



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08573

Date and time of decision: 28 July 2020 16:35:00
D Hughes, 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 citizen of Sri Lanka. He applied for a protection visa on 28 September 2015. A delegate of the Minister for Immigration refused to grant the visa on 17 August 2016. A decision in this matter was initially made by the IAA on 26 September 2016 (IAA16/00641). The matter is currently before the IAA by orders of the Federal Circuit Court, dated 29 May 2020.

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).
3. The applicant has made submissions to the IAA. The submission, dated 15 September 2016, contained new information about the applicant's aunt, his history in Sri Lanka and his activities in Australia. The new information includes corroborating information: photos of the applicant's aunt (put forward as evidence of her association with the Liberation Tigers of Tamil Eelam or LTTE); a letter from the Human Rights Commission (HRC) of Sri Lanka (dated 15 August 2016) relating to his experiences in Sri Lanka; and a letter from [Organisation 1] (dated 2 September 2016) relating to his Tamil Diaspora activities in Australia.
4. In terms of his aunt, the applicant claims his aunt served in the LTTE from 1995-1998. While the applicant mentioned in the visa interview that his mother's sister was involved in the LTTE, he contends the delegate failed to actively engage with the applicant or ask questions in regard to this 'vital information which is relevant to his claims'.
5. The applicant has provided a letter from the HRC of Sri Lanka that seeks to corroborate his claims prior to his departure from Sri Lanka. In terms of his activities in Australia, the submission contends that the information was not given during the interview because the applicant was never asked, and at the material time he never knew that his Tamil activities in Australia were relevant. The letter from the [Organisation 1] was obtained to confirm that the applicant was active in Tamil diaspora activities and is dated after the delegate's decision. The letter from the HRC was obtained very shortly before the decision. In addition, the applicant highlights that he was self-represented.
6. I am satisfied the new information is credible personal information, in the sense that it is capable of being believed, and which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
7. In terms of exceptional circumstances, I do not consider the fact that the applicant was self-represented is alone an exceptional circumstance, or explains his failure to detail this information in his oral evidence. I also consider it was the applicant's obligation to make his case. Equally, I accept he referred to his aunt's LTTE involvement in the interview and note his concerns about raising this information earlier. It is not implausible he may not have appreciated the significance of his activities in Australia, and following advice, he may have sought to obtain corroborative evidence to address the concerns of the delegate. In terms of this information, I note that it is third party evidence (letters confirming his activities in Australia and experiences in Sri Lanka, and photos of his aunt) and that the applicant may also have had less control in terms of the timely provision of such information. While I have some

concerns about the late raising of this information, as a whole, I am satisfied there are exceptional circumstances to justify consideration of the new information.

8. The submission also included new country information, both extracted and referenced within the submission itself. With one exception, the country information predates the delegate's decision of 17 August 2016.
9. In terms of the country reports that predate the delegate's decision, I am not satisfied the new country information was not, and could not have been, provided to the Minister before the Minister (delegate) made the decision. In contrast to the third party evidence, I consider it was within his control to provide supporting country advice about the situation in Sri Lanka. I am also not satisfied the new country information contains credible personal information (in the sense contemplated by s.473DD(b)) which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
10. In terms of the September 2016 [article], I am satisfied it meets s.473DD(b)(i) as it could not have been provided before the decision. In terms of exceptional circumstances, I have weighed the fact that he was not represented before the delegate. Equally, I consider the delegate had regard to a wide range of country information, some of which corroborates the type of issues in the news articles the applicant has provided (both in terms of the articles that pre-dated and post-dated the delegate's decision) and provides more in depth analysis of the situation in Sri Lanka and the applicant's risk profiles. In this regard, I consider the new country information adds little to the advice already before the IAA. In all the circumstances, while I accept it postdates the delegate's decision and could not have been provided earlier (at least in terms of the [report]), I am not satisfied there are exceptional circumstances to justify consideration of any of the new country information provided in the submission.
11. Following remittal of this matter, the IAA has obtained new information. Specifically, the most recent DFAT country report relating to the situation in Sri Lanka as it is relevant to the applicant's claimed risk profile(s).¹ While an assessment could be undertaken on the available country information, I consider reference to the most recent DFAT report is desirable given the time that has passed since the delegate's decision. I am satisfied there are exceptional circumstances to justify consideration of the new country information.
12. The applicant initially indicated to the IAA that he intended to make further submissions and/or provide new information, however he subsequently advised the IAA that he would not be providing any submissions. I thank the applicant for providing clear advice to the IAA.
13. I have weighed whether I should seek further information or comment from the applicant. I am satisfied the determinative issues in this review remain as they were identified by the delegate. I am satisfied the applicant has provided a written submission and evidence that addresses his concerns with the delegate's decision. I am satisfied the applicant has had an opportunity to provide any additional new information or submissions following the remittal of this matter by the Federal Circuit Court. While I have obtained new country information, I am not satisfied it raises any new issues. I consider the information is very much a continuum of the analysis that was before the delegate. Having regard to all the circumstances, I have decided not to seek further information or otherwise invite comment from the applicant.

¹ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244.

Applicant's claims for protection

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

- He is a Tamil Hindu male born in [City 1]. He is a citizen of Sri Lanka.
- His family experienced a lot of difficulties because of the aerial bombardments of the Tamil community. They faced frequent displacement. One of his baby brothers died only a few days after his birth in [O] following a bomb blast. His family were never safe during the wartime. No matter where they went they were caught between the ongoing conflict between the Sri Lankan Army and the LTTE.
- Due to the ongoing conflict in [City 1], his family was displaced to [City 2] in 1999. In [City 2], he completed up to year [number] of high school. He trained as an [Occupation 1] after school. Life was still very difficult for them as Tamils in [City 2]. After their displacement in LTTE-controlled areas, the applicant and his father were often rounded up by the army and questioned on suspicion of being involved in the LTTE.
- In 2009 the applicant was playing [sport] when he was taken along with two or three others by a group of men who identified themselves as being from the Karuna Group. He was taken to a private house where he was questioned, beaten and threatened. The army suspected his family of being involved in or supporters of the LTTE. This was because they had been displaced in LTTE controlled areas and they were from [City 1]. In the end, he did not know why they let him go, but he had feared for his life.
- After this happened, two men were shot dead in the street where he lived. He was scared this would happen to him. He had heard people were being kidnapped on suspicion of LTTE involvement and taken to the 'Fourth Floor' where they were questioned and tortured.
- In April 2011, as he was walking near his house, three members of the Karuna Group were waiting for him in a three-wheeler taxi. As he approached the taxi they called him by his name and warned him that he would be killed if he did not leave the area. He recognised one of these men as a part of the group who had beaten and interrogated him in 2009.
- The applicant feared that the Karuna Group were following him and may harm him. The next month, the applicant fled to [P] where his cousin lived. After speaking to his mother via the telephone, he realised he would be continuously targeted if he remained in Sri Lanka. Many people he knew had gone missing and he feared he would be next.
- The applicant's aunt was associated with the LTTE, being involved in the movement in the late 1990s. She was involved in training.
- The applicant fears harm on the basis of his imputed political opinion as a member of the LTTE; his Tamil ethnicity; and because he left Sri Lanka illegally and claimed asylum. The applicant fears he will be detained, interrogated, kidnapped, assaulted or killed by the Karuna group on return to Sri Lanka. He also believes he will be targeted by the Sri Lankan Army or CID as they suspect that he is a member of the LTTE.

Factual findings

15. The applicant has been consistent about his identity and background. He has provided a range of documents in support of his identity. He spoke freely through a Tamil interpreter at the visa interview. I am satisfied the applicant is a Tamil Hindu male born in [City 1] in the Northern Province, and who later resided in [City 2] in the Eastern Province. Based on the written

evidence, I accept his family was displaced during the conflict. I also accept his baby brother was killed during a bombing incident.

LTTE profile of Aunt

16. The applicant has claimed his aunt was associated with the LTTE. In assessing his profile, I consider it useful to assess his aunt's profile first.
17. In the visa interview, the applicant gave unequivocal evidence that neither he nor his immediate family had LTTE connections. He was not a supporter of the LTTE and never received weapons training. It is apparent he was very young [when] he was detained by the paramilitary Karuna Group in 2009.
18. The applicant was asked briefly about his aunt at the visa interview. He said she was involved in the LTTE in training. He was asked if he knew anything else about his aunt. He said he did not.
19. In the IAA submission, the applicant claimed that he strongly believes he would be perceived to be someone linked to the LTTE by virtue of his aunt's involvement in the LTTE. As a result, he fears that he will be detained, interrogated, tortured, abused and or killed by the Sri Lankan authorities namely the Criminal Investigations Department (CID), the Sri Lankan Army (SLA) or a paramilitary group associated with the government, such as the Karuna Group. He claims his aunt served in the LTTE from 1995-1998. He claims that it was compulsory for those who served in the LTTE to have their hair very short and kept in the way as seen in the photographs to indicate they were LTTE cadre. He claims his aunt's LTTE name was [K].
20. The applicant has provided photos of his aunt. The photos of his aunt depict a woman outside in two dresses. Her hair is notably short. However, there is nothing else before the IAA that confirms the identity of the woman in the photo, that she is the applicant's aunt, or that she had an LTTE profile. I consider the applicant's evidence of his aunt's LTTE profile is limited and unpersuasive.
21. While I accept the delegate did not question the applicant in much depth about his aunt's profile, I also consider his aunt's profile did not form any significant part of his own profile, either in his written evidence or his oral evidence. In terms of his claimed incidents with the Karuna Group (from 2009 and 2011), which I have assessed further below, I am not satisfied there is any indication these incidents were linked to his aunt's profile, or that she had any adverse profile more generally. Had his aunt had such a profile, I consider that would have clearly been a feature of these claims, or his claimed experiences.
22. In view of all the information before me, I am not satisfied his aunt has or had any LTTE connections (whether in training or otherwise) or LTTE profile. More significantly, the applicant has not satisfied me that he has any adverse actual or imputed profile through his aunt, or that this was ever a reason he was targeted in the past.

Past experiences in Sri Lanka

23. The applicant has consistently claimed that he was detained by the Karuna Group while playing [sport]. There has been some variance in the timeframe for when that detention and mistreatment occurred. He claimed it was in 2006 or 2007 during his 2013 entry interview, but later claimed it occurred in 2009 in his visa application and interview. When the discrepancy in his evidence was put to him at the visa interview, the applicant said he felt compelled to

provide a year when questioned at the entry interview, but he could not remember. I have reviewed the records of that interview and I am satisfied the applicant's explanation for the discrepancy is plausible.

24. The applicant's evidence in terms of this claim was otherwise broadly consistent, referring to the context of his detention, the period of his detention (several hours), the number of people detained with him and the specifics of what occurred. I consider his evidence was free from embellishment, as was it consistent with country advice before me about the harassment, arbitrary detention and mistreatment of Tamil males by the Sri Lankan security forces during this period.² Having regard to the evidence before me, I accept the 2009 incident occurred.
25. The applicant's evidence about the second incident in 2011 was far less consistent. He did not mention it during the entry interview. When asked about this at the visa interview, he indicated he was told to give short answers so he focussed on the more significant 2009 detention. That explanation is not implausible. However, there are other concerns with this evidence. In his written claim, the applicant said he recognised one of the men from the Karuna Group as being present when he was previously detained (in 2009). However, he made no such claim in the visa interview. When that discrepancy was put to him, the applicant had no answer. The applicant was also inconsistent about when it occurred (variously claiming April or August 2011). The applicant was also inconsistent about whether the incident occurred after he moved to another town [P] (as he appeared to claim in his oral evidence) or whether it precipitated his move there (which is what he claimed in his written evidence).
26. I have weighed the written evidence provided in support of the 2009 and 2011 incidents. I have accepted the 2009 incident occurred. In terms of the 2011 incident, at most I consider the letter confirms a complaint was made to the Sri Lankan Human Rights Commission. The letter restates the content of the complaint. I have some concerns about the date of the complaint. It indicates that the complaint was made on [date] July 2012, being the day before he left for Australia (stated as [a different date] July 2012 in the same letter). It is not implausible the applicant could raise a complaint a year after the 2011 incident, and three years after the 2009 incident, particularly given his young age, but I have concerns that he would lodge a complaint the day before his departure from the country. That suggests to me that his motivations were not to have the matter investigated, but rather to have documentary evidence. Similarly, I note the letter states that 'we certify that we inquired the above mentioned complaint very carefully and the facts enntoned (sic) above is true and correct'. Given the applicant departed the country the next day, it is not apparent to me how these matters could have been fully investigated and confirmed as true and correct in his absence. No further detail about the HRC's investigation is provided. I consider the content of the letter is limited and unpersuasive.
27. DFAT advice indicates that document fraud is common in Sri Lanka, however there is little before me that obviously indicates the letter is not genuine. Even accepting the letter may be genuine, I consider the letter is of limited value in this assessment. I am not satisfied the letter outweighs my concerns about the applicant's inconsistent evidence regarding the 2011 incident. In view of all the evidence before me, the applicant has not satisfied me and I do not accept that he was threatened by the Karuna Group in 2011.
28. I find the 2011 incident is a contrivance designed to suggest he had an ongoing profile with the Karuna Group. I am not satisfied that was the case. After his release in 2009, I find the Karuna

² Office of the United Nations High Commissioner for Human Rights, 'Report of the OHCHR Investigation on Sri Lanka (OISL (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358.

Group did not consider the applicant to be a person with any LTTE associations or useful intelligence.

29. While I do not accept the specifics of the 2011 incident, I do accept the applicant likely experienced monitoring, harassment, and intimidation (including area round ups, as he claims he and his father experienced) from the Sri Lankan Army and paramilitary groups in a more general sense. I consider those claims plausible and supported by the country information.³ I accept he was targeted for being a Tamil male, and young Tamil male from a former LTTE controlled area. I accept those experiences, and other stories he had heard, may have led the applicant and his family to decide it would be safer for him to live with his cousin in [P], and later travel to Australia.
30. However, I am also satisfied the applicant was not considered by the Sri Lankan security forces to have an LTTE profile, nor was he again specifically targeted after the 2009 incident. I am satisfied he was never again detained or seriously harmed by the Karuna Group, the SLA or any other group. I note that he had no support or association with the LTTE, neither did his immediate family. I have not accepted his aunt had an LTTE profile or connections, nor do I accept the applicant had any actual or imputed adverse profile through his aunt.
31. I find he was not a person of interest to the authorities or Sri Lankan security forces (including the SLA, the CID or Karuna Group). Had the applicant had such a profile, or been suspected of having such a profile, I am not satisfied he could have avoided further scrutiny (including detention, interrogation, torture or rehabilitation) from the security forces.⁴ Instead, I find his profile was limited to his status as a young Tamil male from a former LTTE controlled area. I do not discount the seriousness of the treatment he experienced as a result of that limited profile, however I find that was the extent of his profile, and this would be the extent of his profile on return to Sri Lanka.

Departure

32. The applicant claims to have had a Sri Lankan passport, but did not use it when he departed Sri Lanka by boat. On the basis of his evidence about his departure from Sri Lanka, I accept the applicant departed unlawfully by boat. Given his method of departure and time in Australia, I am satisfied the Sri Lankan authorities may determine that he left Sri Lanka unlawfully by boat and claimed asylum in Australia.

Activities in Australia

33. In his submission to the IAA, the applicant contends for the first time that he had participated in several Tamil diaspora activities in Sydney organised by [Organisation 1]. According to a letter from [Organisation 1] dated 2 September 2016, the applicant had attended annual Tamil events, specifically Hero's Day commemorations in November 2014 and 2015, and Tamil Genocide Remembrance Day in May 2015 and 2016. He has provided a letter of support in this regard from Mr [A] from [Organisation 1].

³ Office of the United Nations High Commissioner for Human Rights, 'Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143; among others.

⁴ Danish Immigration Service, 'Human Rights and Security Issues concerning Tamils in Sri Lanka', 1 October 2010, CIS19345; see also Office of the United Nations High Commissioner for Human Rights, 'Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358.

34. The applicant submits that the Sri Lankan intelligence community closely monitors events of this nature abroad. The applicant contends he will be identified at the airport as someone who is of interest to the Sri Lankan authorities and taken away for interrogation, torture and detention, which will subsequently lead to a life of constant monitoring and harassment, if not death.
35. The evidence of the applicant's participation in these events is very limited. A letter from [Mr A], who is [an official] of the [Organisation 1], confirms the applicant's attendance at four events: Hero's Day commemorations (in November 2014 and 2015) and Tamil Genocide Day (May 2015 and 2016). It confirms the applicant's attendance at these events, but does not provide any other detail.
36. While the letter does not contain a header or any other indicators that the letter was issued by [Organisation 1], I am prepared to accept it as evidence of the applicant's attendance at these events. However, I am not satisfied he had any active role in these events, nor any other role in the Tamil diaspora.

Refugee assessment

37. 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

38. 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.
39. I have accepted the applicant's family was displaced during the Sri Lankan civil war. He lived for a number of years in [City 2]. He attended school in this area and trained as an [Occupation 1]. He was social, playing [sport] with friends, and he had a family network there (including his cousin). There is no indication that his family have returned to the north. I consider [City 2] is the area he would likely live should he return to Sri Lanka.

Ethnic, LTTE and related profile

40. I have accepted the applicant's ethnic profile. I have accepted the applicant was a young Tamil male from a former LTTE controlled area. On the basis of that profile, I have accepted that he was rounded up in the past (along with his father) and that on one occasion he was detained and seriously mistreated by the Karuna Group (in 2009).
41. While the country advice before me indicates that persons with LTTE profiles were targeted, often severely, the evidence before me also refers to widespread, systematic, and discriminatory harm and mistreatment of ordinary Tamils with no-LTTE associations that lived in former LTTE controlled areas in the north and east of the country, during the civil war.⁵ I am satisfied that was the context the applicant found himself in 2009 and prior to his departure from Sri Lanka. Equally, I have also found he faced no further threat or harm from the group in the aftermath of that incident. I do not accept he remained at threat or a target of the Karuna Group, the SLA or any other Sri Lankan authority, when he left Sri Lanka in 2012.
42. If he were to return to Sri Lanka, the applicant contends that on the basis of his profile, he could be subjected to arrest, torture and forced disappearance. He submits that the climate of terror in Sri Lanka in general continues even several years after the Sri Lankan government proclaimed its military victory over the LTTE. He contends that those at a particular risk of torture are people like him who have an actual or perceived association with the LTTE
43. I have found he had no actual or imputed LTTE profile or association, whether directly or through his aunt or any other family member. I do not consider that profile would have changed, even allowing for his limited activities in Australia. In that regard, I do not consider he has involved himself in any way in the LTTE or other Tamil separatist activities. I am satisfied he would have no actual or imputed LTTE profile on return to Sri Lanka. I consider his profile is confined to his ethnic and related profile (as a Tamil and young Tamil male from a former LTTE controlled area).
44. The reports before me confirm the situation for Tamils in Sri Lanka has changed considerably since the applicant left the country in 2012. Advice before the IAA, including from the UK Home Office, DFAT, and others, indicate the security situation for Tamils in Sri Lanka has continued to improve since the end of the war in 2009, and the political and security environment notably changed during the period of the former Sirisena Government.⁶
45. In its most recent 2019 report, DFAT assessed that Tamils (and other ethnic groups) face a low risk of official or societal discrimination on the basis of their ethnicity.⁷ That is consistent with other assessments before me of the risk profile for Tamils, including Tamils from/living in former LTTE controlled areas in the north and east of the country.
46. I accept the country advice about the improved security environment for Tamils is not absolute. Based on that advice, I accept the applicant may face some discrimination on the basis of his profile as a Tamil, and as a Tamil from a former LTTE controlled area in the north/east, albeit I am also satisfied this is a low risk. I also accept DFAT's assessment that, while monitoring of

⁵ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244; Office of the United Nations High Commissioner for Human Rights, 'Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143;

⁶ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143; UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil Separatism', 28 August 2014, OG180885B28; Thomson Reuters 'US lauds Sri Lanka government on post-war Tamil reconciliation', Foundation', 24 November 2015, CXBD6A0DE16447; and others.

⁷ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244;

Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly for those associated with politically sensitive issues.⁸

47. In that respect, I have considered whether the applicant's activities in Australia (at Hero's Day and Tamil Genocide Day commemorations) would be considered as involvement in 'politically sensitive issues'. Advice from the UK Home Office in 2014 indicated that participating in diaspora activities such as attending demonstrations would not in itself be evidence that a person is a committed Tamil activist seeking to promote Tamil separatism within Sri Lanka.⁹ Consistent with this, DFAT states that the Sri Lankan government has relaxed some restrictions on the public commemoration of events associated with the Tamil armed struggle for statehood. While there is monitoring by the authorities, Tamils have been free to hold public ceremonies marking Maaveerar Naal (Great Heroes' Day) since 2016. DFAT states that sources have reported the atmosphere at war commemorations was 'constructive' and Tamils were increasingly comfortable marking such events.¹⁰
48. It follows that while I accept the applicant has attended such events in Australia, and may continue to attend these events on his return to Sri Lanka, I am not satisfied that his attendance at such commemorations would give rise to any adverse or additional profile for the applicant, or that he would be at any chance or risk of harm in this context for being 'associated with politically sensitive issues'. Beyond his limited participation in such events, I am satisfied the applicant would not be associated with politically sensitive issues on his return to Sri Lanka.
49. I accept DFAT's advice about monitoring, but consider any monitoring would likely be limited (given his limited profile and lack of involvement with politically sensitive issues) and I am not satisfied that any monitoring, societal or official discrimination he may face in Sri Lanka based on his ethnic or any related profile, would threaten his capacity to earn a livelihood, cause him significant economic hardship, deny him access to basic services, threaten his capacity to subsist, or otherwise constitute serious harm, even when considered in a cumulative sense.
50. In relation to his ethnic profile, I consider the weight of information before the IAA confirms, as expressed by the UK Home Office in 2014, that being of Tamil ethnicity would not in itself warrant international protection.¹¹ I consider that consistent with DFAT's analysis over the last several years,¹² and other reporting.¹³
51. In terms of any actual or imputed LTTE profile, I have rejected his claims to have any such associations, whether through his aunt or otherwise. In any event, I consider that advice from the UK Home Office confirms that even a person who evidences past membership or connection to the LTTE would not require protection unless they have or are perceived to have had a significant role in the LTTE, be active or involved (or perceived to be) in post-conflict Tamil separatism, or they appear on a 'stop' list at the airport.¹⁴ I consider that consistent with

⁸ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143.

⁹ UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil Separatism', 28 August 2014, OG180885B28.

¹⁰ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143.

¹¹ UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil Separatism', 28 August 2014, OG180885B28.

¹² DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143.

¹³ UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', 1 December 2012, CIS29707; and others cited by the delegate.

¹⁴ UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil Separatism', 28 August 2014, OG180885B28.

DFAT's assessments of the various levels of LTTE profile.¹⁵ I am not satisfied the applicant has any such profile, or that there is any basis on which such a profile would be imputed to him, but note that even such a profile would appear to put the applicant at any real chance or risk of harm.

52. I acknowledge that for those with certain higher LTTE and other politically sensitive profiles (such as Tamil separatism) there remain credible risks in Sri Lanka, including arrest/detention (under the PTA), interrogation and torture. I consider these risks may extend to persons wrongly imputed with such profiles. However, I am satisfied the applicant does not have an actual or imputed LTTE profile, or any other adverse profile of interest to the SLA, the Karuna Group, the CID, or any other Sri Lankan authority or paramilitary force, nor do I consider there is any chance or risk of him being wrongly imputed with such a profile. In that regard, I do not consider there is any basis to impute him with such a profile, mistakenly or otherwise.
53. I have considered his limited profile against advice from DFAT, the UK Home Office, and earlier UNHCR advice, regarding the situation for Tamils (including Tamils from the north and east, and former LTTE controlled areas), including those who participate in Tamil commemorations. Having considered the full range of analysis before me, I am not satisfied the applicant is at any real chance of being suspected or imputed with any adverse profile on return to the country, or that he would face a real chance or risk of harm for any of these reasons. Given my assessment of his limited profile and having regard to the analysis before me, I am not satisfied the applicant would face the same risks of harm and mistreatment that he and other Tamils did in the past, including in terms of risk of harassment, detention and mistreatment and harm from the SLA/CID and paramilitary groups such as the Karuna Group.
54. In view of everything before the IAA, I am not satisfied there is a real chance of the applicant facing harm from the SLA, the Karuna Group, the CID, Sri Lankan authorities, or any other person or group, for reasons of his ethnicity, as a Tamil from a former LTTE controlled area in the north/east, any actual or imputed LTTE links (which I have rejected), his involvement in Tamil commemorations, or on the basis of any profile as iterated above, if he were to return to live in Sri Lanka now or in the reasonably foreseeable future. I find his fears of harm for these reasons, however described, are not well founded.

Illegal Departure

55. I have accepted the applicant departed Sri Lanka illegally and that the authorities may determine that he sought asylum in Australia. I have referenced the specific advice from the most recent DFAT report, however I consider it consistent with the previous DFAT report from 2015 and other sources relied on by the delegate.¹⁶
56. DFAT states that it understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to homes and telephone calls by the CID. DFAT states it understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT states that it is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres.

¹⁵ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143.

¹⁶ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14143; UK Home Office, 'Country Information and Guidance Sri Lanka Tamil Separatism', UK Home Office, 28 August 2014, OG180885B28; Immigration and Refugee Board of Canada, 'Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport', LKA103815.E, 22 August 2011 CIS29896.

DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.¹⁷ DFAT does specifically report on the situation for Tamils in the Eastern Province, however I consider that assessment has some relevance.

57. I have not accepted the applicant has any adverse profile. While I have weighed country advice from DFAT that returnees and failed asylum seekers face a number of practical challenges on return to the country, relating to social stigma, societal discrimination and reintegration difficulties, DFAT also advises that these are not due to an individual returnee's failure to obtain asylum, but rather are due to employment and accommodation difficulties returnees may experience on return to their home country.¹⁸
58. On the limited evidence before me, I am not satisfied any reintegration difficulties, stigma or societal discrimination the applicant may face on this basis (or bases) would amount to serious harm. I have found that he has no ongoing adverse profile. I find he would be returning to an area where he previously lived and has family and friends. I note he was schooled and trained as an [Occupation 1] there. I consider he is equipped to find work and accommodation. I note he is documented, although that documentation may need to be renewed. I consider each of these factors may further reduce the potential for him to face stigma and social discrimination or other issues related to reintegration, which I am not satisfied would constitute serious harm in any event.
59. Having regard to DFAT advice, I accept there is a chance, albeit low, that the applicant may experience a further check up by the authorities on return, either by phone or in person. I am not satisfied this would constitute serious harm. Given my assessment of the applicant's profile, I am not satisfied there is a real chance he would be subjected to ongoing monitoring on return to Sri Lanka, because of his illegal departure, asylum claims, his other profile, or on the basis of any other actual or imputed profile relating to those factors.
60. I accept for those with certain high profiles there are credible risks on return to Sri Lanka. However, given my assessment of his limited profile, I am not satisfied that the applicant's status as a failed asylum seeker or person who departed illegally would lead him to face adverse attention on return to Sri Lanka, or that there is a real chance of him facing harm for these reasons, whether on his immediate return, or in the reasonably foreseeable future.
61. I accept the applicant departed from Sri Lanka illegally as a passenger on a boat and I accept that because of his illegal departure he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (the I&E Act) on return.
62. As the applicant would likely be returning to Sri Lanka on a temporary travel document, I find he would be subject to an investigative process to confirm his identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and, as involuntary returnees are processed in groups, further delays may occur until all returnees are processed. DFAT advises 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 CID

¹⁷ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244.

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

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.¹⁹

63. DFAT states that the Sri Lankan authorities maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of those individuals who have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals whom the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities.²⁰ The applicant has not claimed that he has any extant court order, arrest warrant or order to impound his passport.
64. I have not accepted the applicant's claims that he has an adverse profile with the Sri Lankan authorities. I am satisfied the authorities could determine the applicant's identity based on his identity documents. I have no reason to consider there is any arrest warrant in relation to the applicant, past or current. I have no reason to consider he would be on any stop watch list. Based on country advice above, I am not satisfied his limited attendance at Hero's Day and Tamil genocide remembrance days would give rise to any adverse profile. I have found he has no connection to Tamil separatism in Australia, nor do I consider there would be any information before the Sri Lankan authorities that would suggest he has such a profile. The applicant has not satisfied me he would be considered with suspicion nor have any adverse profile on return to Sri Lanka, beyond the fact that he left Sri Lanka in breach of the law. It follows that I am not satisfied he would face a real chance of harm in terms of his limited profile on return to Sri Lanka.
65. 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. 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. DFAT states that fines are usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163).²¹
66. DFAT advises that the Sri Lankan 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. Bail conditions are imposed on persons who departed illegally on a discretionary basis, and may include reporting to police at the returnee's expense.²²
67. DFAT states that 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

¹⁹ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244.

²⁰ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244.

²¹ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244.

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

appearance. The frequency of court appearance depends on the Magistrate and DFAT states it understands 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.

68. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. 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. I accept DFAT's advice that fines are usually on the lower end of the spectrum (around AUD122-163).²³ Given my assessment of his limited profile, I consider that would be the case for the applicant.
69. The applicant claims the delegate in his findings did not consider whether the applicant would raise the amount of the bail, and just presumed that the applicant is capable of raising this bail amount. He submits the delegate failed to actively engage with the applicant and denied him procedural fairness.
70. I have weighed the submission, but also note that it is the applicant's obligation to make his case. While contending the delegate failed to engage with his claims, the applicant did not detail or elaborate in his submissions why he would be unable to pay any bail or fines imposed in relation to his illegal departure.
71. Based on the evidence before me, I am not satisfied he would be unable to pay such a fine. I consider any fine is likely to be on the lower end, given his lack of other profile. If the applicant were to plead not guilty, I note that bail would be on the basis of personal surety, although he may also need to have a family member act as guarantor. On the evidence before me, I am not satisfied the applicant would be unable to satisfy any bail/surety/guarantee requirements, nor meet the costs of any later court appearances (should they be needed).
72. There is no contention the applicant was involved in people smuggling. Even accepting his limited activities in Australia, I am satisfied the applicant has no links to Tamil separatism, nor the LTTE. I am satisfied the applicant does not have any adverse profile that would warrant a longer detention, custodial sentence, higher fine, or further interrogation from the authorities. I am not satisfied he would face any chance of further or higher fine, penalty, investigation, detention or jail in connection with his illegal departure or any aspect of his profile as considered above.
73. I do not consider any questioning or processing of the applicant by the authorities at the airport on arrival, any surety/bail/guarantee imposed, any ongoing court proceedings or appearances, the costs of such appearances, or the imposition of a fine, would constitute serious harm, even when considered cumulatively, or that the applicant be would unable to meet these costs or requirements. It follows that I am not satisfied there is a real chance the applicant would face serious harm in connection with any penalty he may face in connection with his illegal departure.
74. On a separate basis, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. Based on the evidence before me, I do not consider the law is discriminatory on its terms, that it is selectively enforced, or that it is applied in a discriminatory manner. I find that any investigation, prosecution, punishment or detention of

²³ DFAT, 'Country Information Report - Sri Lanka', 4 November 2019, 20191104135244.

the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and would not amount to persecution in the relevant sense.

75. Looking to all the circumstances, and having regard to the available analysis, I am not satisfied the applicant would face a real chance of harm on return to Sri Lanka for any of these reasons he has claimed. I find his fears of harm are not well founded.

Refugee: conclusion

76. 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

77. 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

78. 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.
79. 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.
80. In relation to his illegal departure, I have determined that any questioning or processing of the applicant by the authorities at the airport on arrival, any surety/bail/guarantee imposed, any ongoing court appearances, or the imposition of a fine, would not constitute serious harm. Having found he has no adverse profile, I have also found he would not face any additional investigation, fine, penalty, detention or jail in connection with his illegal departure or any aspect of his profile as considered in this decision. Having regard to the same matters, I am also not satisfied that these processes (including any short term detention, questioning, bail or court appearances) and/or any fine or penalty he may face as a consequence of his illegal departure, would constitute significant harm as defined.
81. On the basis of his ethnic profile and status as a failed asylum seeker, I accept the applicant may be briefly checked on/monitored after his arrival (but not face ongoing monitoring), and/or a degree of social stigma and discrimination on return to the country. However, in view of my assessment above, having regard to the applicant's individual circumstances and my assessment of his limited profile, and the country information before me, I do not consider any limited monitoring or visits he may experience on return to his home area, or any low level

discrimination or social stigma he may face on the basis of his profile, would constitute significant harm as defined, even when those matters are considered in a cumulative sense.

82. I have otherwise found there is no real chance of the applicant facing harm for any of the reasons he has claimed. For the same reasons, and having regard to the same information, I find there is not a real risk of the applicant facing significant harm for these reasons.
83. The applicant has made submissions that he is at risk of his cumulative profile. I have found his profile is limited to his ethnic and related profile, and his profile on return to Sri Lanka. To the extent that I have accepted his profile, in terms of his ethnic and related profile and his illegal departure and asylum claims, I consider his profile is interconnected and have assessed that profile cumulatively above, specifically in the context of his return to the country. However, to remove any uncertainty, I also do not consider there is any real chance or risk of the applicant facing serious or significant harm on the basis of his cumulative profile, if he were to return to Sri Lanka, now or in the reasonably foreseeable future.

Complementary protection: conclusion

84. 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.