



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09867

Date and time of decision: 10 November 2021 16:37:00
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) claims to be a Sri Lanka national of Tamil ethnicity. He arrived in Australia [in] November 2012 as an unauthorised maritime arrival. On 26 May 2017, he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 2 September 2021 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 13 September 2021 the Immigration Assessment Authority (IAA) received an email from the applicant which contained a submission in response to the delegate's finding and reasons for refusing his claims for protection. The submission mostly contains argument, it also reiterates the applicant's claims that were before the delegate, and I have had regard to this in my review.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He was born in [Year] in [City 1], Northern Province and is a Christian of Tamil ethnicity.
 - He went to primary school in [Town 1] then high school in [City 2]. In 2004 he moved with his uncle to [Town 1] where his family had land and went to [School].
 - Around 2006 he started working as [an Occupation 1] for his uncle. [Town 1] area is an LTTE controlled area. On three occasions the LTTE tried to recruit him. Twice he was asked to get in the LTTE vehicle to go to training but then was released. One time he was taken to their camp for a day but then released. This is because his paternal uncle and his son, as well as three cousins, had senior LTTE positions.
 - His family were in the intelligence division of the LTTE and were secretive of their roles and positions, so he is not aware of their ranks. One cousin was in the LTTE [Support] division and went through rehabilitation after being captured by the Sri Lanka Army (SLA) at the end of the war.
 - Around September 2009 four Criminal Investigation Division (CID) men came to his house. Two called him '[name]' and said they needed information from him. They took him to their camp, interrogated him, asking him if he had trained with the LTTE. They became frustrated when he said no because his uncles and cousins were LTTE.
 - On the third night in the CID camp, he was blindfolded, and three drunk CID started beating him. They hung him upside down and poured chilli powder on his body and private parts. This went on all night.
 - On the fourth day his family went to the police looking for him. The CID handed him to the police and falsely accused him of having an AK47 gun, doing bank robberies and abducting people. He was taken to a Magistrates Court. There was an identification parade, but no one identified him.

- As no decision was made by the court, the police kept him in [jail] for three months.
- Senior Sinhalese prisoners beat him up when they found out the CID suspected he was part of the LTTE. One Sinhalese prisoner sexually tortured him, attempted to rape him but he pushed him away. A prison warden intervened, took him to another cell then beat him. He finds it difficult to discuss. He was forced to sleep in the toilet.
- After three months his case went to court; his lawyer argued there was no evidence for the allegations. He was released with and required to report every Tuesday and Wednesday in [City 2] for two weeks. He then moved back to [Town 1].
- In December 2009 the CID came look for him. His parents called him on his mobile. He went to work for his uncle and lived in [Town 2] for two years staying in the houses they worked on. He managed to stay under the radar as he did not register with the [Town 2] police.
- His parents told him the CID and SLA would come to their house once a week looking for him. They would threaten his family and shout. After some time, they stopped coming once a week but only if there was a function on to see if he was there. The harassment of his parents continued until May 2016.
- He decided to leave Sri Lanka in 2012 because he did not want to keep hiding.
- He fears serious harm including more beatings, detention and torture if returned to Sri Lanka. The CID and SLA will start looking for him again. They will be angry he ran away and will think it is because he is an LTTE member. He fears the authorities will imprison him on false charges and jail him for years.
- He cannot relocate and live safely in a non-Tamil area.
- He fears harms as a failed asylum seeker who no longer has a National ID card. The authorities will assume he was an LTTE member. It is not possible in Sri Lanka to live without a National ID card.

Refugee assessment

6. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

7. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct

- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
8. The applicant has consistently claimed to be a Sri Lankan national. He has provided documentary evidence including copies of his Sri Lankan passport, National ID card, driver licence and birth certificate. I accept the applicant is a national of Sri Lanka, and that Sri Lanka is the receiving country for the purpose of this review.
 9. Based on the consistent oral and documentary evidence before me, I accept the following in relation to the applicant: He was born in [Year], [City 1], Northern province of Sri Lanka, is of Tamil ethnicity and a Christian. He resided mostly in [City 2] and after completing school, worked as [an Occupation 1] for his uncle between [City 2] and [Town 2]. His parents and two sisters continue to reside in [City 2].
 10. The applicant essentially claims that the LTTE attempted to recruit him three times, but he was able to avoid it because his uncle, and cousin had high ranking positions in the intelligence division of the LTTE. After the war in September 2009, the CID took him to their camp, interrogated and tortured him. He was handed over to the police, the CID making a false case against him. He was jailed for three months and released after his case went to court and his lawyer argued there was no evidence for the allegations. The CID continued looking for him.
 11. The applicant also participated in an arrival interview [in] January 2013 a couple of months after arriving in Australia. Asked why he left Sri Lanka, the applicant said he had been having problems with the SLA and the CID. Asked whether he had ever been arrested or detained by the police or security, the applicant said in September 2009 he was detained by the SLA and the CID was also involved. They suspected him of being an LTTE member. He was arrested and tortured and held in prison for three months. They created a story against him as he is not LTTE. He went to court and had a lawyer and they released him without charge. They were always looking for him. After Christmas they went to his house looking for him and asked his parents about him. Asked why they suspected him to be involved with the LTTE, the applicant said he was living in [Town 1] when the problems occurred, he had never entered a refugee camp, that is why they suspected him. The applicant stated he had no involvement with the LTTE.
 12. Information in his arrival interview is generally consistent with that presented in his SHEV application; however, I note the applicant made no reference to his uncle or cousins being high ranking LTTE members. Also, unlike his SHEV application, the applicant stated he had problems with the SLA along with the CID. In his SHEV application he only referred to the CID.
 13. The applicant took part in his SHEV interview on 2 June 2021. The applicant stated at the beginning of his interview he was not involved in any political groups and organisations in Sri Lanka and he was not interested in the LTTE. Questioned about his uncle's involvement, the applicant could only say his uncle was of a high rank and then he got injured, his leg was affected and then he was not able to continue so his son was forcibly recruited and received training. He couldn't say what his uncle's position was, they kept it confidential and his cousin held a position as [an Occupation]. His cousin joined in about 1996. He was too young to know when his uncle joined but he was about [age] when his uncle got injured so maybe 1994.

14. His uncle was currently living in [Town 1]. Asked if anything happened to his uncle after he left the LTTE, the applicant said because he lost his leg, he was not able to continue but he thought he got tortured. Asked again if anything happened to his uncle, the applicant said he didn't know if anything happened to him. At the end of his SHEV interview the applicant said his uncle set up his shop and was a successful businessman; his cousin had faced problems and was living in [Country]. He did not have any evidence to support that his cousin was living in [Country], nor did he know his immigration status.
15. The applicant's knowledge of his uncle and cousin's involvement in the LTTE lacked substance and I agree with the delegate that it would be reasonable to expect the applicant would have some extended knowledge of his uncle and cousin's roles with the LTTE. While the applicant was relatively young at the time of his uncle's involvement, that, he was ultimately detained because of his connection to them would create in the applicant a need to find out more given the alleged interest in him by the authorities.
16. It is also unclear why the applicant's uncle did not experience any questioning by the authorities regarding his involvement with the LTTE given he was relatively high ranking and involved in LTTE intelligence. While his uncle's involvement ceased in 1994, I would expect the authorities to have some interest in him given his son experienced problems following the end of the war and is now currently in [Country]. Instead the uncle has been able to establish a successful [business] of which the applicant was a part of.
17. The applicant claimed the LTTE attempted to recruit him three times in his SHEV application; however, at his SHEV interview the applicant stated the LTTE attempted to recruit him twice. Despite this, I accept the LTTE did attempt to recruit the applicant given this is supported by country information. The applicant was able to evade recruitment and I accept as he has consistently claimed, the applicant had no involvement with the LTTE.
18. Asked why the authorities suspected him of LTTE involvement, the applicant said because he lived in an LTTE area, his cousins' background and his cousins' friends became friends of his and because of this they suspected him of being in the LTTE. One day they came and blindfolded him, took him to a forest area, accused him of being an LTTE member and asked him where he was keeping the weapons. Asked when this was, the applicant said 2008. They tied his hands, put chilli powder in his eyes and penis and inserted a stick in his anus, then questioned him. When he said no, they tortured him some more. They detained him three days and after he was missing three days, his mother made a complaint to the police. The police contacted the authorities who handed him to the police.
19. The police charged him with having arms, kidnapping and took him to court. He was in prison, bailed and then he hired a lawyer who proved he was not guilty. Asked how long he was detained after he had been handed over to the police, the applicant said they kept him three days and then handed him to the police and the police took him to court the next day. The court sent him to jail and in jail he came out on bail, hired a lawyer, he won the case and so the court dismissed the charges. He stated he was in jail three months. He had a letter from his lawyer saying the court procedures he went through.
20. Asked what happened after his release, the applicant said he was staying home in [City 2] and working in [Town 1]. He sometimes came home to [City 2] and one day 'they' came, and his parents said the CID were looking for him and he escaped out the back. The CID came to his place in 2009 after the court released him.

21. The applicant stated his parents were not harmed but they were threatened and harassed. They were asked his whereabouts. His uncle helped him to work out of the city and he got this opportunity to come to Australia without going to his home. Asked whether anything happened to him after his release from prison until he left for Australia, the applicant said during that time he kept his movements out of sight so nothing happened to him but when they visited his parents at home, that made him decide to leave Sri Lanka. The applicant confirmed he was not convicted of anything, the court said they were false allegations and released him. The last time the authorities visited his parents was two years prior and he told his parents to tell them he was in Australia, the authorities verified that, and they stopped coming.
22. The following discrepancies are apparent between his SHEV application and his oral evidence given at his SHEV interview:
- The applicant claimed the CID took him in September 2009 but at his SHEV interview he stated it happened in 2008.
 - He introduced the claim of having a stick inserted in his anus at his SHEV interview.
 - He claimed it was on the fourth day that his family started looking for him and went to the police but at his SHEV interview it was after three days his mother made the complaint to the police.
 - He claimed he was not at home when the authorities came looking for him after his release from prison and his parents called to tell him but at his SHEV interview he said he had to escape out the backdoor when the authorities came.
 - He claimed to have lived in [Town 2] for two years staying in the houses he worked at for his uncle, but the applicant failed to mention this at his SHEV interview, only that he was keeping out of sight.
 - While he claimed his parents told the CID and SLA he was in Australia in 2016 and there were no more visits after that, at his SHEV interview the applicant said the authorities had last gone to his house two years ago (2019).
23. The applicant provided documents in support of his claims. There is a letter dated 29 June 2017 from an attorney at law based in [City 2]. It confirms the applicant was arrested by the Sri Lanka police and army in 2009 with a fabricated case against him under the 'Fire Arms Ordinance', and two cases were filed at the [City 2] Magistrate Court, the cases were both discharged in the year of 2012. This contradicts the applicant's claims that the case against him was dropped in 2009. This is a difference of three years.
24. The Australian Department of Foreign Affairs and Trade (DFAT) assesses that document fraud is common in Sri Lanka. Genuine identity documents can be obtained by submitting fraudulent supporting documents, including birth certificates and NICs. Counterfeit documents are the primary cause of fraud in the issue of NICs, passports and driver's licences. Attempts to use fraudulent documents are common and DFAT is aware of fraudulent sponsor letters and employment letters being presented by asylum seekers.¹ Given this and the three-year discrepancy, I am not satisfied this is a genuine document and give it no weight.
25. Sri Lanka, formerly Ceylon, achieved independence from the United Kingdom (UK) in 1948. Historically, relations between Sri Lanka's majority Sinhalese and minority Tamil communities

¹ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244.

have been tense. A number of militant groups emerged to advance the cause of Tamil statehood. The most prominent of these, the LTTE, was formed in 1976 and launched an armed insurgency against the Sri Lankan state in 1983. The LTTE – commonly known as the Tamil Tigers – established and maintained de facto control of Tamil-populated areas in the north and east. The LTTE gained notoriety for its recruitment of children and; in particular, use of suicide bombings.²

26. At its peak in 2004, the LTTE had an armed force of approximately 18,000 combatants. The LTTE had an intelligence wing, a political wing and an extensive administrative structure based in its de-facto capital of Kilinochchi (Northern Province). The majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course. The LTTE was supported by both voluntary and forced recruitment of Tamils.³
27. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war. While LTTE members and supporters were almost all Tamil, security forces also imputed LTTE support based on ethnicity, and emergency regulations were, at times, applied in a discriminatory manner.⁴
28. The *Prevention of Terrorism Act* (PTA) was enacted as a temporary measure in 1979 to counter separatist insurgencies. It was made permanent in 1982. The PTA is not part of regular criminal law, and contains special provisions on detention and the admissibility of confessions. The PTA allows arrests for unspecified “unlawful activities”, permits detention for up to 18 months without charge and provides that confessions are legally admissible. The PTA was used mainly to target those suspected of involvement with the LTTE.⁵
29. Government forces re-took the eastern part of the country from the LTTE in July 2007 and, in January 2008, launched a major offensive to capture remaining LTTE-controlled areas in the north, culminating in the elimination of most of the LTTE’s senior ranks, including its leader, Velupillai Prabhakaran. The LTTE surrendered in May 2009. Towards the end of the war, government security forces arrested and detained a large number of LTTE members. The government managed a large-scale rehabilitation process for former LTTE members and as of March 2019, 12, 191 had been rehabilitated.⁶
30. DFAT assessed in 2014 in its Thematic Report on People s that those Tamil civilians who were not members of the LTTE, including those who may have provided a low-level of support to the LTTE, may be monitored by Sri Lankan authorities, but are at a low risk of being detained or prosecuted.⁷
31. I note the delegate in her decision refers to another applicant’s submission and that the applicant claimed his father was involved in the LTTE. I am not satisfied the applicant has claimed this to be the case. Despite my concerns regarding the applicant’s testimony I accept the applicant may have been detained by the authorities as claimed, the applicant has been consistent in this regard and given he originates from the former LTTE controlled area and is of Tamil ethnicity and during the civil war period, the security forces imputed LTTE support on ethnicity alone. I also consider the applicant has embellished his claims. The applicant was not

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ 'DFAT Thematic Report People with Links to the Liberation Tigers of Tamil Eelam', DFAT, 03 October 2014, CIS2F827D91260

detained under the PTA and with his mother's assistance the CID brought him to police upon her request. The applicant was released following submissions from his lawyer that the charges were baseless and based on the evidence in his SHEV application he only had to report to the police for two weeks. His lawyer applied to have the conditions removed because he had been reporting.

32. While I accept the applicant was detained for three months and I accept it is plausible he was physically mistreated including sexually or that he was raped, I do not consider that after his release by the court because of no evidence against him, and given he only had to report for two weeks, that after this period he was of any ongoing concern to the authorities. While I note in his submission to the IAA his reporting conditions were removed in 2012, I prefer his original claims that he only had to report for two weeks. The applicant simply did not have a profile to warrant further attention or monitoring by the authorities. The applicant has consistently claimed he was not involved himself with the LTTE. I do not accept that after this period the CID started looking for him again. It is unclear on what basis they would continue to do so given he had no direct involvement with the LTTE. The applicant was able to move around the Northern Province between [Town 1] and [Town 2] whilst working for his uncle, when the military presence in the north was significant. I do not accept the applicant was in hiding after his release from detention until his departure from Sri Lanka in November 2012.
33. I do not accept the CID or SLA would come to his house at least once a week after he left [Town 1] or that they continued to do so up until 2016 (or 2019) when his parents advised them the applicant was in Australia. I find at the time the applicant departed Sri Lanka in 2012, he was of no interest, adverse or otherwise, with the Sri Lanka authorities including the SLA and the CID.
34. I have found, as claimed by the applicant, that he had no prior LTTE involvement. I accept in 2009 the applicant may have been imputed to have an LTTE involvement, association; however, the applicant was released without conviction. I accept the applicant is of Tamil ethnicity and originates from the Northern Province, a former LTTE controlled area. Ethnic Sinhalese comprise 74.9 per cent of Sri Lanka's total population. Tamils constitute the largest ethnic minority, at 15.3 per cent of the population. Tamils comprise 93.8 per cent of the population in the Northern Province.⁸
35. The Sri Lanka civil war ended 12 and a half years ago and there have been significant improvements in the security situation for Tamils. I accept that during the civil conflict and its aftermath, the SLA and other authorities sometimes equated Tamil ethnicity with support for, or association with the LTTE. There have been many changes since the end of the 26 year long civil war when in May 2009 the government announced its military victory over the LTTE and complete territorial control over Sri Lanka. 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.⁹
36. The situation for Tamils improved significantly when the former President Sirisena took power in 2015, he publicly committed to reducing military involvement in civilian activities. It removed checkpoints on major roads in 2015 and there were no restrictions on travelling to the north and east. On Easter Sunday in 2019 after local Sri Lankan Islamic extremists carried out terrorist attacks on hotels and churches, some checkpoints were re-established (ostensibly to check for Islamist terrorists) and brought back fears and mistrust of the authorities. These checkpoints had since been removed.¹⁰

⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

⁹ Ibid.

¹⁰ Ibid.

37. DFAT noted in 2019 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 issues related to the war, including missing persons, land release and memorial events. The previous government relaxed some commemorations of events associated with the Tamil's armed struggle for statehood. Tamils have been free to hold public ceremonies marking 'Great Heroes Day' since 2016 and were increasingly comfortable marking such events. DFAT advise that 'white-van' abductions had not occurred in recent years and were no longer common.¹¹
38. Tamils were disproportionately detained under the Protection of Terrorism Act (PTA) in the past. This legislation was effectively suspended between 2016 and April 2019 and was used only sporadically. It remains legally in force and was used, alongside the Emergency Regulations to detain persons allegedly involved in the 2019 Easter Sunday terrorist attacks. The Emergency Regulations have lapsed, and most Tamils detained under the PTA have been released. Of those individuals who have been detained under the PTA, they were allegedly involved in an assassination plot and the Easter Sunday attacks. Anti-Muslim sentiment has increased in Sri Lanka following the attacks.¹²
39. DFAT confirms the Sri Lankan authorities have remained sensitive to the potential re-emergence of the LTTE throughout the country. DFAT assessed that Tamils were 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. DFAT also understands that other than the 'stop' lists there are also 'watch' list databases which include names of those the Sri Lankan security services consider to be of interest, including suspected separatist or criminal activities and 'watch' lists included former LTTE cadres and these were likely to be monitored.¹³
40. DFAT observed late 2019 Tamils have a substantial level of political influence, there are numerous Tamil political parties, and their inclusion in political dialogue increased after the 2015 election when President Sirisena came into power and during his period in office there were many positive developments including more freedoms. DFAT reported 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.¹⁴
41. In November 2019 President Sirisena's government was replaced when Gotabaya Rajapaksa, candidate of the Sri Lanka Podujana Peramuna (SLPP) party was elected President. Gotabaya was Minister of Defence who oversaw the end of the civil war conflict.¹⁵ On 5 August 2020, the SLPP party and his brother and Prime Minister, Mahinda, (President during the last days of the conflict and up until 2015) decisively won the Sri Lankan parliamentary elections. Tamils overwhelmingly voted against the ruling SLPP party in the 2019 presidential and 2020 parliamentary elections because of concerns about its treatment of minority group.¹⁶ This

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', OHCHR, 18 February 2020, 20200221140652; 'Sri Lanka: Economy, human rights key challenges facing Rajapaksas', Aljazeera, 19 August 2020, 20200819205836.

¹⁶ Sri Lanka: Presidential Election And Tamil Politics – OpEd', Eurasia Review, 27 November 2019, 20191128103208; 'Unfair to attribute racist dimension to Tamil vote, says Sampanthan', Hindu, The, 18 November 2019, 20191121095223; 'Support Sajith or minorities could suffer - Hakeem', Daily News Sri Lanka, 28 October 2019, 20191028114803; 'Sri Lanka Muslim party warns of a massive plot to buy minority votes to defeat Sajith Premadasa', Colombo Page, 09 November 2019, 20191111104451; 'Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure', International Crisis Group

victory has led to the consolidation of power of the Rajapaksa family. Gotabaya was accused of war crimes during the final days of the civil war and has been implicated in human rights abuses.¹⁷ He has also appointed to senior government positions military figures alleged to have been involved in atrocities committed during the conflict.¹⁸

42. President Gotabaya and other officials announced their desire to reverse prior reforms that had reined in the presidency's power. A proposed constitutional amendment would allow the president once again to hold multiple ministerial portfolios, and unilaterally to appoint judges, the attorney general, the police chief and other senior officials, without involvement of the constitutional council.¹⁷ In February 2020 several news agencies reported that the new Independence Day celebrations. This was a move away from the previous government who sang the national anthem in both Tamil and Sinhalese to promote ethnic harmony. The new Rajapaksa government has reversed or announced its intention to abandon many key legislative achievements and policy commitments of the preceding United National Party (UNP) government, including promises on post-war reconciliation, accountability and inclusive governance made to the UN Human Rights Council and to the EU.¹⁹
43. A report from a Sri Lanka Human Rights Documentation Centre (HRDC) June 2020 undertaken seven months after Gotabaya's election, reported 72 incidents of human rights violations in for May 2020. Eleven of these were physical attacks (15.3 per cent), three arrests and four attempted arrests or threats of arrests. The highest percentage of incidents (27.8 per cent) reported was related to verbal or written threats including online hate speech, and insulting statements. This was a significant increase when compared with the previous months. Another significant difference was 32% of incidents reported from the North and East. Fourteen incidents (19 per cent of total incidents) were reported only from the Jaffna district. In the cases, where information on ethnicity was applicable and available, over 60 per cent of the victims were Tamils, 31 per cent Sinhala and 6 per cent Muslim. Similarly, when gender was considered, 87 per cent were males. The highest number of victims by profession was state officials. Secondly, it was politicians and their party members. Journalists and civil society activists were also relatively high. The military and police were responsible for highest percentage 37.5 per cent of incidents.²⁰ While this report indicates Tamils are predominantly targeted over other ethnic groups including the Sinhalese majority, it is Tamils with a specific profile including politicians, journalists or civil society activities.
44. The UK Home Office FFM conducted between 28 September and 5 October 2019 and published in January 2020 observed that most sources noted that Tamils are not specifically targeted. It stated certain Tamils may be subject to closer scrutiny such as political activists, journalists and those returning from abroad may be monitored although this was not the case

(ICG), 18 November 2019, 20191119144914; 'Sri Lanka's new president has a worrying past', Economist, The, 23 November 2019, 20191122115223; 'Rajapaksa Rule', Foreign Policy, 14 August 2020, 20200817165533; 'Sri Lanka is becoming a one family state', Economist, The, 15 August 2020, 20200814111514.

¹⁷ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

¹⁸ 'Sri Lanka: Resolution 30/1 Implementation Monitor Statistical and Analytical Review No. 4', Verite Research, 01 March 2019, 20190318141458; 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', OHCHR, 18 February 2020, 20200221140652.

¹⁹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

²⁰ 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', INFORM Human Rights Documentation Centre, 29 June 2020, 20200702160949.

for all Tamils.²¹ The UK Home Office 'Sri Lanka: Tamil Separatism' report of May 2020 confirmed Tamils are unlikely to face persecution based on their ethnicity alone.²²

45. In its 2020 Country Report on Human Rights Practices for Sri Lanka, the US Department of State throughout Sri Lanka, but especially in the north and east, Tamils reported security forces regularly monitored and harassed members of their community, especially activists, journalists, and former or suspected former LTTE members.²³ Such incidents, as well as harassment of human rights defenders, have also been noted by a United Nations Special Rapporteur.²⁴ According to Human Rights Watch in its 2021 World Report civil society groups have reported increasing harassment and intimidation towards family members of individuals who disappeared during the war who demand to know the whereabouts of their loved ones. Human rights defenders, as well as lawyers and journalists whose work was perceived as challenging the government were also targeted.²⁵
46. I accept there are still reports of torture occurring in Sri Lanka, including from US State Department, UN Special Rapporteurs, the HRDC, and other sources, although DFAT is unable to verify allegations of torture in Sri Lanka since 2016 and the UK Home Office expresses a similar view to DFAT.²⁶ While recognising concerns with the current government, the situation in Sri Lanka is much different from the conflict and post war period. I accept there are still reports of continued human rights violations and the Sri Lankan authorities acting with impunity. I acknowledge the serious allegations against the current President and his government but any suggestion that they will target ordinary members of the Tamil community, is speculative. The information before me does not support that the change of government gives rise to a real chance of harm to Tamils, or to individuals with the applicants' profiles or that Tamils are currently imputed as LTTE supporters because of their Tamil ethnicity. 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, gender, and provenance.
47. Sri Lanka is a party to the International Convention on the Elimination of All Forms of Racial Discrimination. The constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds.' 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 based on ethnicity in the public sector employment. Rather, Tamils under-representation is largely the result of language constraints and disrupted education because of the war.²⁷

²¹ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

²² UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

²³ US Department of State, Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412.

²⁴ 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.

²⁵ World Report 2021. Events of 2020', Human Rights Watch (HRW), 13 January 2021, 20210114072851

²⁶ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', US Department of State, 30 March 2021, 20210401122412; 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', INFORM Human Rights Documentation Centre, 29 June 2020, 20200702160949.

²⁷ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

48. The US State Department similarly reported Tamils maintained that they suffer discrimination in university education, government employment, housing, and health services.²⁸ Information before me does not indicate discrimination has increased under the Rajapaksa government. 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.²⁹ The applicant has not claimed to have been denied an education. He worked for his uncle [and] he has not claimed he ever sought and was denied government employment. He has not claimed to have been denied access to housing or health services. DFAT assesses that the poorer economic conditions in the Northern and Eastern provinces act as the main driver for migration – internal and external – from these areas.³⁰
49. The applicant departed Sri Lanka in November 2012 nine years ago, and at which time, I have found he was of no ongoing interest to the Sri Lankan authorities. The applicant is not a journalist, human rights activist, politician, former LTTE member and nor have he claimed to be involved in Tamil separatism either in Sri Lanka or Australia. I am not satisfied he has a profile of any concern that would attract the attention of the Sri Lankan authorities on his return to Sri Lanka.
50. Given the passage of time, that the civil war ended more than 12 years ago, given the applicant had not direct involvement with the LTTE, I am not satisfied he will be imputed to be a former LTTE member or supporter or with an anti-government political opinion based on his Tamil ethnicity, familial links to the LTTE, and because he originates from [Town 1] in the Northern Province, a former LTTE controlled area, and that he was detained for three months by the authorities over 11 years ago. I am not satisfied the applicants face a real chance of any harm from the Sri Lankan authorities now or in reasonably foreseeable future on account of these claims.
51. While I have found it plausible the applicant was in the past physically mistreated and may have suffered sexual assault, the country information before me does not indicate that those who have been raped or sexually assaulted by the Sri Lankan authorities in the past including those of Tamil ethnicity are targeted on any ongoing basis. I am not satisfied the applicant faces a real chance of any harm as a Tamil male who has been previously raped or sexually assaulted by the Sri Lankan authorities on his return to Sri Lanka now or in the reasonably foreseeable future.
52. The applicant claimed to fear harm from the authorities as a failed asylum seeker who no longer has a National ID card. He fears the authorities will assume he is an LTTE member and that is why he does not have a National ID card. His National ID card was taken by the agent on the boat to Australia. His original birth certificate and passport were in [City 2]. While the applicant did not claim to fear harm based on his illegal departure from Sri Lanka, the matter was considered by the delegate and so have I.
53. The applicant has provided copies of his identity documents including a copy of his National ID card. I accept that the applicant will be returning to Sri Lanka as a (failed) Tamil asylum-seeker without his original National ID card who departed the country illegally and who has resided in Australia a western country for nine years.

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

²⁹ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³⁰ Ibid.

54. 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 are treated the same regardless of their ethnicity and religion. According to DFAT, such persons are very likely to be questioned at the airport, security, criminal and identity checks, and enquiries undertaken, then charged with an offence under the under the IE Act. DFAT understands detainees are not subject to mistreatment during the interviewing process.³¹
55. Both DFAT and the UK Home office indicate some asylum seekers may be passed to the CID based at the airport. The CID would make additional checks with the local police in the area where the person claimed to be from.³² According to the UK Home Office, claiming asylum abroad is not an offence.³³ If the CID were to make enquiries about the applicant, I am not satisfied they would suspect him of any LTTE involvement or support if they became aware of his detention and subsequent release in 2009, or that this would be of any ongoing concern to the authorities. The applicant does not have a criminal or terrorist background and he has no outstanding court orders or arrest warrants against him.
56. 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. Fines are issued to deter people from departing illegally in the future. DFAT has been advised by the Sri Lankan government that no mere passenger on a boat has been given a custodial sentence. As part of the process at the airport the applicant may be held in an airport holding cell for a period of two days if a magistrate is not available. A guilty plea attracts a fine, which can be paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court.³⁴
57. Additionally, there may be ongoing court costs.³⁵ There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face a real chance of imprisonment, but it is highly likely that he will be found guilty and fined. As noted above, DFAT report that returnees are not subjected to mistreatment during processing at the airport. While the applicant may be briefly detained in an airport holding cell, I am not satisfied that this would constitute serious harm.
58. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. Some returnees charged under the IAEA report having to travel long distances to attend court hearings and have found this disruptive to their livelihoods. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the IAEA appear in court every three to six months and that they, in addition to their own court hearings, may be summonsed as witnesses in cases against the facilitators or organisers of people smuggling ventures.³⁶
59. On the evidence before me, I find the imposition of any fine (which can be paid in instalments), surety or guarantee would not of itself constitute serious harm. Nor am I satisfied that any

³¹ Ibid.

³² Ibid; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

³³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

³⁴ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³⁵ Ibid.

³⁶ Ibid.

lifestyle disruption or costs associated with any reporting conditions or court appearance/s would constitute serious harm to the applicant. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being applied to illegal departees with a profile such as the applicant. I am not satisfied there is a real chance that the applicant would face imprisonment. There is no information before me to suggest that returnees who do not have their original identity documents including their national ID card are imputed to be former LTTE members or are subject to any harm on this basis.

60. In any event, it is clear that 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.
61. 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 and failed asylum seekers reported social stigma upon 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. 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.³⁷ The UK Home Office FFM also observes this.³⁸ I am not satisfied the applicant has 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.
62. The applicant is [age] years old. I consider it highly likely he will return to his [City 2], Northern Province, where his parents and one married sister reside and who he maintains contact with. Alternatively, he may wish to reside in [Town 1] where he lived until his departure from Sri Lanka and where his uncle has a successful [business]. The applicant has previous work experience in Sri Lanka as [an Occupation 1] and in Australia he has worked [in various roles] and more recently as an [Occupation 2] and this will assist him to find suitable employment.
63. I accept he may face some practical challenges re-integrating but I am not satisfied that any challenges he may face in and finding employment or long term accommodation, or any social stigma he may experience as a returning asylum seeker or returnee from Australia amounts to serious harm for the applicant. I am not satisfied the applicants face a real chance of persecution on the basis of being a returned (Tamil) asylum seeker/failed asylum seeker, returnee from Australia who departed Sri Lanka illegally nine years ago and no longer has his National ID card, now or in the reasonably foreseeable future.
64. 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.

³⁷ Ibid.

³⁸ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

Refugee:

65. 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

66. 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

67. 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.

68. 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.

69. I have accepted the applicant will be returning to Sri Lanka having departed illegally. I have found that as a returnee, the applicant would be subject to an interviewing process whilst security, criminal and identity checks are undertaken by the authorities and he may face processes and penalties as a result of his departure in contravention of the IE Act. I accept the applicant may face challenges in re-integrating including finding suitable employment on return after his time in Australia and that may face some social stigma as a returnee or failed asylum seeker. I am not satisfied that the treatment (including court appearances) and penalties to which the applicant may be subject to amount to significant harm as defined. I am not satisfied there is a real risk of the death penalty being carried out, arbitrary deprivation of life or torture. Nor am I satisfied that there is a real risk the applicant will be subject to cruel and inhuman treatment or punishment or degrading treatment or punishment. The evidence does not support that there is an intention to inflict pain and suffering that may be regarded as cruel or inhuman in nature, severe pain or suffering or an intention to cause extreme humiliation.

70. I have otherwise found that the applicant does not face a real chance of harm in relation to his claims and profile. The requirement for there to be a "real risk" of significant harm applies the same standard as the "real chance" test. 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, they will face a real risk of significant harm.

Complementary protection: conclusion

71. 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.