



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08662

Date and time of decision: 7 October 2020 11:07:00
S McNeill, 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) is a national of Sri Lanka. He arrived in Australia [in] October 2012 and on 29 May 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 2 September 2020 a delegate of the Minister for Immigration refused to grant the visa.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 28 September 2020 the IAA received a submission from the applicant. The submission mostly consists of argument against the delegate's findings and which I have considered.
5. The submission also contains an attachment identified as a copy of a Police Message form and its English translation. The applicant advises the document was forwarded by email by his brother-in-law from Sri Lanka and he received it on 14 September 2020. He was unaware of this document until 28 August 2020 when he spoke to his mother on the phone and she told him words to the effect of 'There is a letter. I can't read it. I am going to see my sister who can read Sinhala and English.' Later, on 5 September 2020, he spoke to his mother again and she told him it was from the police addressed to him; he advised his mother to translate it and send him a copy as he believed it may have been relevant to his case.
6. According to the document translation it is dated 20 August 2020 and addressed to the applicant from the Police at TID [City 1] asking him to present at their office on 27 August 2020 to provide a statement. The applicant states the TID is the Terrorism Investigation Unit. The applicant is worried the police will find him and torture him. This Police Message form, the circumstances surrounding how the applicant came to know of it and his fear arising from it, is new information.
7. The delegate made his decision of 2 September 2020 and while the applicant did not receive an explanation of it until 5 September and a copy of the document until 14 September, his mother had advised him on 28 August 2020 that a letter had been received and she would seek her sister's help. The decision was made five days later. I am concerned about the time frame regarding the request by the police for the applicant to present himself; that this should occur just prior to the delegate's decision but also conveniently he was not made aware of the letter's contents until after the decision being made therefore allowing him to submit he could not have presented it to the delegate because he did not know of its existence.
8. The message from the police lacks any substantive detail other than to provide a date, 27 September 2020, and a time, 10.00 hr, for him to present at the TID office. There is no information as to what kind of statement the police require or whether it relates to his claim of being detained in an army camp in August 2012 for three days regarding his relationship with 'T' a former LTTE member. In his SHEV application of 2017, the applicant did not indicate the authorities had been looking for him since his departure from Sri Lanka in 2012 nor did he state so at his SHEV interview on 3 July 2020. That the authorities would have no interest in the applicant for eight years and then call him in for a statement only after his SHEV interview is coincidental and raises further credibility concerns regarding the applicant's overall reliability which I share with the delegate. I note also country information before the delegate indicates

document fraud is common in Sri Lanka.¹ Furthermore, the applicant failed to attend the TID office on 27 August 2020 and his submission to the IAA was written a month later, the applicant has not provided any information as to what action the police took, if any, given he did not present himself. Taking all these factors into account, I am not satisfied there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

9. The applicant's claims contained in his statutory declaration of 8 May 2017 can be summarised as follows:

- He was born in [year] in [Village 1] , Jaffna district, Northern province of Sri Lanka.
- He is of Tamil ethnicity and a Christian.
- Between 1993 and 2003 his family resided in the Vanni area due to the war; it is a former Liberation Tigers of Tamil Ealaam (LTTE) controlled area. His sister 'L' underwent compulsory weapons training while the family resided in Vanni.
- He began working as a fisherman sometimes assisting his uncle on his fishing boat in 2010. They needed to obtain a pass from the Sri Lankan navy personnel at the sentry and register their details before going to sea. During this registration process the SL navy would beat and harass them, occasionally preventing them from going sea.
- On one occasion in 2010 when they were returning to shore, the navy stopped them. He was pushed off the fishing boat by navy personnel when he refused to give them a portion of their catch. He managed to swim to shore.
- In May 2012 his sister's friend 'T' came from the Vanni to visit his sister 'J'. He had not seen T since 2005 when she had come home to visit J. T began to visit frequently and stay a few days. He would drop her off at the bus stand. He fell in love with T and she agreed to marry him.
- Sometime in August 2012 T went missing. She had stayed two weeks at their house, and he dropped her off at the [bus] stand [in] August 2012, [at] [a specified time].
- [In] August 2012 at [a specified time] he was returning home [on] his bicycle when two men riding bicycles stopped him in front of the [shop] in [Village 1]. The armed men spoke some Tamil. They told him to come to the army camp referred to as the "pass office" to discuss his obtaining a pass to commence his own fishing business.
- He went to the pass office and one person wearing a black uniform physically assaulted him, grabbed his neck and pushed him against the wall. He was detained for three days, tortured, kept in a dark room and his shoulder was dislocated as his hands were tied.
- Men interrogated him, asking him questions about T. They showed him a photo of T wearing an LTTE uniform and at this point he got to know T was a member of the LTTE. They told him T had been reported missing on 25 August; she had been under surveillance and he had been seen with her. They suspected he was an LTTE member.
- He escaped from the pass office on the third [night]. Too afraid to go home, he sought refuge in the [Location 1] and borrowed [money]. He then travelled to the [Location 2]

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

situated in [District 1] and remained there one month before an agent helped him leave Sri Lanka.

- He fears he will be seriously harmed if he is returned to Sri Lanka. This is because he is a young Tamil male from the north who is a suspected LTTE member because of his connection to T and because he departed Sri Lanka illegally and claimed asylum. T remains missing until today.

10. Further claims submitted at his SHEV interview of 3 July 2010 and post SHEV interview submission of 3 July 2020 include the following:

- He fears harms as an ethnic minority Tamil on account of the former Defence Minister during the civil war Gotabaya Rajapaksa, and brother of the former Prime Minister Mahinda Rajapaksa, winning the Presidential election in November 2019.
- He fears harm on account of the Sri Lankan government's response to the COVID-19 pandemic including the appointment by the President of his war crimes alleged genocidal commander Lt. Gen. Shavendra Silva to "spearhead the National Operation Center for Prevention of COVID-19 Outbreak" and that the ethnic Tamil minority are more at risk.

Refugee assessment

11. 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

12. 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.

13. There is no issue as to the nationality of the applicant. He claims to be a Sri Lankan national and has provided a copy of his national identity card and birth certificate in support of this. I accept that the applicant is a national of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.

14. Based on the consistent documentary and oral evidence before me, I accept the applicant's background as follows: The applicant was born in [Village 1], Jaffna district, Northern Province of Sri Lanka in [year]. He is of Tamil ethnicity and a Christian. The family were displaced to the Vanni area between 1993 and 2003, a former LTTE controlled area in the Northern province. His parents [and] sisters currently reside in Jaffna, Sri Lanka. The applicant completed his schooling in 2009 and then worked in both construction and fishing for his maternal uncle.
15. The applicant claimed he began working as a fisherman sometime in 2010 assisting his maternal uncle [and] they operated on the coastal areas of the Northern province. At the time they needed to obtain a fishing pass and were required to register their details with the Sri Lankan navy. The Sri Lankan navy would beat and harass them and on occasion they were prevented from going to sea for various reasons. The navy would threaten them and ask for their catch of fish treating them differently to the Sinhalese fishermen. Sometime in 2010, he was pushed off the fishing boat by a navy personnel as he refused to them a portion of their catch and he had to swim to shore.
16. After the applicant arrived in Australia [in] October 2012, he participated in an arrival entry (arrival) interview soon after on 16 October 2012. In that interview when asked why he left Sri Lanka, the applicant stated he did not have a peaceful life there; when he went to work fishing the Navy would come and take 'it' away from him. He asked for help and the army asked for money and things like that.
17. According to the Australian Department of Foreign Affairs and Trade (DFAT) Sri Lanka's population is approximately 21.2 million; Sinhalese are the ethnic majority with 74.9 per cent, followed by Tamils with 15.4 per cent, 9.2 Muslim and 0.5 per cent made up by 'others'.² Tamils live throughout Sri Lanka but are mainly concentrated in the Northern Province where they comprise 93 per cent of the population, and the Eastern Province, where they comprise 39 per cent of the population.³ Along with agriculture, fishing dominates the economies of the Northern and Eastern provinces.⁴ In May 2009, the Sri Lankan government announced its military victory over the LTTE and complete territorial control over Sri Lanka. Following the end of the war the military and security forces maintained a significant presence in the Northern Province, including in Jaffna district.⁵
18. Information before the delegate indicates fishermen were required to obtain passes for fishing in the Northern sea area but that in July 2011 an announcement was made by the government, fishermen were no longer required to obtain a pass.⁶ A Danish Immigration Service Report from 2010 noted some fishermen were beaten by the Navy for having gone fishing without permission in waters controlled by the Navy. This incident took place in the Kilinochichi district which is part of the Northern province.⁷ Another report observed local Tamil fishermen claimed they were being systematically denied access to fishing banks far from the coastline, while large Sinhalese vessels are granted licences. Tamil fishermen have to pay for licences that are geographically and temporally limited. Others pointed out that limited access to and poor

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ DFAT, "Country information Report Sri Lanka", 24 January 2017, CISED50AD105.

⁶ 'All restrictions on fishing in North lifted - Minister Basil Rajapaksa', Sri Lanka: Government of, 11 July 2011, CX268598

⁷ 'Human Rights and Security Issues concerning Tamils in Sri Lanka', Danish Immigration Service, Danish Immigration Service, 1 October 2010, CIS19345.

experience with bureaucracy, as well as language barriers, are the main reasons why Tamil fishermen are not granted concessions and franchises.⁸

19. Based on the applicant's consistent claims to have experienced problems with the Sri Lanka Navy and the above country information I accept the applicant faced challenges whilst working as a fisherman assisting his maternal uncle in the post war period in Jaffna including be asked to provide a portion of his catch. While the applicant claimed he was pushed into the water and swam to shore, he did not claim the navy personnel continued to pursue him following this incident when he refused to provide them with a portion of his catch. The applicant at his SHEV interview did not add to this claim nor did he indicate his uncle was having any ongoing problems with the authorities including from the Navy whilst fishing. The applicant also claimed to have worked in construction as indicated in both his SHEV application and arrival interview in the three-year period prior to his departure from Sri Lanka which indicates fishing was not his sole source of income. The applicant did not claim to have experienced any altercations or incidents of note with the authorities when working in construction.
20. With regards to the applicant's core claims that he came to the attention of the authorities because of his relationship with T, I have some significant concerns which causes me to doubt the credibility of this claim. The applicant claimed sometime in May 2012, T came to their parents' house to visit his sister J. The last time he had seen her was in 2005. T agreed to marry him. He last saw her [in] August 2012 when he dropped her at [the] bus stand and then [in] August 2012 the authorities detained him regarding T's disappearance. My concerns regarding this claim and the evidence provided by the applicant at his SHEV interview are as follows:
 - I note the applicant has consistently claimed to have been born on [date] (arrival interview, SHEV application and interview). At his SHEV interview the applicant confirmed the incident with T happened in 2012 the year he came to Australia. The delegate put to the applicant that he was [age] years old when he fell in love with T and the applicant stated 'yes'; T was [a few] years older than him. The delegate expressed surprise that a woman [a few] years older would be interested in a teenage boy. Asked how old he was when he met her, the applicant said [age] and he was in a relationship with her for two [years]. The delegate in his decision wrote in May 2012 the applicant would have been [age] in May 2012 and T [age], and [age] when he met T in 2011 two years previous. The delegate found it unlikely a [age]-year old boy would attract the romantic attention of a [age]-year old girl and did not accept the claim that the applicant had been in a two-year relationship to be credible. On the information before me, I am somewhat perplexed that the delegate would firstly find the applicant to be [age] in 2012 and that the applicant would agree. The applicant has consistently claimed to have been born on [date] and his Sri Lankan birth certificate and national identity card also indicate so. On my calculation this would make the applicant [age] years old in May 2012 not [a younger age]. At the applicant's SHEV interview his representative was present but he too did not seem aware of this error. While all parties concerned seemed to have overlooked the applicant's correct age, I am more alarmed that the applicant did not attempt to clarify his actual age ([age] years old) when he came to the decision, he wished to marry T and was subsequently detained and tortured by the authorities. Furthermore, at his SHEV interview he stated the relationship began two years earlier but according to his written claims when T first came to visit his sister in May 2012, he had not seen her since 2005, a seven-year period.

⁸ 'Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province', Landinfo, 01 December 2012, CIS25286.

- There are other inconsistencies that stand out between the applicant's written claims and his oral evidence given at interview. In his written claims the applicant claimed [in] August 2012 two armed men in civilian clothing riding bicycles stopped him in front of the [shop] in [Village 1]. The armed men spoke some Tamil. Twice in his statutory declaration the applicant claimed the men were armed. At his SHEV interview the applicant twice said four people came and questioned him on the [specified day] after he went to the [shops]. Asked by the delegate whether they had weapons on them; the applicant said they didn't, when they talk in public, they won't have weapons on them. When the delegate pointed out that in his statement, he had claimed it was two armed men in civilian clothes riding bicycles and sought clarification as to whether it was two or four men. The applicant said two men came and talked to him, on the same kind of bicycle two people were in the front and two behind and according to his calculation four people and two people came to talk to him. I do not find the applicant's explanation here satisfactory or persuasive.
- Another obvious discrepancy is what he claimed happened after he escaped. In his SHEV application the applicant claimed he escaped from the pass office on the third [night]. He was too afraid to return home hence he sought refuge in the [Location 1] in [Village 1]. The narrative he provided at his SHEV interview shifted considerably. He stated on the Tuesday night he was able to leave. Asked where he went, the applicant stated he went to his home and his mum and sisters were crying and asking where he was. He told them he couldn't stay; he had escaped from 'them' and they might come looking for him. They needed to tell them he had not come there, and he needed some money for his expenses, he took some money and left. His family were crying and coming after him, but he needed to leave as he could not put them in danger. The delegate pointed out in his statement he had claimed he was too afraid to return home and he went to [Location 1] in [Village 1]. The applicant stated he went and told them at home and then went to [Location 1]. The delegate repeated he had said the opposite in his statement, to which the applicant responded rather unconvincingly that he didn't know how to tell for a human being, the correct words would come and he couldn't tell exactly correct when something happened like that. At the end of his SHEV interview the applicant said when he went home it was only for five minutes. This clearly contradicts his initial claim of being too afraid to go home and I am again not persuaded by the applicant's response to the inconsistencies put forward to him.
- The applicant's account at his SHEV interview of how he escaped I also find incredulous. As already noted in his written claim he said he escaped on a [specified day] the third night but at his interview it became a Tuesday. While in his written claims he did not provide any details as to how he escaped, at his SHEV interview the applicant presented a rather far-fetched story. The applicant stated he was held for two days in a dark room and on the Tuesday night many people came to that place to get their fishing pass and when there were too many people, they were not in a position to keep everyone in captivity, so he left. Asked how he left, the applicant said when a fisherman goes fishing, they don't have anything on their upper body, no shirt or t-shirt and he left like a fisherman. Only the officers who saw him could identify him, but the others didn't know who he was, so he was able to leave along with the other fishermen. The delegate stated he thought he had been locked in a room to which the applicant responded they had locked him in a room but at that time too many people came and he was unsure what was going to happen to him; he was trying to move and was able to get out because he was scared he might 'leave' his life. The applicant confirmed he had a dislocated or injured shoulder, but he had one good arm, two good legs and a strong mind. He left thinking he needed to escape and with courage he left. I agree with the delegate on this

point, the applicant's account of how he escaped relying on his willpower and courage does not rationally account for how he managed to escape being locked in a room and with his injuries.

- The applicant also changed his evidence as to when he learned of T's LTTE background. In his SHEV application the applicant claimed it was only when he was detained, interrogated about T and shown a picture of her in her LTTE uniform, at that point he got to know T was an LTTE member. However, at his SHEV interview the applicant said T told him she was in the LTTE when he fell in love with her.
 - I also share the delegate's concern that the authorities would show an interest in the applicant when his sister J who was T's friend, and his other sister L who had undertaken compulsory LTTE training and his parents were not questioned given she stayed with the family. The delegate also noted his family had been able to apply for his birth certificate just after he came to Australia from a government office when he was supposedly under surveillance and this did not indicate he was of interest to the Sri Lanka authorities if they were able to access government services.
 - Lastly as the delegate noted the applicant failed to put forward this claim in his arrival interview as a reason for his departing Sri Lanka. The delegate observed the applicant in his arrival interview has been asked whether he or any of his family had been associated with any political group or organisation and he had said no but now he said that he had an LTTE operative living in his house and he was going to marry her. Furthermore, asked whether he had ever been detained by the police or security organisation and he said 'no' but now he was saying he had been detained by the CID for three days. The applicant confirmed he did not tell the Australian government about this incident and that the government suspected him of having links to the LTTE. Asked why, the applicant said at the time he had come through the ocean and was risking his life, he was without food and water for days and saving his life was the only thing on his mind at the time. At the same time, he was scared if told things like this or the whole truth he might be deported back, and he was scared too. His representative also confirmed at the end of the interview the applicant found it difficult to communicate at his arrival interview, the atmosphere was not conducive to him opening up and there was the fear factor. While I accept the applicant's boat journey to Australia would have been challenging and that the arrival interview is an imperfect process and it is not the opportunity for an applicant to provide their claims in full or for these claims to be tested, I consider it significant the applicant failed to mention this incident and presented contradictory information. I have listened to the recording of the arrival interview which was conducted using an interpreter in the Tamil language and the applicant did not sound fearful. He also did not present as not understanding the interpreter. The Departmental officer told the applicant that he was expected to give true and correct answers to the questions asked.
21. Given my many concerns identified above, I do not accept the applicant's claim that in 2012 he fell in love with his sister's friend T who was a former LTTE member and that she subsequently went missing. I do not accept the applicant was stopped by the authorities [in] August 2012, detained for three days in a dark room, tortured or that he was suspected of also being a member of the LTTE. I do not accept that the applicant escaped, sought refuge firstly in a [Location 1] in [Village 1] and then another [Location 2] in [District 1] for one month. I find that at the time the applicant departed Sri Lanka he was of no adverse interest to the Sri Lankan authorities.
22. I accept the applicant's sister L undertook LTTE training when they lived in the Vanni region between 1993 to 2003 given this was a former LTTE controlled area. Country information indicates the majority- Tamil civilian populations of the areas controlled by the LTTE were

required to interact with the LTTE as a matter of course.⁹ However, this occurred over 17 years ago and based on the applicant's own evidence his family members have not come to the attention of the authorities since his departure and the applicant did not indicate or claim that L was of interest to the authorities at the end of the 2009 civil war. Given this, I am not satisfied the applicant faces a real chance of any harm on account of this claim or his sister L's limited involvement with the LTTE over 17 years ago, on his return to Sri Lanka now or in the reasonably foreseeable future.

23. While I have not accepted the applicant was suspected of being a member of the LTTE prior to his departure from Sri Lanka, I accept the applicant is a young Tamil male who originates from the Northern Province of Sri Lanka and who lived for period of time in the Vanni, a former LTTE area and who had some low level familial links to the LTTE with his sister L.
24. Tamils, after Sinhalese, are the second largest ethnic group in Sri Lanka and comprise 93.8 per cent of the Northern Province. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, cast, sex, political opinion, place of birth or any such grounds.'¹⁰
25. The situation in Sri Lanka has shifted considerable since the end of the 26 year long civil war. In May 2009, the Sri Lanka government announced its military victory over the LTTE and complete territorial control over Sri Lanka.¹¹ The LTTE has not carried out attacks since 2009 and DFAT assesses that the LTTE no longer exists as an organised force inside Sri Lanka.¹² Following the end of the conflict government security forces arrested and detained large numbers of LTTE members and that security forces questioned and monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment. Although not officially mandated, in many areas the military took a visible and active role in civilian life. Since 2015, the government has publicly committed to reducing military involvement in civilian activities.¹³ The government no longer restricts travel to the north and east. It removed checkpoints on major roads in 2019, although some were re-established following the 2019 Easter Sunday terrorist attacks, these have since been removed.¹⁴
26. Members of the Tamil community in the north and east continue to claim that authorities monitor public gatherings and protests, and practice targeted surveillance and questioning of individuals and groups. Security forces are likely to monitor people associated with politically sensitive issues related to the war, including missing persons, land release and memorial events.¹⁵ The previous government relaxed some commemorations of events associated with the Tamil's armed struggle for statehood. While sources told DFAT there is monitoring by the authorities, Tamils have been free to hold public ceremonies marking 'Great Heroes Day' since 2016 and were increasingly comfortable marking such events.¹⁶
27. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Physical violence against those being monitored is not common.¹⁷ Whilst the country information does indicate Tamils, particularly in the north and

⁹ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

east, may face harassment including monitoring, I am not satisfied this would amount to serious harm.

28. The UK Home Office concluded in 2017 a person being of Tamil ethnicity would not of itself warrant international protection. Furthermore, neither in general, would a person who evidences past membership or connection to the LTTE, unless they are perceived to have a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.¹⁸ The government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism to destabilise the unitary Sri Lankan state rather than treating all Tamil returnees with suspicion.¹⁹ There are a number of articles from the Tamil Guardian indicating the arrests of a number of former LTTE cadres in late 2018 and early 2019 but these appear to be due to recent events including the killing of two police officers and being found in possession of weapons, not because of their historic links to the LTTE.²⁰
29. DFAT also confirms Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. DFAT assesses that Tamils are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links and the authorities were not actively looking for non-rehabilitated former LTTE members. One rehabilitation centre (of originally 24) remains open and currently houses one former LTTE member.²¹ The applicant has not claimed to have been involved in Tamil politics or separatist activities either in Sri Lanka or Australia nor has he claimed that any of his family members are. I am not satisfied the applicant will be imputed to support the LTTE or be associated with it based on the fact he is ethnically Tamil given his lack of past individual involvement or direct association with the LTTE (other than his sister's LTTE training), and on the evidence before me, he is not involved in Tamil separatism.
30. The Prevention of Terrorism Act (PTA) was enacted as a temporary measure in 1979 to counter terrorism and was made permanent in 1982. During the war the authorities detained more Tamils under the PTA than any other ethnic group. Whilst the PTA remains legally in force it was effectively suspended between 2016 and 2018 following the government commitment to repeal and replace it; however, during this time it was still used sporadically. It was used to detain persons following the 2019 Easter Sunday attacks.²² Country information indicates it was the Muslim community which was targeted by the authorities following the Easter Sunday attacks. The Muslim community has come under increased scrutiny as part of the government's counter terrorism efforts following the Easter Sunday attacks monitoring signs of radicalism and 2,000 Muslims were questioned and, in many cases, detained for 'extremism' on the basis of limited evidence. Muslims have reportedly been targeted for vehicle searches at security roadblocks throughout the country.²³ In early July 2019, police said 575 people had been arrested under the PTA; the majority being 537 Muslims, then 25 Sinhalese and 13 Tamils, while hundreds more had been arrested under emergency regulations. Country information indicates more Sinhalese and Muslims were arrested than Tamils.²⁴
31. I have accepted the applicant experienced problems with the Sri Lankan Navy whilst fishing with his uncle. The applicant did not state his uncle continued to experience these problems and fishermen have not required passes since 2011. As already noted, the applicant did not claim to

¹⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁹ Ibid.

²⁰ 'Two former LTTE cadres detained and 20 people questioned over Batticaloa police murders', Tamil Guardian, 3 December 2018, 20190722164516; 'Police target former LTTE cadre over Vavuniya search', Tamil Guardian, 6 January 2019, 20190722164330; 'TID arrests former LTTE cadre', Tamil Guardian, 20 January 2019, 20190722164145.

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

²² Ibid.

²³ Ibid.

²⁴ Ibid.

experience any harm whilst working in construction the three years prior to his departure. At his SHEV interview the applicant stated he was currently working full time for the council concreting footpaths. DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination, including in their ability to access education, employment and housing.²⁵

32. Some members of the Tamil community report discrimination in employment, particularly in relation to government jobs. Even the Tamil dominated north and east have relatively few public servants. DFAT assesses there is no official discrimination on the basis of ethnicity in the public sector employment. Rather, Tamils under-representation is largely the result of language constraints and disrupted education because of the war.²⁶ Tamils have a substantial level of political influence, and their inclusion in political dialogue has increased since the change of government in 2015. DFAT assess there are no barriers to Tamil political participation.²⁷
33. Whilst I note the poor economic conditions and livelihood opportunities are more limited in the Northern Province with unemployment at 7.7 per cent, Sri Lanka's economy has expanded significantly since the end of the war and post-war reconstruction has benefited the majority of the population in the Northern and Eastern Provinces, particularly in areas isolated by the war.²⁸ Taking this country information into consideration and the applicant's personal circumstances including his recent work experience in Australia as a council worker and his past work experience in Sri Lanka both in construction and fishing, I am not satisfied the applicant will not be able to work, or that he will suffer significant economic hardship or he will be denied a livelihood or denied access to basic services such that this will threaten his capacity to subsist.
34. The applicant's representative submitted in the applicant's post SHEV interview submission that the applicant as a member of the Tamil ethnic minority there is a real chance he will be exposed to serious and or significant harm as a result of the 16 November 2019 Presidential election when Gotabaya Rajapaksa won a decisive victory. Country information noted the Tamil minority and victims of human rights abuses fear Gotabaya, the former wartime defence minister under his brother, Mahinda Rajapaksa, the former president.²⁹ Other information before the delegate indicates Gotabaya named his brother Mahinda Prime Minister and that both brothers are credited with defeating the LTTE, with the security services they controlled accused of war crimes and multiple human rights abuses.³⁰ DFAT reported that local sources, both Tamil and non-Tamil, expressed concern human rights improvements achieved since 2015 could be reversed if Mahinda Rajapaksa, or an individual close to him returned to power.³¹ The International Crisis Group reported in late 2019 Tamil journalists and editors have also been targeted including individuals who previously covered the war.³² In January 2020 the International Truth and Justice Project observed Gotabaya's strategy was to take organisations and individuals who document, report and litigate on behalf of victims, especially Tamils in former conflict areas and crush any opposition and suppress dissent. It also noted the new president has been appointing many war time cronies in the military to key posts in state

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

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²⁹ 'The Terminator': how Gotabaya Rajapaksa's ruthless streak led him to power', The Guardian, 17 November 2019, 20191118111230; 'Sri Lanka to hold presidential election on November 16', Aljazeera, 18 September 2019, 20190919133747.

³⁰ 'Sri Lanka's new president picks brother Mahinda Rajapaksa as PM', Aljazeera, 21 November 2019, 20191121171701.

³¹ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³² 'Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure', International Crisis Group (ICG), 18 November 2019, 20191119144914.

institutions and he had already appointed many war individuals accused of corruption and alleged to have committed war crimes to his inner circle.³³

35. A Tamil Net article of 1 July 2020 provided by the applicant's representative discusses the arrest and detention of 22 Tamils under the allegation of attempting to regroup armed struggle in the previous six-month period.³⁴ I am mindful of the UK Home Office comments that the scale and extent of arrests and detentions is difficult to quantify and reliable information is not available noting the lack of neutrality in the pro-Tamil reportage.³⁵ In the absence of any significant concrete changes to government policies and practices, I agree with the delegate that it is entirely speculative to suggest the election of Gotabaya Rajapaksa late last year will lead to a changed attitude by the Government towards the Tamil community, and will result in a deterioration in general conditions in Sri Lanka, or more particularly that it increases risks in Sri Lanka to those with profiles like the applicant or to Tamils in general.
36. Relying on an uncited Tamil Net article of 17 March 2020, the applicant's representative further submitted the president's appointment of his war-crimes alleged genocidal commander Lt. General Shavendra Silva to "spearhead the National Operation Centre for Prevention of COVID-19 Outbreak" in Sri Lanka, is likely to instil fear in the minds of Tamils living in Tamil majority areas.³⁶ Furthermore, Sri Lanka's response to the pandemic includes a nationwide curfew, persons being returned from overseas transported to quarantine centres and hundreds being arrested for breaking strict curfew conditions.
37. The delegate, in responding to the inferred claim the Sri Lankan authorities were exploiting the COVID-19 pandemic in order to restrict freedom of Tamils observed parts of Australia, notably Victoria, had been subject to very restrictive lockdowns including an evening curfew and restrictions on daytime activities. Australians faced both domestic and international travel restrictions and punitive financial penalties for breach of such restrictions. The articles again relied on by the representative are predominantly from Tamil websites including Tamil Net and the Tamil Guardian and these present a partisan view. On the information before me, I am not satisfied that Sri Lanka Tamils are specifically targeted or discriminated against by the Sri Lankan authorities over other ethnic groups, including the Sinhalese majority, in their efforts to control the spread of coronavirus including through curfews, travel restrictions and quarantine.
38. I accept there are still reports of continued human rights violations and the authorities acting with impunity in Sri Lanka. The credible country information before me is that while it is not without issue, the security situation has improved considerably since the end of the conflict, particularly amongst the Tamil population. I am not satisfied that Tamils are being systematically targeted and subjected to persecution because of their ethnicity or provenance. Based on the information before me, the improved conditions for Tamils in general including those originally from the Northern province, the significant passage of time since the war ended 11 years ago, and the fact that I have found the applicant was not of any adverse interest to the authorities at the time he departed Sri Lanka in 2012, I am not satisfied the applicant faces a real chance of any harm from the Sri Lankan authorities now or in the reasonably foreseeable future on his return to Sri Lanka on account of the fact he is a young man of Tamil ethnicity from the Northern

³³ 'SRI LANKA: AND THE CRACKDOWN BEGINS', International Truth and Justice Project, Journalists for Democracy in Sri Lanka, January 2020, 20200114142534.

³⁴ 'New secret unit among four SL military and police squads competing to arrest Tamil youth in North', Tamilnet, 1 July 2020.

³⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826, [2.3.12], p.7.

³⁶

Province, with links to a former LTTE controlled area and who has relatives with previous low level LTTE involvement.

39. The delegate noted that according to departmental records, the applicant was included in the list of detainees inadvertently published by the Department in February 2014. The applicant was advised of this by letter on 14 March 2014 and the delegate observed the applicant had not raised any claims arising from this incident. The applicant has not raised any claims in his submission to the IAA about the website disclosure addressed by the delegate's decision and I have not considered this matter further.
40. The applicant claimed if he returned to Sri Lanka, he could be seriously harmed by the Sri Lankan authorities because he departed Sri Lanka illegally and had claimed asylum; he feared he would be imprisoned for a long time. The applicant has consistently claimed throughout the protection application process to have departed Sri Lanka by boat illegally without a passport and I accept that he did so. There is no information before me to suggest the applicant was anything other than a passenger on the journey. The applicant has claimed asylum in Australia. I accept that on his return to Sri Lanka the applicant may be identified by the Sri Lankan authorities as a (Tamil) asylum seeker or failed (Tamil) asylum seeker or returnee from a western country who departed Sri Lanka illegally.
41. Sri Lanka's Constitution entitles any citizen 'the freedom to return to Sri Lanka'. The Immigrants and Emigrants Act (the IE Act) governs exit and entry from Sri Lanka and makes it an offence to depart other than via an approved port of departure, such as a seaport or airport. Returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under the IE Act.³⁷ According to DFAT, such persons are very likely to be questioned at the airport, enquiries undertaken and charged with an offence under the under the IE Act. DFAT reports that passengers on a people smuggling venture (such as the applicant) are fined, usually between AU\$122 and AU\$162, and are not subject to a custodial sentence.³⁸
42. It is possible that as part of this process, a returnee may be held or several days at the airport if a magistrate is unavailable but the country information indicates that they are not subject to mistreatment at the airport. It also indicates returnees are treated the same regardless of their ethnicity and religion. If a returnee pleads guilty, they are fined (which may be paid in instalments) and are free to go. If they please not guilty they are granted bail immediately on the basis of a personal surety or guarantee by a family member. There may be ongoing costs associated with Court visits.³⁹
43. There is information in the review material, although somewhat dated, of a small number of Tamils being arrested and detained on their return for extended periods of time however those arrested have a profile, those known to have been associated with the LTTE including former LTTE members, or those suspected of having links to Tamil separatism.⁴⁰ The applicant does not fit this profile. I have found the applicant not to have been involved in any Tamil separatist activities in Australia and I have found there is no real chance of the applicant being subject to

³⁷ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ 'SL military continues to arrest Tamils from East returning from Middle-East', Tamil net, 31 May 2015, CXBD6A0DE7540; '16 Batticaloa Tamils arrested within last 100 days at Colombo airport', Tamil net, 03 May 2015, CXBD6A0DE6027; '10 Tamils arriving in Lanka arrested', Sri Lanka Mirror, 04 March 2015, CXBD6A0DE6065; 'UNSTOPPED: 2016/17 TORTURE IN SRI LANKA', International Truth and Justice Project, 14 July 2017, CISED50AD4849.

any harm on account of his claims to have been in a relation with T a former LTTE member because I have not accepted these claims.

44. I am not satisfied the applicant will be imprisoned for a long time on his return to Sri Lanka. I accept the applicant will be questioned on his return to Sri Lanka. There is nothing in the information before me to suggest the applicant will plead not guilty and I consider he will most likely plead guilty. I accept the applicant will be subject to questioning, a relatively brief period of detention and a fine upon their return to Sri Lanka. In any event, it is clear the IE Act provisions that deal with a breach of the departure laws from Sri Lanka are not discriminatory on their face, nor do they disclose discriminatory intent nor are they implemented in a discriminatory manner. Moreover, I do not accept that these processes and penalties rise to a level that may be regarded as serious harm in this case. I also find the imposition of a fine, surety or guarantee does not of itself, or when combined with the brief detention, constitute serious harm.
45. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms and there is no information before me to suggest it is applied in a discriminatory way. I find that the processing, investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act. I note the applicant has been working in Australia. There is nothing in the information before me to support a finding that he would be unable to pay a fine, or that their family members in Sri Lanka would not be able to act as guarantor for their release if it is necessary.
46. The Sri Lankan government has consistently stated refugees are welcome to return to Sri Lanka. DFAT notes that despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return and most returnees have incurred significant expenses or debt to undertake their journey. Some refugees reported social stigma on return to their communities. Overall DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Many returnees have difficulty finding suitable employment and reliable housing; those who have skills in high demand are best placed to find well paid employment. DFAT understands some returnees including returnees to the north and east with suspected LTTE links have been subject to monitoring including visits and telephone calls from the CID; most are not actively monitored on an ongoing basis.⁴¹ I find the applicant does not have a profile to warrant any attention from the authorities on this basis and I am not satisfied he will be subject to monitoring on his return. The applicant has also not claimed to owe anyone money for his travel to Australia.
47. The applicant is [age] years old. I consider it highly likely the applicant will return to Jaffna in the Northern Province, where he originates from and where his parents [and] sisters continue to reside. The applicant has recent work experience in Australia, and previous work experience in Sri Lanka. The applicant has maintained regular telephone contact with his mother. I accept the applicant may face some practical challenges re-integrating but overall I am not satisfied that any challenges the applicant may face re-establishing himself in Sri Lanka, and finding employment, or any social stigma he may experience as a returning asylum seeker or returnee from Australia amounts to serious harm for the applicant.
48. I am not satisfied the applicant faces a real chance of persecution on the basis of being a returned (Tamil) asylum seeker/failed asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future.

⁴¹ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

49. Considering the applicant's circumstances and profile as a whole and in the context of the current country conditions in Sri Lanka, I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

50. 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

51. 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

52. 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.

53. 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.

54. I accept that the applicant may face some treatment and challenges including employment as a returnee to the north or failed asylum seeker. I am not satisfied that there is a real risk the applicant will be subject to the death penalty or will be arbitrarily deprived of his life or will face torture. Nor am I satisfied in relation to this treatment and challenges that there is any intention to inflict severe pain or suffering, pain or suffering that could reasonably be regarded as cruel or inhuman in nature or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of cruel or inhuman treatment or punishment or degrading treatment or punishment.

55. I have otherwise concluded that the applicant does not face a real chance of any harm for the reasons claimed. Given 'real chance' and 'real risk' involve the same standard, I am not satisfied he faces a real risk of harm on these bases. For the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary consequence of the applicant's removal to Sri Lanka, he will face a real risk of significant harm.

Complementary protection: conclusion

56. 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.