usually take. I also found that he would not face a real chance of suffering serious harm while this processing or investigation occurs. I accept that the applicant will be identified on return as a person who departed illegally and that he will be investigated, arrested and detained for several hours at the airport, and possibly detained on remand for some days pending bail, required to return to attend court until finalisation of the matter, and then fined. I accept that the applicant may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources.¹⁹ But this questioning, charges and fine or briefly being detained 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 this treatment, either during the investigation process or while being held at the airport or on remand, or in the prosecution process amounts to significant harm.

46. I have accepted that the applicant may experience initial challenges resettling in Sri Lanka concerning reliable housing, employment or access to services but I have not accepted that this would be for reason of his race or ethnicity or other s.5J reason. Nor am I satisfied that any harm he may experience would include deprivation of life, the death penalty, nor am I satisfied he will be subject to torture, or cruel or inhuman or degrading treatment or punishment as defined, or that any harm he may experience would be intentionally inflicted. I am not satisfied that the applicant would experience significant harm in Sri Lanka.

47. I have otherwise found the applicant would not face a real chance of harm if returned to Sri Lanka on the bases claimed. Noting that the Full Federal Court²⁰ has set out that the “real risk” test for complementary protection is the same standard as the “real chance” test, it follows that, based on the same information, and for the reasons stated above, I am also satisfied that there is not a real risk that he would face significant harm for those reasons if returned to Sri Lanka.

Complementary protection: conclusion

48. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

¹⁹ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244

²⁰ *MIAC v SZQRB* [2013] 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.