



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09415

SRI LANKA
IAA reference: IAA21/09414

SRI LANKA
IAA reference: IAA21/09413

SRI LANKA
IAA reference: IAA21/09417

SRI LANKA
IAA reference: IAA21/09416

Date and time of decision: 12 August 2021 13:53:00
M Simmons, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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 applicants (the applicants) claim to be a family unit that are ethnically Tamil and Sri Lankan nationals. They comprise a husband (first applicant), wife (second applicant) and their three children (third, fourth and fifth applicants). The fourth and fifth applicant were born in Australia. On 1 July 2017 they lodged applications for temporary protection visas. The first and second applicant attended interviews to discuss their protection claims on 5 May 2021. On 23 June 2021 delegate of the Minister for Immigration refused to grant the visas.

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's provided written submissions via their representative on 11 July 2021. To the extent these contain legal argument or address the conclusions of the delegate, or restate the delegate's findings, they do not constitute new information and have been considered. The submission cites 2020 reports from the United Kingdom Home Office and the Office of the High Commissioner for Human Rights which were before the delegate and are not new information.
4. The submission also contains new information from the matter of *KK and RS v Secretary of State for the Home Department (KK and RS)*, a case from the UK Upper Tribunal (Immigration and Asylum Chamber)¹. A copy of that decision was also provided. This case was decided on 27 May 2021, around four weeks prior to the decision of the delegate. The case concerns Tamil diaspora political activity claims, which the applicants have raised, and it also comments on various country information reports on Sri Lanka including reports from the United Kingdom Home Office (UKHO) and the Australian Department of Foreign Affairs and Trade (DFAT) that were relied upon by the delegate.
5. The lawyer's submission to the IAA does not seek to explain how the new information from this source meets the criteria in s.473DD. I am not satisfied it is credible personal information that may have affected consideration of the applicant's claims, rather it contains guidance regarding how decisions makers in the United Kingdom about the assessment of various reports and protection claims regarding Sri Lanka. I am not satisfied s.473DD(b)(ii) is not met. The judgment was promulgated well before the delegate's decision and other information which post to dates that judgment was provided to the delegate by the representative before he made his decision. I do not accept that this information could not have been provided before that decision. The requirements of s.473DD(b) are not met. However, I have decided to obtain the *KK and RS* decision myself. I am satisfied that there are exceptional circumstances justifying my consideration of information this source. The information provides very recent and high-level analysis and expert opinion on a number of country information reports which were central to many of the conclusions made by the delegate, and also includes detailed analysis on Tamil diaspora activism claims which these applicants have raised. It provides commentary on the current political environment and the nature of certain diaspora organisations. I have considered the information from this case.
6. The submission also includes references to a June 2021 SBS News report and a June 2021 press release from human rights lawyer Yasmin Sooka. The representative has not provided copies of

¹ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

these articles, and has not clearly identified what information is new information from these sources, and has not provided submissions explaining either relevance of the new information or how it satisfies the requirements of s.473DD. Given the various instances of non-compliance with the practice direction, and noting they only reflect commentary on *KK and RS* when I already have before me the full judgment, I have decided not to accept this new information.

7. On 17 June 2021 the UKHO released an updated Country Information Report on Tamil Separatism Sri Lanka.² This report was published very recently and contains more recent details on the situation for persons affiliated with Tamil separatist included diaspora activism. This report updates the UKHO report relied upon by the delegate. I am satisfied that there are exceptional circumstances which justify consideration of this information and I have had regard to it.

Applicants' claims for protection

8. Only the first and second applicants have raised protection claims.
9. The first applicant's claims can be summarised as follows:
 - He is a Tamil Hindu who originates from Jaffna District.
 - He resided in an LTTE (Liberation Tigers of Tamil Eelam) controlled area for decades. His brother, [Mr A], was an LTTE cadre who was killed by the Sri Lankan Army (SLA) in [Year 1].
 - His younger brother, [Mr B], was also an LTTE member. The Criminal Investigations Department (CID) arrested him in [Year 4] on suspicion of having transported goods and weapons for the LTTE. He was held for 6 months during which time he was tortured. [Mr B] was released, but he was arrested again in [Year 5] and not released until [Year 6].
 - After [Mr B]'s arrest the applicant feared he would be suspected of LTTE involvement. He and his family went into hiding and moved around regularly.
 - Based on the past harm to his brother, and the applicant's imputed support for the LTTE and opposition to the present government, the applicant fears serious harm from the SLA and CID.
 - He cannot relocate to Western, Central or Southern parts of Sri Lanka because he does to speak Sinhalese.
 - He suffers from PTSD as a result of his experiences in Sri Lanka.
 - The applicants were in immigration detention on the relevant date when the Department of Immigration's Data Breach occurred.
 - The applicants have attended and participated in Tamil diaspora events in Australia between 2016 and 2021. In February 2021 they attended an event in [Location 1] in support of the Protest Demonstration March, which took place in Sri Lanka on 3 February 2021. The object of the event was to protest against various acts of alleged oppression and discrimination being perpetrated against Tamils in Sri Lanka.
 - A number of Tamil Diaspora groups and individuals, including the Tamil Co-ordinating Committee (TCC) and Australasian Federation of Tamil Associations (AFTA) were listed

² UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", June 2021 #20210624114752.

as proscribed groups by the Sri Lankan government in February and March 2021. The TCC is responsible for organising Tamil Martyrs Day and Tamil Genocide Remembrance Day each year, which the applicants attended.

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

- She is a Tamil Hindu and originates from an area previously under LTTE control.
- Her older brother, [Mr C], was accused of being an LTTE supporter.
- Her husband's elder brother, [Mr A], was an LTTE cadre who was killed in [Year 1]. Her husband's younger brother, [Mr B], was involved with the LTTE. [Mr B] was arrested in [Year 4] and held for 6 months and was arrested again in [Year 5]. He was not released until [Year 6].
- She has also attended and participated in Tamil diaspora events in Australia between 2016 and 2021.
- She is a Tamil Hindu woman who has lived in LTTE controlled areas and is imputed to support the LTTE. As a young Tamil woman she is in danger of being detained, tortured and raped by the police, if she sought help from the police.
- She has PTSD as a result of her experiences in Sri Lanka. She has diabetes and was referred for counselling in 2017 as a result of depression and emotional distress following the death of her mother.
- In February 2020, the SLA visited her father's home looking for people who had returned to Sri Lanka from overseas. He suffered a heartache as a result of this harassment, so did her brother.
- The applicant will be a failed asylum seeker if she returns to Sri Lanka.

Factual findings

Identity and background

11. The applicants have provided evidence in support of their claimed identity and Sri Lankan Nationality, including a copies birth certificates, national identities cards and a marriage certificate. The first and second applicant's evidence at interview about their identities and backgrounds mostly accorded with that set out in their visa application. I accept that the applicants' identities are as claimed, and I accept they are Sri Lankan Tamils and Hindus who originate from Jaffna in Sri Lanka's Northern Province. I accept that the first and second applicants are married, and that the third to fifth applicants are their children and that they are also Sri Lankan nationals as declared. The first applicant provided various documents pertaining to his qualifications and employment in Sri Lanka. I accept that he holds [qualifications] and that he worked at a government [Workplace 1] as [an occupation] in the years preceding his departure.

Familial LTTE links

12. The first applicant claims his older brother [Mr A] was a member of the LTTE and that he was killed in battle in [Year 1]. He discussed this with the delegate at interview. He also submitted a copy, with translation, of an extract from Veeravengaikal.com, a website which honours

members of the LTTE who died in battle. The extract indicates that his brother, also known as [Alias], died a 'heroic death during the attack on the Sri Lankan army [details deleted]', on [Date, Year 1]. The LTTE was formed in 1976 and launched an armed insurgency against the Sri Lankan state in 1983. It maintained de facto control of Tamil-populated areas in the north and east and at its peak in 2004, the LTTE had an armed force of approximately 18,000 combatants.³ I consider the applicant's claim regarding his brother's LTTE involvement are plausible, and on the material before me accept that he was a combatant who was killed in conflict nearly 30 years ago.

13. The second applicant claimed one of her brothers [Mr C] was not an LTTE member but was suspected of involvement with the group. This began in roughly [Year 3] and he was questioned and once detained for a day as a result. The second applicant has not suggested that her brother was ever detained for an extended period, such as in a rehabilitation centre. LTTE members and supporters were almost all Tamils, and security forces also imputed LTTE support based on ethnicity.⁴ Noting many Tamils who were not LTTE members were imputed with being LTTE supporters due to their ethnicity, I accept the second applicant's brother was suspected of LTTE involvement as claimed.
14. It is claimed that the applicants left Sri Lanka fearing adverse attention from the authorities emanating from their interest in the first applicant's younger brother, [Mr B]. At the interview with the delegate, the first applicant indicated his younger brother was in the LTTE from [Year 2] to [Year 4], and that he used to transport people between Colombo and Jaffna, and was also an intelligence officer. He claimed that his brother was arrested in [Year 4] when he was apprehended by the SLA. He was detained for six months in [Year 4], and released on the condition that he report regularly to the SLA, before being detained again in [Year 5]. Copies of a 'Detention Attestation from International Committee of the Red Cross' pertaining to the [Year 4] arrest, and a translation of 'Receipt of Arrest from the Ministry of Defence', pertaining to the second arrest in [Year 5], were provided. Country information indicates a large number of actual or suspected LTTE members were arrested at the end of the war, with most being sent to government-run rehabilitation centres, while some were prosecuted in the courts.⁵ I regard the applicant's evidence regarding [Mr B]'s LTTE involvement as credible and I accept that [Mr B] was an LTTE member, and that he was arrested in [Year 4], and again in [Year 5].
15. However, I have real doubts in relation to [Mr B]'s claimed on going interest with the authorities. In the 2017 visa application the first applicant states [Mr B] was 'released in [Year 6] and on reporting conditions to date'. At the protection visa interview, however, he indicated neither he, nor any of his family, had seen or spoken to his younger brother since his first arrest in [Year 4]. When asked to comment on this the first applicant claimed that friends of theirs saw his brother in [Year 6], which is how he knew he had been released. The applicant's evidence does not suggest that [Mr B] had a senior or any role of note within the LTTE. Moreover, if he was of such interest to the authorities due to his LTTE involvement, it strikes me as quite unlikely that he would be released from arrest in [Year 4] as efforts to quash the LTTE were at their peak. I do not accept either that [Mr B] remained in prison until [Year 6] or that he remained of ongoing interest to the Sri Lankan authorities until 2017. I consider these to be exaggerations.
16. It is claimed after [Mr B] was arrested that the first applicant and his family became targets of the Sri Lankan authorities. As the SLA and CID were searching they went into hiding, living

³ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

⁴ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

⁵ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

between two different locations in Jaffna, and generally being discreet. The first applicant continued to go to work during this time but would go straight home afterwards. This continued from [Year 4] until they departed from Sri Lanka in 2012. He was never located or questioned directly by the CID, SLA or any other authority, in relation to his perceived links to the LTTE and was never arrested or detained himself. The CID came to his parent's house once while he was at work.

17. In addition to carrying out [specified] work, the first applicant also held a government job at Jaffna's [Workplace 1] from [Year 4] until 2012. He indicated that the government identity he held related to his employment meant he could travel to and from work safely. He claimed the authorities were not allowed to enter his place of work, so they were unable to try and question him there. In the meantime, he claimed, they were still searching for him at the houses he had been hiding out in. I do not find this aspect of the applicant's narrative at all persuasive. I do not accept the authorities were interested in pursuing him at all during this period. I consider if they wished to locate him it would have been relatively straightforward for them to do so, noting he continued to work at the same government [Workplace 1] from [Year 4] until 2012. I do not accept his contention that his place of work, a government institution, was off limits to the authorities including in respect of their considerable efforts to pursue Tamil separatists at that time.⁶ While it may be that case that having a government identity enabled the applicant to move around more freely, I do not find it plausible that the applicant continued carrying on his employment as usual while concurrently living discreetly outside of work hours and fearing imminent detection at his place of residence. I also note that some of the employment documents submitted by the applicant indicate that he the applicant a number of seminars and courses in public spaces in Jaffna during the period he claims he was living discreetly. Given the applicants remained living in Jaffna from [Year 4] until 2012, that the first applicant was never arrested or detained, never spoke directly with anyone from the SLA or CID, and that first applicant carried working at the government [Workplace 1] without incident, I do not accept that the applicants were of any adverse interest during this period including up until their departure from Sri Lanka.
18. The applicants claim they departed Sri Lanka via Colombo airport, using Sri Lankan passports in their own names, which they obtained by paying a person to deal with the passport office on their behalf. It is also claimed that they paid a bribe via a CID connection to ensure that they were able to exit via the airport. I accept that they left Sri Lanka using passports issued to them in their own names by the Sri Lankan government. However I am not satisfied they were of any interest to the authorities for any reason at the time of their departure, and I do not accept that they either used an interlocuter to obtain their passports or that they paid a bribe to secure passage through Colombo airport.

Data breach, Returning asylum seeker

19. Information in the visa application and the representative's submissions confirm that the applicants were in Australian immigration detention in January 2014. Like the delegate, I accept that when the applicants were held in immigration detention, some of their personal information was inadvertently released online by the Department of Immigration.
20. I also accept that were the applicants to return to Sri Lanka, they would do so after having resided in Australia for a number of years and after having requested asylum here.

⁶ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

Diaspora activities in Australia

21. I accept the applicants have attended Tamil war memorial events and protests in Australia. They provided photographs which are described as depicting Tamil Martyrs Day events on 27 November 2016, 27 November 2017 and 27 November 2018. The first applicant and second applicants their children are visible in some of the images, as is LTTE imagery including the tiger insignia and what appears to be mock graves as memorials for certain war dead. The applicants also claimed they attended protest events, including a February 2021 protest march in [Location 1] which was coordinated in support of Tamil rights demonstrations occurring in Sri Lanka at that time. They have provided photographs of an event labelled [February] 2021. They have no provided photos of other protest events. The first applicant is photographed standing with a group of men [description deleted]. The applicants assert they were motivated to attend the demonstrations in order to protest against the ongoing mistreatment of Tamils by the Sri Lankan authorities. They also indicated that these activities are part of their involvement in the Australian Tamil community. Given the background I accept they hold, including their familial LTTE links and having resided in a conflict affected area of Sri Lanka , I am satisfied that there are social, cultural and personal motivations for them engaging in these diaspora activities that are unrelated to their migration status. I am satisfied these activities were not engaged in for the sole purpose of enhancing claims to be owed Australia's protection.
22. The applicants provided a letter of support from [D], who attests to the applicants' attendance at the above events. That letter explains that the Tamil Coordinating Committee (TCC) are responsible for organising diaspora activities attended by the applicant including Martyrs Day events. The letter is not from the TCC itself and the author does not appear to have any role in that organisation. It is not compelling evidence in support of the TCC's claimed involvement in Martyrs Day events.
23. The applicant's representative made submissions to the delegate on 27 April 2021 touching on the topic of proscribed Tamil diaspora groups, amongst other issues. Those submissions state that gazette No.2216/37 issued on 25 February 2021 includes the Australian Tamil Congress, National Council of Australian Tamils and Tamil Youth Organisations, amongst others. No reference for these contentions was supplied. In further submissions dated 8 May 2021 the representative contends that on 22 February 2021, the Australian Federation of Tamil Associations, Tamil Coordinating Committee, Australian Tamil Congress, and Tamil Youth Organisation were proscribed by Sri Lanka government gazette. Again these assertions are unreferenced and the relevant Sri Lankan government gazette was not submitted despite another unrelated and more recent gazette being submitted. I note that in *KK and RS* the organisations proscribed by the Sri Lankan government 25 February 2021 includes the Australian Tamil Congress, Tamil Coordinating Committee, Tamil Youth Organisation.⁷
24. When asked at interview by the delegate which groups he had been involved with, the applicant indicated that he simply referred the various groups as the 'Tamil Community' though he acknowledged that the groups may have various other names. I accept from the oral evidence and support letter various Tamil diaspora groups in Australia. I can accept that a mere attendee at yearly events, as the applicant described himself, he may not have been aware of which particular group or groups were organising events. I note that when asked if he was member of any political group, the applicant replied that he was not but that he regularly engages in Tamil social and cultural events and that he advocates for social and political issues affecting Tamils by taking part in community events and demonstrations. On material before

⁷ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

me I am not satisfied the Tamil Martyrs Day commemorations or any other activities attended by the applicants are organised by the TCC or another proscribed group. Nor am I satisfied that the applicant have had involvement with any entity proscribed by the Sri Lankan government gazette, noting the evidence on which groups are proscribed and which groups they may be affiliated with is vague and confused.

Medical conditions

25. In a statement provided on 27 April 2021, the applicants' migration agent stated both applicants suffer from PTSD as a result of their experiences in Sri Lanka and he reiterated this at interview. At the interview, the second applicant indicated she witnessed incidents of extreme harm, such as people being killed in the street. Given they lived through a period of extended conflict, I find it plausible the applicants were witnesses to such events. A letter regarding the second applicant from [E], Accredited Mental Health Practitioner, dated 25 April 2021 was provided. It states the second applicant became depressed and emotionally distressed following the death of her mother and that she suffers from worsening anxiety and depression as a result of uncertainty about her visa situation in Australia, and has acute symptoms of depression following the death of her father. This letter does not mention PTSD, but does state that the second applicant has from diabetes. I accept the second applicant suffers from depression and diabetes.
26. I accept the applicants may have been witness to violence during the civil war. However there is no independent evidence before me that either applicant has been diagnosed with PTSD. I do not accept the claim that they suffer from PTSD. I note neither applicant has raised any claim to fear harm due to any medical or mental health condition or an inability to access required treatment in Sri Lanka.

Harassment of family in Sri Lanka

27. At the protection visa interview, the second applicant claimed in February 2020 the SLA searched her father's home looking for returnees from overseas. She said they entered her father's home at night and that as a result of this search, her father had a heart attack and died. She said her brother also had a heart attack as a result of the search. This assertion is made in the letter from the mental health practitioner, dated 25 April 2021. No documentation evidencing the deaths of the second applicant's relatives or the circumstances of the passing was provided. I can accept that the second applicant's father and brother are deceased. I note that the applicant left Sri Lanka on valid passports issued in their own names via Colombo airport as such I consider that Sri Lankan authorities would be aware that they are no longer in the country. As such I consider it quite unlikely that the authorities would search for them at their relatives home around eight years after their departure. The applicant did not identify that it was her and her husband that the SLA were searching for, just that they were looking for someone in Sri Lanka from abroad. Relevantly I note that she has sisters ordinarily resident in [Country 1] and [Country 2], as per the details in her visa application. I am not satisfied on the available information that the applicants' father was visited by the SLA in connection with applicants as the authorities would know they are not in Sri Lanka.

Well-founded fear of persecution

28. 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.

29. In submissions to the IAA, referring to *KK and RS* and media commentary on that decision, it is contended that the 2019 DFAT report is ill drafted, factually inaccurate and should be set aside. The decision of *KK and RS* is before me and has been considered in my assessment, however the deliberations in that decision are not binding on the IAA and were made in a different jurisdiction under a different process. I note the Upper Tribunal did not set aside any country information reports. The judges analysed the evidence before them and gave reasons explaining the weight they were prepared to afford to the various reports, noting attributes that may have made certain reports more or less compelling. While noting some concerns with aspects of the DFAT report, the judges expressly stated that they have placed appropriate weight on the DFAT report when evaluating the country information as a whole.⁸ Ultimately the 2019 DFAT report is relied upon to support a variety of conclusions *KK and RS*, including in respect of the risk of harm during detention, use of 'stop lists', the risk to low profile LTTE members and arising from familial LTTE links.⁹ I have had regard to the judgment of *KK and RS* and the lawyer's submissions in respect of the DFAT 2019 report. I have considered it the context of the various sources of information on Sri Lanka that are before me, and as it relates to issues arising in this review.

30. The applicant's claim to fear harm owing to their Tamil ethnicity. United States Department of State notes that Tamils reported suffering systematic discrimination in university education, government employment, housing, health services, language laws, and procedures for naturalization of non-citizens.¹⁰ The UK Home Office report states that while there is some discrimination towards Tamils, they do not suffer persecution simply for their Tamil ethnicity.¹¹ Although reports persist of some ongoing monitoring and surveillance of the Tamil community, security measures such as military checkpoints and restrictions on travel to the north and east

⁸ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

⁹ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

¹⁰ US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

¹¹ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

have been lifted and monitoring in day to day life has decreased in recent years. In 2019, Tamils who had failed to secure asylum in Australia and since returned to the Northern Province, reported to DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.¹² The material before me does not suggest that Tamils presently face a real chance of harm in Sri Lanka solely because of their ethnicity.

31. I have accepted the applicants have historical familial ties to the LTTE. LTTE members and supporters were almost all Tamils, and security forces also imputed LTTE support based on ethnicity. Towards the end of the war, government security forces arrested and detained a large number of LTTE members, most of whom were sent to government-run rehabilitation centres. In the immediate post-war period Sri Lankan government forces continued to detain those with links to the LTTE, imputed or otherwise, and their use of torture was particularly brutal.¹³ The situation in Sri Lanka has shifted considerably since the end of the civil war. Tamil ethnicity no longer forms a basis for imputing LTTE of itself, nor does originating for an area previously under LTTE control. The LTTE in Sri Lanka itself is a spent force, and generally past LTTE connection would not warrant protection.¹⁴ In its January 2020 assessment from a fact finding mission to Sri Lanka, the UKHO reported that an NGO worker advised that if returning failed asylum seekers were found to have links to the LTTE they would likely face further questioning but it would depend on the case.¹⁵ While after the war whoever was connected to the LTTE would be arrested, sent to court and go through rehabilitation, the UKHO reported in October 2019 now just having supported the LTTE is not enough to be arrested.¹⁶ The Attorney General's Department and the Criminal Investigation Department told the UKHO that former LTTE cadres would only be of interest if there was a pending criminal case against them and that mere membership of the LTTE would not make someone of interest.¹⁷ While the authorities regard the Tamil diaspora with a generally adverse mindset, the UKHO reports that they do not consider the entire cohort as either holding separatist views or being politically active in any meaningful way.¹⁸ I accept that the applicants had brothers who were actual and/or suspected LTTE members, including at least one of whom was a combatant and war martyr. None of the applicants themselves were LTTE members. The country information before me does not support a conclusion that such LTTE affiliation would be of any interest to the Sri Lanka authorities presently or in the foreseeable future.
32. Persons most at risk are those perceived to have a significant role in relation to post conflict Tamil separatism.¹⁹ I accept that the applicants have taken part in war memorial events and demonstrations on Tamil issues while in Australia. In *KK and RS* the Upper Tribunal affirmed that the question of whether an individual has, or is perceived to have, undertaken a significant role in Tamil separatism remains in their view the appropriate touchstone when considering the risk arising from conduct outside Sri Lanka. The Sri Lankan authorities will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil

¹² DFAT, Country Information Report Sri Lanka, 3 November 2019, 20191104135244.

¹³ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009; DFAT, Country Information Report Sri Lanka, 3 November 2019, 20191104135244.

¹⁴ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', June 2021 #20210624114752; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009; DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

¹⁵ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

¹⁶ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

¹⁷ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

¹⁸ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', June 2021 #20210624114752.

¹⁹ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', June 2021 #20210624114752.

Eelam.²⁰ The term “significant role” in this context does not require an individual to show that they have held a formal position in an organisation, are a member of such, or that their activities have been “high profile” or “prominent”.²¹ Relevant though non-exhaustive factors, none of which will in general be determinative, may include:

- the nature of any diaspora organisation on behalf of which an individual has been active. Proscription will be relatively significant in terms of the level of adverse interest reasonably likely to be attributed to an individual associated with it, although its existence or absence is not determinative of risk;
- the type, extent, nature and duration of activities undertaken;
- any relevant history in Sri Lanka;
- any relevant familial connections.²²

33. I accept that the applicants have attended various Tamil events in Australia. I also accept the activities in question have been carried on for a period of roughly 6 years. While the applicants do have some historical familial LTTE links, those links did not impart any profile of interest when they left Sri Lanka and there have not been any new relevant familial LTTE activities or new familial LTTE links since that time. There is no suggestion that the applicants had any relevant Tamil separatist history in Sri Lanka themselves. Moreover, I consider the nature and extent of their involvement in activities in Australia is not significant. There is no indication their involvement was ever beyond that of an attendee. They have not suggested that they took part in organising, funding, promoting or presenting at any such events. The events they have attended appear to either mourn Tamil war dead or advocate for Tamil rights, rather than calling for a separate Tamil state. Though I accept such matters may certainly overlap, when viewed in its entirety, there is very little on the evidence before me to suggest that the applicants are opposed to the unitary Sri Lankan state. In this respect I note that some photos of war memorial events do clearly depict an LTTE logo. However in their evidence the applicants themselves have not espoused separatist views or a pattern of separatist advocacy. The first applicant indicated that he attended around 1-2 Tamil events per year, which I do not regard as overly frequent. I have had regard to the letter of support and photos from the events, and considered that such images may have been posted online. Beyond the February 2021 demonstration there is no indication that they have engaged in any other form of political activism, and they indicated they are not members of any particular group. Taking into account the entirety of the applicants’ evidence and the information before me in respect of Sri Lanka, I am not satisfied these applicants’ would be regarded by the authorities as having had a role of any note in Tamil separatist causes or that they may be so regarded in the foreseeable future.

34. I accept that the applicants’ views in support of Tamil issues and mourning war dead are sincerely held, and given their conduct in Australia over a number of years I accept that they may seek to engage in similar activities in Sri Lanka should they return there. DFAT reports that the Sri Lankan government has relaxed some restrictions on the public commemoration of events associated with the Tamils’ armed struggle for statehood, and although sources told DFAT there is monitoring by the authorities, Tamils have been free to hold ceremonies marking Great Heroes’ Day since 2016, and Tamils are increasingly comfortable marking such events.²³ The US Department of State more recently reported that in 2020 Tamils in Mullaitivu gathered

²⁰ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC); UK Home Office, Country Policy and Information Note Sri Lanka: Tamil separatism’, June 2021 #20210624114752.

²¹ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

²² *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC); UK Home Office, ‘Country Policy and Information Note Sri Lanka: Tamil separatism’, June 2021 #20210624114752.

²³ DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244.

peacefully to commemorate war victims on 18 May, the day the war ended in 2009.²⁴ Providing social distancing guidelines are adhered to, the government allows commemoration of those killed during the war, but there is likely to be consequences for those who would commemorate the LTTE, and have indicated commemorative events would be surveilled. The presence of security forces was notable at the largest event in Mullaitivu, however they did not disturb the commemoration. Later in the year Great Heroes Day commemorations on 27 November were banned, with police citing COVID-19 restrictions on public gatherings, and police searched for evidence of private commemorations of the birthday of deceased LTTE leader Prabakaran, on 26 November, and arrested some people for sharing content on social media that glorified the LTTE.²⁵ Country information indicates that activities comparable to those they have engaged in while in Australia, in terms of demonstrations in respect of Tamil issues and mourning war dead, are tolerated and do occur in Sri Lanka albeit with monitoring by the authorities. The applicants were not LTTE members and neither have ever espoused pro-LTTE views or a desire to celebrate or glorify the LTTE, including during their time in Australia in which they were seemingly free to do so. I note some of the images from martyrs day events attended by the applicants depicts the LTTE logo, but of itself I do not infer from that the applicants support a separate Tamil state when they have indicated their attendance at these events in Australia was to mourn war dead. Where they to return to Sri Lanka and attend Tamil demonstrations and war memorial events. I accept they may experience some monitoring, but reports do not suggest, and I am not satisfied that would amount to serious harm. I am not satisfied that they would be required to conceal or alter any truly held pro-LTTE or Tamil separatist opinions, as the material before me does not suggests they hold any such convictions and I am not satisfied they in fact do.

35. DFAT reports that violence and discrimination against women is prevalent in Sri Lanka. Local sources told DFAT that violence against women occurs throughout the country, across all ethnic groups and social strata. Violence against women is most common in domestic settings.²⁶ The material before me does not suggestion widespread violence by the Sri Lanka authorities against women because of their gender, ethnicity or religion, as the second applicant suggests. Country information indicates certain groups of women are subject to discriminatory treatment, such as the heads of female-headed households who are vulnerable to poverty, gender-based violence and sexual exploitation, and face obstacles to accessing services and employment opportunities.²⁷ Sexual harassment was common and was a particularly widespread problem in public transport.²⁸ I accept that the material before me notes that gender-based violence is prevalent in Sri Lanka, within family units, and that certain groups of women make face discrimination or harassment. There is nothing on the material before me to suggest that the second applicant is at risk of violence in the domestic setting, or that her marriage may break down leading to her becoming the female head of a household. There is no indication she has ever been a victim of domestic violence or sexual harassment previously, and there is no suggestion or indication of any risk of violence within her family unit. I note that the second applicant would return to Sri Lanka with her husband and children, and that she would have other familial and community connections there. Having regard to her circumstances, I am not satisfied that the second applicant faces a real chance of harm from the Sri Lanka authorities owing to her gender, even when viewed holistically with her

²⁴ US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

²⁵ US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

²⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244.

²⁷ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

²⁸ US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

background including her status as a Tamil Hindu with familial LTTE links and some diaspora Tamil and war related activities in Australia.

36. There is no information before me on the applicant's medical needs or the availability of any necessary services in Sri Lanka. The representative provided a March 2010 article from The Lance which notes Sri Lanka struggles with mental health challenges following the then recently concluded civil war. The article also indicates there is a social stigma about mental health in Sri Lanka, and that mental health care facilities are limited in rural parts of the country, which is broadly consistent with DFAT's 2019 assessment though some recent improvements are noted.²⁹ Notwithstanding the shortcomings of Sri Lanka's mental health care, neither applicant has raised any claim to fear harm due to their mental health condition or an inability to access required treatment on any basis including due to discriminatory treatment. Nor has it been suggested that the second applicant fears either being harmed due to her diabetes or being unable to access required treatment for that condition.
37. As they are not presently in possession of Sri Lankan passports, the applicants would need to obtain temporary travel documents from the Sri Lankan High Commission to facilitate any return to Sri Lanka. In *KK and RS* expert opinion to the Upper Tribunal asserted that before any person returns on a temporary travel document the authorities are likely to obtain information on them on matters including any involvement with diaspora groups, diaspora protests or war commemorations amongst others.³⁰ Involuntary returnees to Sri Lanka, are processed by various state agencies on arrival at Colombo airport. Checks of returnees' travel documents and identity information are undertaken against immigration databases, intelligence databases and the records of outstanding criminal matters.³¹ For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, determine if a person is trying to conceal their identity due to a criminal or terrorist background or if a person is attempting to avoid court orders or arrest warrants. This will sometimes involve interviewing the returning passenger and contacting his claimed home suburb or town. All returnees are subjected to this standard procedure, which does not involve mistreatment, regardless of ethnicity or religion.³² The information before me does not suggest that the applicants are subject of any outstanding criminal charges or that they may otherwise feature on a stop or watch list. Though I accept they may be questioned about their diaspora activities in Australia as part of standard returnee processing, noting I have found they have not had a role in Tamil separatism, and that the Sri Lankan authorities may have information about these activities, I do not consider there is a real chance of this leading to them being remanded in custody or otherwise subject treatment amounting to serious harm.
38. I accept the applicants have not resided in Sri Lanka for many years and that it may be inferred that they requested asylum in Australia, including because they were subject of a data breach. Country information does not indicate that a person with the applicants' backgrounds face a real chance of harm on return to Sri Lanka because they requested asylum in another country. DFAT reports that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries and most were Tamil. Any reintegration issues that a returnee may face are not considered by DFAT to be due to a failure to obtain asylum, but rather due to the employment and accommodation difficulties. There were some reports of social stigma from their communities upon return including resentment of the financial support provided to returnees. Overall,

²⁹ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

³⁰ *KK and RS (Sur place activities: risk) Sri Lanka* [2021] UKUT 0130 (IAC).

³¹ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

³² DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

DFAT's assessment is that societal discrimination is not a major concern for returnees, including failed asylum seekers. DFAT advised it is not aware of returnees, including asylum seekers, being treated in such a way that endangers their safety and security after their return.³³ The applicants have relatives including siblings in Sri Lanka. I am satisfied they will be able to return and establish themselves find a way to support and shelter their family, noting they have not indicated any concerns in this respect. I accept there is a chance as returning asylum seekers the applicants may experience some stigma, however I do not consider this treatment would amount to serious harm.

39. Various commentators have expressed concern in recent years about the ongoing use of torture against persons in the custody of the Sri Lanka authorities. In March 2021, the United States Department of State cited the Human Rights Commission of Sri Lanka (HRCSL) reporting the use of torture by police as endemic, noting many reports of torture referred to police officers allegedly "roughing up" suspects to extract a confession or otherwise elicit evidence to use against the accused.³⁴ The information indicates that there remains a risk of torture for certain individuals with profiles of interest to the authorities in their custody, including political activists and journalists amongst other.³⁵ However the material before me does not support a conclusion that the applicants have any profile such that the Sri Lanka authorities may wish to either detained or torture them for any reason. As such I do not accept that there is a real chance of that occurring.

40. I am not satisfied the applicants face a real chance of treatment amounting to serious harm for any reason advanced or arising on material before me. The applicants' fear of persecution is not well founded.

Refugee: conclusion

41. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

42. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

43. Under s.36(2A), a person will suffer 'significant harm' if:

³³ DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

³⁴ US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

³⁵ International Truth and Justice Project, 'Sri Lanka: And the Crackdowns Begin', January 2020, # 0200114142534; United Nations Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association', 5 May 2020, 20200622112923; INFORM Human Rights Documentation Centre, 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', 29 June 2020, 20200702160949; Office of the United Nations High Commissioner for Human Rights, 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 18 February 2020, 20200221140652; US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

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

45. I accept the applicants may experience some stigma within their community as returnees. I note that they will be returning to Jaffna where they have familial connections which will aide in their reintegration. I also accept that the applicant may face monitoring from the authorities should they attend war memorial events or Tamil rights demonstrations on return to Sri Lanka. I am not satisfied that any such treatment may amount to significant harm in the relevant sense. The material before me does not suggest, and I am not satisfied, it would involve a real risk of the applicants being arbitrarily deprived of life, being subjected to the death penalty or tortured. Nor does such treatment involve pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation.

46. As ‘real chance’ and ‘real risk’ involve the same standard.³⁶ 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 applicants’ removal to Sri Lanka, they will face a real risk of significant harm for any of the other reasons advanced.

Complementary protection: conclusion

47. 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 applicants will suffer significant harm: The applicants do not meet s.36(2)(aa)

Member of same family unit

48. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression ‘member of the family unit’ is defined in r.1.12 of the Migration Regulations 1994 to include spouses and children. I have before me a marriage certificate confirming the first and second applicants are married to each other, and birth certificates verifying the third, fourth and fifth applicants are their children. As such I am satisfied the second to fifth applicants are each a member of the family unit of the first applicant.

49. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

³⁶ *MIAC v SZQRB* (2013) 210 FCR 505.

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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.