



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08191

Date and time of decision: 18 May 2020 13:28:00
N Becke, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Northern Province of Sri Lanka. On 9 December 2015 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 12 July 2016 a delegate of the Minister for Immigration (the delegate) refused to grant this visa.
2. On 16 August 2016 the IAA affirmed the decision not to grant the applicant a SHEV. [In] March 2020 the Federal Circuit Court of Australia remitted the matter to the IAA on the basis that the IAA had failed to consider an integer of the applicant's claims.

Information before the IAA

3. I have had regard to the material (the review material) given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 30 July 2016 the IAA received two emails on behalf of the applicant, attached to which were a submission ('the first IAA submission') and a new document ('the complaint letter'). The submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate which I have noted and considered.
5. The complaint letter is dated [in] 2016 and bears the letter head of the 'Presidential Commission to Investigate Complaints Regarding Missing Persons'. The letter appears to be addressed to the [Investigation Team] of the Presidential Commission and states that the applicant's mother appeared at the public sittings held in [2016], regarding her children [Mr A and Ms B] (two of the applicant's siblings) who disappeared on [specified dates in] 2009. The letter concludes with a request to please commence investigations and submit the final report to the Commission soon. The signature block at the bottom belongs to [specified role on] the Commission but the letter is unsigned.
6. The covering email from the applicant's representative states, "on the basis of the contents of the complaint letter, and action that is expected to be taken it is submitted that the review applicant's fear of being targeted and harmed could be exacerbated" and "the review applicant requests that the reviewer consider the likely harm the review applicant would face if returned due to the actions undertaken by his mother".
7. The applicant's SHEV interview, at which his representative was present, took place on 13 April 2016, during which the matter of the applicant's mother's ongoing efforts to find his siblings was squarely at issue. At the end of the SHEV interview the delegate reminded the applicant that any further information she received prior to making her decision would be taken into account. Five days later the applicant's representative forwarded country information to her for her consideration but did not include the complaint letter. The covering email does not explain why the complaint letter was not provided prior to the delegate's decision, which took place almost three months after the letter was issued. I also note the dates of disappearance given in the complaint letter are at odds with the date the applicant gave during his SHEV interview ([a date in] April 2009), and also dates his mother gave in other correspondence (19 & 23 February 2009). I also find it remarkable that this letter was produced on the same date as the public sittings it refers to, and I have some concerns regarding its authenticity. Given

the circumstances overall, I am not satisfied exceptional circumstances exist to justify consideration of the complaint letter or that the matters in s.473DD(b) are met.

8. The first IAA submission also argues that “in the fairness of justice” the applicant would like the IAA to conduct a fresh hearing of his case to provide him an opportunity to clarify concerns which were raised by the delegate. However, I am satisfied the applicant has availed himself, through the submission to the IAA, of the opportunity to put forward his concerns with the delegate’s decision, and to put forward new information such as he has elected to provide. The first IAA submission has not specified why the information the applicant wishes to provide at a hearing could not appropriately be provided in writing and I note s.473DB of the Act provides that, subject to Part 7AA, the IAA must review decisions on the papers without interviewing the applicant. The applicant has retained the same representative since first lodging his SHEV application in 2016, who is a solicitor and registered migration agent providing specialist assistance to Fast Track applicants and should be cognisant of the requirements of s.473. Given all the circumstances I have declined to invite the applicant to an interview as requested.
9. On 22 March 2020 the IAA received another submission from the applicant’s representative (‘the second IAA submission’). The focus of the second IAA submission is on the political changes which have taken place in Sri Lanka since the delegate’s decision. Given the length of time which has elapsed since then I have also had regard to this additional, second IAA submission and the arguments contained therein.
10. The second IAA submission also raises a new claim, which is that the applicant fears harm in Sri Lanka due to the November 2019 election of Gotabaya Rajapaksa, the former Defence Secretary and brother to ex-President Mahinda Rajapaska, as the new President of Sri Lanka. I accept this claim could not have been raised prior to the delegate’s decision and that it relates to a significant change in country information. Given the circumstances I am satisfied exceptional circumstances exist to justify its consideration.
11. Also referenced in the submission’s footnotes are several new sources of country information. The first footnote consists only of a hyperlink, which has not been properly extracted or identified, nor the date of publication specified. The applicant had earlier been provided with a copy of the IAA’s “Practice Direction for Applicants, Representatives and Authorised Recipients”, and a fact sheet in his own language, which specify the requirements of giving information to the IAA. As noted above, the applicant’s representative is a registered migration agent who would also be cognisant of the Practice Direction(s), which are publicly available, and which the representative has complied with in relation to the other new sources provided. Accordingly, pursuant to ss.473DC(2) and 473FB(5), I have decided not to accept the hyperlink in the first footnote.
12. The second new source is from the Department of Foreign Affairs and Trade (DFAT) ‘Smart Traveller website’, which the second IAA submission indicates was published on 11 November 2019 and for which excerpts have been provided. The purpose of the Smart Traveller website is to provide advice to Australian citizens who may be considering travelling overseas for tourism, business, or other short term purposes, not risks to citizens of Sri Lanka returning there. Further, the extracts cited by the representative relate to the expected security situation arising from the November 2019 elections, and six months have now passed since then. I am not satisfied that this information is indicative of the circumstances the applicant will face on his return to the country or that it otherwise has probative value in my assessment of his particular claims for protection. I am not satisfied exceptional circumstances exist to justify considering the new information from the Smart Traveller website.

13. The third new source is from the November 2019 DFAT 'Country Information Report' on Sri Lanka. The delegate, in her decision, relied on the December 2015 DFAT report for Sri Lanka, which has since been superseded by updated versions, most recently the November 2019 DFAT report.¹ Given four years have now passed since the delegate's decision, and the DFAT report has been specifically prepared for protection status determination purposes, I am satisfied exceptional circumstances exist to justify its consideration.
14. The fourth new source is a June 2014 paper titled "National Security Law (PTA) in Sri Lanka: Impunity and Accountability". The paper predates the delegate's decision by two years and the second IAA submission is silent as to why it was not provided earlier or how it constitutes credible, personal information about the applicant. I have had regard to the more recent information before me, including from the November 2019 DFAT report, regarding the current operation of the Prevention of Terrorism Act (PTA) and I am not satisfied the 2014 paper adds anything to the information before me. Given the circumstances overall, I am not satisfied exceptional circumstances exist to justify consideration of the 2014 paper.
15. The fifth new source is a news article from Al Jazeera, published on 19 September 2019 regarding the upcoming Presidential election, which was won by Gotabaya Rajapaksa. The sixth new source is an article from the Diplomat, dated 3 January 2020, regarding Rajapaksa's stated intention to make constitutional changes. The sixth new source is a Human Rights Watch (HRW), "World Report 2020", dated 2 February 2020. I am satisfied these three reputable sources provide an update on political developments and the current human rights situation in Sri Lanka since the delegate's decision. Overall I am satisfied exceptional circumstances exist to justify their consideration.
16. The applicant's representative has provided copies of the IAA's previous decision and the court judgment remitting the matter, both of which the representative argues must now form part of the IAA's reconsideration. I have considered the court judgment as this set aside the previous IAA decision; however, my task is to review the applicant's matter afresh and I am not satisfied the previous IAA decision is relevant to this review. I have not had regard to it.
17. On 25 March 2020 the IAA received another email from the applicant's representative attached to which was a new submission ('the third IAA submission') and a number of recent country information sources regarding the COVID-19 pandemic and the response of the Sri Lankan government. On 16 April 2020 another email was received with one further source attached. The third IAA submission claims that the applicant faces a real chance or real risk of contracting COVID-19, particularly if he were to be detained upon arrival.
18. One of the new sources is a 2010 World Health Organization (WHO) report on Sri Lanka, which I am not satisfied contains credible personal information in the relevant sense. Furthermore, given the data contained therein is now a decade old, I am not satisfied that it has relevance to the current capacity of the public health system in Sri Lanka to deal with COVID-19 (or any other public health matter). The report is of limited probative value to the issues to be determined in this review and I am not satisfied there are exceptional circumstances to justify its consideration or that the matters in s.473DD(b) are met. However, the rest of the new sources of country information specifically relate to the COVID-19 pandemic, which has affected Sri Lanka, and these sources have been published very recently. I am satisfied exceptional circumstances exist to justify their consideration.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

Applicant's claims for protection

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

- In [year] he was born in the LTTE-controlled Kilinochchi District, Northern Province. He and his family ethnic Tamils. They were civilians during the Sri Lankan civil war and did not have any involvement with the LTTE.
- From 2008 he and his family were displaced on approximately ten occasions due to the intensifying civil conflict between the Sri Lankan Army (SLA) and the LTTE.
- In April 2009, during the final stages of the civil war, the SLA transferred him and his family to [Location 1] where they were interrogated regarding any LTTE links.
- The SLA removed his brother [Mr A] and his sister [Ms B] from the family group as they suspected they were LTTE cadres. The rest of the family were then transferred to [Camp 1] in Vavuniya district without [Mr A and Ms B].
- He and his family were detained at [Camp 1] for six months, during which time the Criminal Investigation Department (CID) interrogated him on three occasions as to whether he had LTTE involvement. In November 2009 he and his family were released
- In August 2010 he lodged an enquiry at the Colombo office of the Human Rights Commission (HRC) about [Mr A and Ms B]. In November 2010 the HRC forwarded him a written response from the SLA headquarters, which states that the SLA did not take [Mr A and Ms B] into custody in 2009.
- His mother also made enquiries with the police, the International Committee of the Red Cross (ICRC), the local government agent's office and the International Organisation for Migration (IOM).
- In approximately January 2011 several CID officers came to his house. They interrogated him as to whether he was an LTTE member, if he had helped the LTTE, or if he knew of persons in the area with LTTE connections. One hour later the CID left.
- Following this incident, CID officers came to his house every two to three months. The men spoke Tamil and asked him the same questions each time for around one hour. They spoke aggressively but did not physically harm him.
- In August 2012 four unknown men claiming to be CID officers came to his house. He had not met them previously. The men asked the same questions and also threatened to harm him if he spoke to organisations like the HRC and the ICRC about [Mr A and Ms B].
- In fear of his life the applicant departed Sri Lanka illegally by boat later that same month.
- His mother continues to search for [Mr A and Ms B], who are still missing. The family believe [Mr A and Ms B] are likely held in a secret prison due to their imputed LTTE involvement.
- He fears the Sri Lankan authorities will detain, interrogate, torture or kill him because: he is a Hindu Tamil from the formerly LTTE-controlled Northern Province; his missing siblings are imputed to be LTTE cadres; he and his mother have made complaints to human rights organisations; he departed Sri Lanka illegally and sought asylum in Australia.
- He also fears that he will contract COVID-19 in Australia, on route to Sri Lanka, or after his arrival there. He also fears the Sri Lankan government's response to COVID-19 will cause him serious harm as a returning Tamil asylum seeker and illegal departee.

Refugee assessment

20. 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

21. 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.
22. The applicant has been consistent in stating his identity since his arrival in Australia. In support he provided his original Sri Lankan national identity card and a copy of Sri Lankan birth certificate, both with English translations. I am satisfied the applicant’s identity is as claimed and that Sri Lanka is the receiving country for the purposes of this assessment.
23. I accept the applicant is from Kilinochchi District, Northern Province. The country information before me indicates that during the civil war the LTTE maintained control over significant portions of the Northern Province, including Kilinochchi, and that the majority of Tamil civilians in these areas had some degree of contact with the LTTE in their daily lives. Following the end of the civil war in May 2009, many Tamils, particularly in the north and east of Sri Lanka, reported being monitored, harassed, arrested and detained by security forces under the former Rajapaksa government.²
24. The applicant claims that during the final months of the civil war he and his family were repeatedly displaced as the SLA advanced on formerly LTTE-controlled areas. The applicant claims that in April 2009 the SLA took all the civilians in their area for processing at [Location 1]. The applicant claims that the SLA, suspecting that [Mr A and Ms B] were LTTE cadres, separated them from the rest of the family and that [Mr A and Ms B] were never seen again. When asked why the Sri Lankan authorities would suspect [Mr A and Ms B] of being LTTE cadres, the applicant explained that there was LTTE cadres intermingling and hiding amongst displaced Tamil civilians at [Location 1], some of whom were acting as informants. The applicant claims he was also interrogated as to whether he was an LTTE cadre but was then allowed to proceed with the rest of his family to a refugee camp at [Camp 1]. The applicant claims that at [Camp 1] the CID interrogated him on three occasions as to whether he had had

² DFAT, “Country Information Report - Sri Lanka”, 18 December 2015, CISEC96CF14143

any LTTE involvement, or if he could identify others with LTTE involvement. During the SHEV interview the applicant told the delegate that he was not harmed during these interrogations. The applicant has consistently claimed that neither he, nor any member of his family, including [Mr A and Ms B], were ever involved with, or supported, the LTTE and I accept his claims in this regard.

25. Country information before the delegate supports the applicant's claims that thousands of civilians from LTTE-controlled areas, who entered Internally Displaced Persons (IDP) camps, were subjected to extensive ongoing interrogation. Rigorous ongoing screening processes existed, with those who were suspected of being LTTE supporters, or members, being detained in separate camps to the general IDP population before being sent for rehabilitation. Former LTTE supporters-turned-informers also had a presence in the IDP camps and I accept that this resulted in some with low level LTTE links, or no LTTE links, being arbitrarily detained. On the country information before me I also accept that some of those accused of LTTE links were not sent to rehabilitation but went missing while in SLA custody and are presumed dead. It is plausible, and I accept, that for reasons which are unknown to the applicant and his remaining family, some aspect of [Mr A's and Ms B's] profiles triggered the suspicion of the SLA at [Location 1]. I accept the applicant's claims regarding the circumstances of [Mr A's and Ms B's] disappearance [in] April 2009, while in SLA custody, in their entirety.
26. The applicant claims that in November 2009 he and his family were released from [Camp 1] and returned to their home area where they began to rebuild their house and resumed farming. The applicant claims that shortly after their release he and his mother also began to make enquiries about [Mr A and Ms B] with the ICRC, the police, the HRC, the government agent's office and IOM. The applicant has provided a copy of a letter, dated [in] January 2013, from the ICRC, which confirms that [in] February 2011 his mother opened tracing cases at the ICRC Vavuniya for [Mr A and Ms B]. The letter notes that [Mr A and Ms B] went missing [in] February 2009 but does not specify this occurred while they were in the custody of the SLA. The letter concludes the ICRC has no information about their disappearance. When the delegate asked the applicant to comment on why the letter indicates that [Mr A and Ms B] disappeared on different dates, and not on [date] April 2009, as he claims, he explained that his mother is old and forgets such things.
27. The applicant has also provided a copy of a letter, dated [in] 2010, from the SLA Headquarters in Colombo addressed to the HRC. The letter references an HRC enquiry of [date] 2010 regarding [Mr A and Ms B], and states that the Security Forces Headquarters in Mullaitivu have confirmed that no persons of those names were ever taken into SLA custody. The letter is signed on behalf of the Commander of the SLA. The letter does not state who lodged the initial enquiry with the HRC; however I accept that it was the applicant.
28. When asked why it took him ten months to lodge this enquiry following his release from [Camp 1] the applicant responded that he had to travel to Colombo to visit the HRC office there that transport was unreliable and that there were "problems" from the SLA at this time. Country information before the delegate indicates that security remained tight in the Northern Province following the end of the civil war, and that rigorous security checking remained in place on major roads leading to and from the capital. I also note the applicant's evidence that he and his family were occupied rebuilding their house at this time and re-establishing their livelihood as farmers, and I have not drawn an adverse inference regarding the ten month delay. The applicant also advised the delegate that he personally made the enquiry with the HRC, while his mother made enquiries with the ICRC, the police, the government agent's office, and IOM. The applicant also explained that apart from the HRC and ICRC documents he does not have documentary evidence of the enquiries his mother made to the other organisations.

I have not drawn a negative inference from this and I accept those enquiries were made as claimed.

29. The country information before me indicates that in the months following the end of the civil war in the north, thousands of missing person enquiries were lodged with human rights organisations and also directly with the Sri Lankan authorities. The Commissioner General for Rehabilitation also established a system for civilians to search family members who may have been sent for rehabilitation. However, due to the large numbers of IDPs, and the government's reluctance to set up a more comprehensive tracing system, there was a general lack of information on those who were missing, presumed dead. On the evidence before me I consider the ICRC, HRC and other organisations would have been pursuing lines of enquiry with the Sri Lankan authorities on many cases similar to those of [Mr A and Ms B]. Nor do I consider the enquiries from the applicant and his mother to have been particularly contentious; even taking into account that they had specified that [Mr A and Ms B] had last been seen in the custody of the SLA.
30. The applicant claims that in about January 2010, two months after his release from [Camp 1], the CID came to his house and questioned him. The applicant claims these visits continued to take place every two or three months, which I consider somewhat at odds with his other evidence during the SHEV interview that there were several visits in total between January 2010 and August 2012. The applicant claims that during these visits the CID would show him their ID cards and question him as to whether he had ever had any LTTE involvement, or if he knew anyone else who had had LTTE involvement. When asked, the applicant confirmed that the CID did not mention his August 2010 HRC enquiry during the later visits. The applicant also confirmed that although his family were home during these visits he was the only one who was questioned.
31. Country information before the delegate indicates that in the aftermath of the 25 year civil war the authorities continued to view Tamil males with suspicion, given their possible ongoing LTTE links. The Sri Lankan authorities also continued to closely monitor the northern Tamil population and regularly interrogated Tamil civilians during household visits, regarding matters such as their family composition and any possible LTTE involvement. The applicant also confirmed to the delegate that the CID visited other households in their neighbourhood to make enquiries about the inhabitants. Given the applicant also told the delegate that his parents were elderly, his father had injuries from the war, and that his two youngest siblings were still children, I do not find it unusual that during these visits the CID focused their questioning on the applicant, who was a young Tamil male (at that time). On the evidence before me overall, but particularly the applicant's admission that the CID did not refer to his HRC enquiry, or to his mother's various enquiries to other organisations, I consider that those visits were routine visits within the applicant's community.
32. I consider the applicant's evidence regarding the purported visit he received in August 2012, was unconvincing and suggested he was not recalling evidence from his personal experience. The applicant claims that four or five unknown men came to his home to interrogate him about the HRC complaint. The applicant told the delegate that that was different to the previous several visits, because the men did not show their government ID and this time there were more of them. The applicant claims the men were "rougher than usual" and spoke in a mix of Tamil and Sinhala. The men wanted to know details of the applicant's life from birth up until that time, what he had done during the war, and if he had supported the LTTE. They also asked the applicant to provide details of anyone living in his area who had LTTE connections.

33. The applicant told the delegate the men then asked him about his HRC enquiry and threatened that if he lodged any more similar enquiries he would suffer the same fate as [Mr A and Ms B]. When the delegate asked the applicant to elaborate on the rough behaviour of the unidentified men, he responded that that they had been angry and annoyed and that while they had not harmed him, he had been frightened. The applicant suggested to the delegate that the men may have been from an armed group operating in the area, but when asked, was unable to name any of these groups. The applicant added that this incident was the primary reason he had left Sri Lanka. When the delegate put to the applicant that he had also said that he had been looking for opportunities to leave prior to this incident, he agreed and said that this incident was the final reason.
34. I have serious concerns regarding the timing of the purported August 2012 incident. The applicant told the delegate that the men threatened him specifically in relation to the HRC enquiry and he believes the HRC were the only organisation with the power to make enquires directly with the SLA. Even in the context of the above cited country information, which indicates the Sri Lankan authorities were dealing with thousands of missing person enquiries at this time, I still find it farfetched that the SLA would take almost two years to visit the applicant at home and threaten him in relation to his HRC enquiry. In making my finding I have also given significant weight to the applicant's evidence that during this same period his mother was making enquiries with other organisations, but that she was never threatened in relation to these enquiries, nor were they mentioned during the August 2012 incident. Nor do I consider it credible that the HRC was the only human rights organisation which could make enquiries with the SLA, but not the ICRC, IOM, or other groups. On the evidence overall, I do not accept that in August 2012 unknown men threatened the applicant at his home in relation to the enquiries he had lodged about [Mr A and Ms B]. On the evidence overall I am not satisfied that the applicant was a person of adverse to the Sri Lankan authorities, or any other group, at the time of his departure from Sri Lanka.
35. Later in the SHEV interview the applicant again claimed that pro-government armed groups continue to operate in his home area, and the government have not taken their weapons away from them. The applicant referred to a 2016 Jaffna incident in which a suicide bomb kit had been found, and eight people arrested, as proof of this paramilitary activity and after the SHEV interview provided the URL of the news article to the delegate. The applicant further claimed that if he returned to Sri Lanka there is a risk that one of these groups could plant a weapon in his house to frame him as an LTTE operative. I note that when asked in his 2013 arrival interview if there were any groups operating in his area the applicant mentioned the Karuna Group, the Eelam People's Democratic Party (EPDP) and the People's Liberation Organisation of Tamil Eelam (PLOTE), but that he stated he had had no involvement with them. The news article refers to a single suspect who was discovered with a cache of weapons believed to be left over from the civil war. The police arrested the suspect and launched an investigation. There is no information regarding the man's identity, his ethnic background, or whether he belonged to an armed group or paramilitary. While I accept pro-government armed groups operated in the north and east of Sri Lanka in the postwar era, the country information cited below indicates that their influence has steadily declined and they now operate as mainstream political parties.
36. The 2012 United Nations High Commission for Refugees (UNHCR) Guidelines, issued the year of the applicant's departure from Sri Lanka, identified persons with certain links to the LTTE, and their family members, as potentially in need of protection at that time, although it did not specify individuals of Tamil race as requiring protection for that reason alone. Furthermore, in the UNHCR's opinion, individuals originating from an area where the LTTE had been active,

such as the applicant, did not require protection solely on that basis unless there were additional, relevant factors which may have given rise to a profile of risk.³

37. In terms of real or perceived links to the LTTE, I note the UNHCR identified at that time, amongst other risk profiles, those with familial links to the LTTE as potentially in need of protection.⁴ For the reasons given above, I have accepted the Sri Lankan authorities suspected [Mr A and Ms B] of being involved with the LTTE at the time of their disappearance in April 2009. I also accept that the applicant was interrogated about whether he had any LTTE links or knowledge while he was at [Location 1] and [Camp 1], and then on several occasions after his release, during routine household visits from the CID. The applicant has never been charged or harmed in relation to suspected LTTE links, either his or those of his siblings, nor for any other reason. The applicant has also confirmed there have not been any adverse consequences for his parents or two other siblings in relation to [Mr A and Ms B].
38. The 2012 UNHCR Guidelines also identified persons seeking justice for human rights violations, and their family members, as potentially in need of protection.⁵ As noted above, the chaos and mass displacement of civilians during the final stages of the civil war, resulted in thousands of enquiries being lodged regarding missing persons, including those who had been involved with the LTTE. The applicant told the delegate that since his departure his mother has continued to make enquiries with various agencies regarding [Mr A and Ms B], including the Presidential Commission to Investigate into Complaints Regarding Missing Persons. While I am prepared to accept this is the case, on the evidence before me I am not satisfied that this means she has a profile as a “low level human rights activist” as the applicant’s representative has claimed. In any case I give significant weight to the fact neither the Sri Lankan authorities, nor any other group, have ever warned the applicant’s mother to stop making enquiries. I consider that if the Sri Lankan authorities did not want the applicant’s mother to make enquiries about her missing children, that her age, or even her gender, would deter them from warning her. When asked if his family currently have any contact with the Sri Lankan authorities at all, the applicant clarified that the SLA visit them every six months to conduct a household check to verify who is living there, and that they conduct the same checks for other households in their community. I accept the applicant’s claims in this regard and I am satisfied such visits are routine.
39. Eleven years have passed since the end of the civil war and eight since the publication of the UNHCR Guidelines and the country information before me indicates the situation for Tamils in Sri Lanka has continued to improve markedly. Given the passage of time, I am also not satisfied that the profile of a young Tamil male continues to be relevant to the applicant’s circumstances. The monitoring and harassment of Tamils in the north and east of the country, while still occurring, has reduced significantly and is more likely to occur to Tamils associated with politically-sensitive issues related to the war, including missing persons, land release and memorial events.⁶ While I acknowledge the country information indicates that in some circumstances Tamils who engage in missing persons advocacy may still face monitoring and harassment, there is no evidence before me that the applicant’s mother has made any enquiries about [Mr A and Ms B] since 2016. Nor, as already noted, is there any evidence that the applicant’s mother, his father, or his remaining siblings have ever been subject to adverse attention as the result of his mother’s activities (or the applicant’s own HRC complaint). While

³ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁴ Ibid.

⁵ Ibid.

⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

I accept the applicant himself made a single enquiry with the HRC ten years ago, I am not satisfied he has made any others since then, or that he would do so upon return to Sri Lanka.

40. Given all the country information cited above, including the results of the 2019 presidential election, I am satisfied there have been markedly positive political gains for the Tamil community since the end of the civil war, including Tamils from the formerly LTTE controlled north. DFAT currently assess that all Sri Lankans face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment, and housing.⁷ Some members of the Tamil community report discrimination in employment, particularly in relation to government jobs; however DFAT assess that the under-representation of Tamils in the public sector is due to language constraints and disrupted education during the war, rather than official discrimination on the basis of ethnicity. Despite government incentives, the number of Tamil-speaking police officers and military personnel in the north and east remains small, and monolingual Tamil speakers can have difficulty communicating with authorities.⁸ Given the country information overall, I accept the applicant may face some low level discrimination in Sri Lanka as a Tamil (including as a Tamil speaker); however I am not satisfied that this would amount to serious harm.
41. The November 2019 elections saw the installation of new President Gotabaya Rajapaksa and the subsequent appointment of his brother and former President, Mahinda Rajapaksa, as Prime Minister. New President Rajapaksa was the Defence Secretary under the Presidency of his brother and they both face allegations of war crimes, including against Tamils during the civil conflict.⁹ While I acknowledge the serious allegations against the President and Prime Minister regarding their past treatment Tamils during and after the civil war, the government has publicly declared its commitment to ethnic and religious reconciliation. While the applicant claims to fear harm from armed groups operating in his home area, for the reasons given above I am not satisfied that he has ever had contact with, or is known to, such groups. In any case DFAT confirms that such groups, who were aligned with the first Rajapaksa government during the war, including the former Karuna Group, and the EPDP, have now disarmed and are engaged in politics.¹⁰
42. DFAT also currently assesses that adherents of faiths other than Buddhism face a low risk of official discrimination and that the Hindu community can practise their faith freely in Sri Lanka.¹¹ Gotabaya Rajapaksa has expressly pledged to work for greater cohesion amongst Sri Lanka's ethnic and religious minorities. The evidence before me does not suggest that Rajapaksa has a specifically anti-Tamil agenda, that he intends to reintroduce any of the restrictions which were placed on the Tamil community during the civil war, or that ethnic or religious tensions have actually increased since his election. Given all the country information cited above, including the results of the 2019 presidential election, I am satisfied there have been markedly positive political gains for the Hindu Tamil community since the end of the civil war in 2009. I am satisfied that the chance the applicant, a Hindu Tamil from the formerly LTTE controlled north, whose siblings were suspected of LTTE links and who, along with his mother, made enquiries about their disappearance with the authorities, would face serious harm upon return to Sri Lanka, is no more than remote.

⁷ Ibid.

⁸ Ibid.

⁹ The Diplomat, 'Sri Lanka President Urges Limit on Minority Political Power', 3 January 2020; Al Jazeera, 'Sri Lanka to hold Presidential Election on November 16', 19 September 2019; and Human Rights Watch (HRW), 'World Report 2020', February 2020

¹⁰ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

¹¹ Ibid.

Returning Asylum Seeker

43. I accept the applicant departed Sri Lanka illegally by boat in August 2012 and travelled to Australia, where he has sought asylum. As a returnee to Sri Lanka without a passport, I accept the applicant would require a temporary travel document issued by the Sri Lankan authorities in Australia prior to his departure. Upon arrival the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times, the TID (Terrorist Investigation Division) check travel documents and identity information of returnees against the immigration and intelligence databases, as well as determine whether a returnee has any outstanding criminal matters.¹² With reference to the applicant's particular circumstances, I am not satisfied he was wanted in relation to a crime, was subject to an arrest warrant, or any other judicial process.
44. Persons who depart Sri Lanka illegally ('illegal departees') can be charged under the Immigrants and Emigrants Act (I&E Act) upon return, and may remain in police custody at the airport for a short period after arrival, and should a magistrate not be available before this time – for example, because of a weekend or public holiday – may be held in an airport holding cell. DFAT indicates that returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed, although they are free to go to the bathroom and to talk to one another during this time.¹³ There is no evidence before me to suggest that illegal returnees are subject to any sort of mistreatment during processing. After the SHEV interview the applicant's representative provided additional news articles regarding returning Tamil asylum seekers being arrested on the basis of tip offs, amongst other matters. However, given the significant amount of time which has elapsed since those articles were published, I have given greater weight to the most recent DFAT report's assessment of the situation.
45. DFAT assess that the Sri Lankan authorities differentiate between fare-paying passengers and the facilitators or organisers of irregular migration. DFAT advise that if an individual pleads guilty, they will be fined and are then free to go. In most cases if they plead not guilty, they will be granted bail on their own personal surety immediately by the magistrate, or may be required to have a family member act as guarantor. Bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country.¹⁴
46. The Sri Lankan Attorney-General's Department has directed that all passengers of people smuggling ventures, not only those suspected of facilitating or organising irregular migration, be charged under the I&E Act and appear in court. DFAT suggests that the requirement to appear in court also applies to those who have already pleaded guilty and paid a fine. Those charged are required to appear in court in the location where the offence occurred, which involves legal and transport costs, and those who have had to travel long distances have found this disruptive to their livelihoods. The Attorney-General's Department claims no fare-paying passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally (as distinct from facilitators or organisers).¹⁵
47. I accept there is a real chance the applicant will be questioned and held briefly as part of the re-entry process, and that if he pleads guilty he will be fined, or if he pleads not guilty he will be granted bail on the basis of personal surety, or on guarantee by a family member (in which case he would need to wait until that person arrives). However, the applicant has not claimed, and there is no other evidence in the material before me to indicate, that he would not be

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

granted bail on his own personal surety, or that he would be unable to pay the fine upon his return.

48. I have found the applicant was not of interest to the authorities at the time of his departure from Sri Lanka in 2012. As a paying passenger of a people smuggling venture I am not satisfied that the applicant would face greater scrutiny or penalty upon return than other ordinary illegal departees or that there is a real chance he will be detained at the airport beyond a short period.¹⁶ I am not satisfied that being detained for a short period, the payment of a fine, or the requirement to report to the police (as part of bail conditions) or a court (for all those charged), cumulatively amounts to serious harm for the applicant.
49. Furthermore, the country information before the delegate indicates the I&E Act applies to all Sri Lankan citizens, and is not discriminatory on its face or in its application. A generally applicable law will not ordinarily constitute persecution and I am satisfied that the law itself, and application and enforcement of the law, in this case does not amount to systematic and discriminatory conduct.¹⁷ As such I find the treatment the applicant will face as a consequence of the application of the I&E Act is not persecution within the meaning of s.5J(4) of the Act.
50. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security, and indicate that most are not subjected to monitoring by the Sri Lankan authorities after they leave Colombo airport. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.¹⁸
51. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to the sale of their belongings to fund irregular ventures overseas, but generally do not experience societal discrimination for seeking asylum elsewhere. However, some refugees and failed asylum seekers reported social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers.¹⁹
52. Many returnees also have difficulty finding suitable employment and reliable housing on return and a lack of documentation for some returnees inhibits access to social welfare schemes, the ability to open bank accounts, find employment, or enrol in educational institutions. Those who have skills that are in high demand in the labour market are best placed to find well-paid employment.²⁰ The applicant spent two years working in [occupation] in Sri Lanka prior to his departure and has immediate family (parents and adult siblings) residing in their own home in Kilinochchi. The applicant is also still in possession of his original NIC and a copy of his birth certificate, amongst other personal documents. On the evidence before me I am satisfied the applicant would not face undue challenges with accommodation, employment, or reintegration generally, upon return. While I accept the applicant may face social stigma or societal discrimination within the local community due to his profile as a returnee asylum seeker from Australia, I am not satisfied that he would face treatment that would constitute serious harm.

¹⁶ Ibid.

¹⁷ *Chen Shi Hai v MIMA* (2001) CLR 293

¹⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

¹⁹ Ibid.

²⁰ Ibid.

COVID-19 Pandemic

53. The applicant claims he faces a real chance of contracting COVID-19 in Australia, or during the process of being returned to Sri Lanka, or after his arrival there. The third IAA submission puts forward a number of reasons to support this argument including general travel restrictions, the conditions of the plane journey from Australia to Sri Lanka, and the conditions in Sri Lanka for persons of the applicant's claimed profile, particularly in detention. The applicant's receiving country is Sri Lanka and I am not satisfied that his claimed fear of harm relating to contracting COVID-19 in Australia is relevant to this assessment under the Act.
54. The country information in the third IAA submission indicates that there have been changes to the processing of international arrivals in Sri Lanka due to COVID-19, and the applicant may have to spend some time in a quarantine centre. A military official, who has been accused of war crimes against Tamils, has been appointed to oversee the Sri Lankan government's response to COVID-19 and curfews have been imposed across the country, including in the applicant's home area. The new country information also indicates there have been prison riots relating to COVID-19 and allegations that Sinhalese inmates forced Tamils to participate in that protest.²¹
55. I accept that the applicant, like all incoming passengers, may be required to remain in a quarantine centre for some time upon arrival in Sri Lanka and will then be subject to a curfew while resident in his home area. However, on the evidence before me, I consider these restrictions have been imposed for public health and safety reasons, and not on a discriminatory basis. Furthermore, I am not satisfied that the applicant has any sort of adverse profile with the Sri Lankan authorities or that the appointment of the particular military official exacerbates any risk to the applicant as a Tamil. Given the applicant's personal circumstances, and DFAT information regarding the treatment of returning illegal departees, I am not satisfied that the new country information regarding Tamil prisoners and riots in the Sri Lankan prisons are relevant to him.
56. While I accept that COVID-19 is a serious and highly contagious virus, I consider the claims raised in the third IAA submission are purely speculative. On the evidence before me I am not satisfied there is a real chance the applicant would contract COVID-19 in transit to Sri Lanka, or on return to Sri Lanka (including during incoming processing as a returning illegal departee). Even if the applicant were to contract COVID-19 (and I consider the chance of this to be remote) I am not satisfied that would arise from any systematic and discriminatory conduct on the part of the Sri Lankan government (or anyone else), or that it is for the one of essential and significant reasons as set out in s.5J(1)(a) of the Act. Sri Lanka has free universal health care and a strong performance in infectious disease control.²² On the evidence before me overall, I am not satisfied that the applicant would be denied medical treatment on the basis of his Tamil ethnicity, his origins in the Northern Province, or on any other discriminatory basis, should he require it.
57. I am not satisfied the applicant has a well-founded fear of persecution for any of the reasons claimed.

²¹ See 2020 publications referred to in the third IAA submission.

²² DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

Refugee: conclusion

58. 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

59. 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

60. 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.
61. 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.
62. I am not satisfied the applicant faces a real chance of contracting COVID-19 on route to Sri Lanka, or after his arrival, or that he faces a real chance of any other harm related to the pandemic, or the Sri Lankan government's response to this. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm for these reasons. In any event I am not satisfied that harm suffered in relation to COVID-19 would constitute the arbitrary deprivation of life, because the applicant's death would not be the result of unlawful or extra-judicial conduct. I am also not satisfied the applicant would have the death penalty carried out on him, or be subjected to torture on this basis. I am also not satisfied this would amount to cruel or inhuman treatment or punishment, or degrading treatment or punishment because it would not, through any act or omission, intentionally inflict pain or suffering considered cruel or inhuman in nature, or cause extreme humiliation as to be regarded as significant harm. I am not satisfied the applicant faces a real risk of significant harm in Sri Lanka for any reason related to the COVID-19 pandemic.
63. I have accepted the applicant would be returning to Sri Lanka as an asylum seeker who left the country illegally, and will be subject to a process under the I&E Act. Country information cited above indicates if the applicant pleads guilty he will be fined, which he can pay by instalment. If the applicant pleads not guilty, he will be granted bail on the basis of personal surety or with a family member acting as a guarantor. I accept that in any of these scenarios the applicants may be detained for a short period at the airport. I am not satisfied this, the imposition of a fine, or additional costs arising from any requirement to report to the police or a court, would amount to the arbitrary deprivation of life, or the death penalty. Nor am I satisfied the

applicant will be subject to pain or suffering that is cruel or inhuman in nature, or severe pain or suffering or extreme humiliation, nor that there is an intention to inflict cruel, inhuman or degrading treatment or punishment. I am also not satisfied that the applicant faces a real risk of a custodial sentence.

64. I have accepted that the applicant may face some level of societal discrimination as a Hindu Tamil and a returnee asylum seeker from Australia. Given the applicant's own circumstances, and evidence discussed above, I am not satisfied that this discrimination would amount to the arbitrary deprivation of life or the death penalty. Nor am I satisfied the applicant will be subject to pain or suffering that is cruel or inhuman in nature, or severe pain or suffering or extreme humiliation, nor that there is an intention to inflict cruel, inhuman or degrading treatment or punishment. I am not satisfied that this amounts to significant harm as defined, even when considered in conjunction with the I&E process he will undergo upon arrival, and I find there is not a real risk of significant harm on this basis.
65. I have otherwise concluded that the applicant does not face a real chance of harm for any reason. Based on the same information, I am not satisfied that the applicant has a real risk of suffering significant harm.
66. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

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

...

Protection obligations

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

Determining nationality

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