



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA23/10544

Date and time of decision: 30 August 2023 16:39:00

K Allen, 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 applicant claims to be a Tamil, Hindu man from the Northern Province of Sri Lanka.
2. He departed Sri Lanka by boat in 2012 and arrived in Australia [in] December 2012. He applied for a Safe Haven Enterprise Visa (SHEV) on 31 August 2016, making the claim that he fears harm from the Sri Lankan authorities because of his ethnicity, previous detention in 1997 and profile as a Tamil businessman from the Northern Province.
3. On 17 February 2017, a delegate of the Minister for Immigration and Border Protection (the delegate) decided under s.65 of the *Migration Act 1958* (the Act) to refuse to grant the visa, finding that the applicant's claims were not genuine and Australia did not owe protection obligations to the applicant. On 22 February 2017, the matter was referred to the Immigration Assessment Authority (IAA).
4. The IAA affirmed the delegate's decision on 25 August 2017. However, [in] 2023 that IAA decision was quashed by the Federal Circuit and Family Court of Australia (FCFCOA) which found that the 2017 IAA decision was affected by jurisdictional error because the IAA erred in its application of s.473DD when assessing new information. The Court remitted the applicant's matter back to the IAA for reconsideration of the applicant's claims for protection.
5. This is a *de novo* decision; my task is to consider the applicant's claims for protection and the materials before me afresh. I am not bound by any earlier findings by the delegate, or the IAA.

Information before the IAA

6. I have had regard to the material given by the Secretary in 2017 under s.473CB of the *Migration Act 1958* (the Act).
7. S.473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information; and the new information was not and could not have been provided to the Minister; or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
8. When this application was remitted back to the IAA in 2023, the Secretary provided the IAA with an updated portfolio with additional documents from the Department's holdings. These documents had not formed part of the Secretary's original referral to the IAA and they were not considered in the 2017 IAA decision. The additional documents provided to the IAA by the Secretary are in my view, mostly administrative documents that are not relevant to my consideration of the applicant's claims for protection. I have not considered any of these administrative documents. One of the additional documents provided by the Secretary was a 'Protection File Note' which contained a summary of information the applicant provided at an enhanced screening interview held soon after his arrival in Australia in 2012. In my view, this document contains information that is relevant to my consideration of his claims for protection, and I am satisfied that there are exceptional circumstances to justify considering the Protection File Note provided by the Secretary.

9. On 22 March 2017, the applicant's representative provided the IAA with written submissions in response to the delegate's decision. To the extent that the submissions contain argument about the delegate's decision, I have had regard to those submissions in making this decision. The submission makes reference to new country information from 2016 but that information is not attached and, in accordance with the *IAA Practice Direction for Applicants, Representatives and Authorised Recipients*, I have not had regard to that information. The submission makes reference to previous IAA decisions. IAA decisions are not precedent as each case is assessed and considered on its own merits. The submissions contain a new claim that the applicant faces harm due to returnees being processed *en masse* at the airport. It is claimed that members of such a group could all be imputed with political opinion they did not hold due to one member of such a group being found to be a person of interest. This does not appear to be supported. I am not satisfied that this claim could not have been made to the Delegate before the decision was made, particularly given the applicant had the same representative at the primary stage. I am also not satisfied that this is personal information in the relevant sense as it is about a class of people, returning asylum seekers. I have considered the situation for returning asylum seekers in this decision and I am not satisfied that there are exceptional circumstances to justify considering the new claim.
10. On 26 April 2017, the applicant's representative provided two documents. One was a letter of support dated 20 February 2016 issued by the [Town] Trader's Association. Given the date of the letter and the fact that the applicant was represented, I am not satisfied that this new information could not have been provided to the delegate before the decision was made in 2017. The letter itself is fairly limited in terms of probative value. It does not contain any new information which was not already provided by the applicant, it does not provide any information about why the applicant felt unsafe nor does it suggest that the writer has any first-hand knowledge of the applicant's circumstances. Overall, I am not satisfied that this letter is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. Given these factors and the fact that the letter does not corroborate the applicant's main claim that he was wanted by the Sri Lankan authorities, I am not satisfied that there are exceptional circumstances to justify considering the new information.
11. The other document provided by the applicant's representative is purported to be a "Warrant of Arrest" issued [in] December 2016, some four years after the applicant left the country. The applicant's representative claims that the arrest warrant was handed to the applicant's parents by the local post office when they returned to [Village] in December 2016. The applicant's representative has submitted that when the applicant's parents informed the applicant about the warrant, the DIBP interview had concluded and the applicant did not see the need to forward this document at the time to the delegate. I don't find this explanation at all plausible. If the applicant was indeed fearful of arrest on his return to Sri Lanka, I consider that he would provide that information to the delegate, noting the warnings given to him to provide all the information relevant to his claims. I am not satisfied that this new information was not, and could not have been, provided to the delegate before the decision was made in 2017. I have significant concerns about the credibility of this document which I address in this decision, however on its face, I am satisfied that this is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. The FCFOA found that the previous IAA decision was affected by jurisdictional error as this document was not considered. Given the risk of falling into jurisdictional error again and the relevance of an arrest warrant to the applicant's claims to fear harm on his return to Sri Lanka, I am satisfied that there are exceptional circumstances to justify considering the new information.

12. On 16 June 2017 the applicant's representative provided a third document which is a press article with an English translation. The translation states that it is a news item appearing in Tamil local daily [newspaper] dated [in] 2008. It is about a [occupation] from Colombo that was shot in [location] by cadres in army uniform. No explanation has been provided as to why it was not provided at the primary stage or the relevance to the applicant and his personal circumstances as a businessman in [City 1]. I am not satisfied that this new information could not have been provided to the delegate before a decision was made in 2007. While the article contains personal information it is unclear how it is connected to the applicant's claims. I am not satisfied that it is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. For those reasons and the lack of any further explanation I am not satisfied that there are exceptional circumstances to justify considering the new information.
13. This applicant submitted his protection visa application in 2016, and it was decided by the delegate in 2017. Given the passage of time, I have decided to obtain up to date country information about conditions in Sri Lanka. I have obtained the Department of Foreign Affairs and Trade (DFAT) Country Information Report Sri Lanka dated 23 December 2021. This report was prepared by an authoritative source to assist asylum seeker decision makers who consider asylum claims related to Sri Lanka. This report contains general information about conditions in Sri Lanka and is not about the applicant specifically. This report is an updated version of the 2015 and 2017 reports considered by the delegate. In the circumstances, I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

14. The applicant's claims can be summarised as follows:
 - He is a Tamil Hindu who was born in [City 1] in the Northern Province of Sri Lanka in [Year]. His parents and [sisters] continue to live in Sri Lanka.
 - In 1997 he was displaced from his family home. He was arrested and detained by the Sri Lankan Army (SLA) at [Location] for twelve days on suspicion of being a Liberation Tigers of Tamil Eelam (LTTE) member due to the area he was from. The SLA was suspicious of Tamil boys living near their camp. After this time he was transferred to [Police Station] and kept there for another two months. He was abused, given little food and water and questioned frequently. He was transferred to [Prison 1] and appeared in court where he was granted bail and released [in] July 1997.
 - When he was granted bail he went to [City 2] to make arrangements to get back to [City 1]. The roads were closed and it was not until 1999 before he could return back to [City 1]. While he was living at [City 2] he lived at his sister's home. He was regularly called in for questioning and would be interrogated whenever there were any bombings in the area.
 - After the war ended, he opened his own [business]. The authorities were suspicious of his business, questioned him on how he got the funds to start the business and suspected that he received the funds from the LTTE. Every day prior to opening his shop he had to report to the SLA camp to sign in. He would be beaten every day when he signed in. Many days he would be forced to not open his shop as a result of the beatings.
 - [In] June 2012 when returning home from his shop, he was attacked by a group of people. They attempted to stab him however he managed to escape. He was treated in

hospital for two days. He reported the incident to the police, however there was no investigation into the matter. He subsequently closed his business.

- In October 2012 he was asked by phone to report to the fourth floor of the Criminal Investigation Division of the Sri Lanka Police (CID) in Colombo for their inquiries. He started staying in different locations until arrangements could be made for him to leave Sri Lanka.
- After he left Sri Lanka, the CID went to his home looking for him. His father was detained on two occasions. On the second occasion his father confessed that his son had fled Sri Lanka.
- He fears that he will be tortured and most likely killed if he returns to Sri Lanka. He will be called for inquiry by the CID at the fourth floor in their office in Colombo as his records are on file and when arriving at the airport he will be arrested immediately.

Factual findings

Identity

15. The applicant claims to be a Tamil Hindu man born in the Northern Province of Sri Lanka in [Year]. It is noted that he has not made any claims related to his religion and therefore I have not had further regard to that in this decision. He states that his parents and [sisters] continue to live in Sri Lanka. In support of his claimed identity he provided a copy of the biodata page of his passport issued in 2008 (which he states he disposed of in [Country 1]), a copy of his birth certificate and translation, a copy of his National Identity Card, a copy of his Sri Lankan driver's licence issued in 2003; a copy of a 2010 ration card; and an untranslated document from a school principal noting the date of [Year] which is the same year he states he completed school. The document translations do show alternative spellings of the applicant's name but I accept that these variations are transliteration differences and do not relate to a different person. DFAT reports¹ that Tamils form approximately 15% of the Sri Lankan population. Tamils are the second largest ethnic group in Sri Lanka. Tamils live throughout Sri Lanka, but the Tamil population is mostly concentrated in the Northern and Eastern Provinces. In the Northern Province, Tamils comprise around 93% percent of the population. The applicant's documentation is consistent with his accounts of his life to the Department and, having considered this information as a whole, I am satisfied that the applicant's identity is as claimed and that he is a Tamil from the Northern Province.

Arrest and detention in 1997

16. The applicant claims that he was arrested and detained by the SLA in 1997 on suspicion of being an LTTE member. It occurred when he was displaced from his family home. He and a friend were arrested when they went back to his former home. He claims that he was arrested due to the area he was from and its proximity to the SLA camp. He claims he was held for twelve days at the SLA camp in [Location] where he was beaten and had a petrol bag tied on his head and was forced to breathe in petrol fumes. He claims he was then transferred to [Police Station] and kept there for another two months where he was abused, given little food and water and questioned frequently. He claims he was then transferred to [Prison 1] and appeared in court where he was granted bail [in] July 1997.

¹ Department of Foreign Affairs and Trade, 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

17. Throughout the application process, the applicant has consistently claimed that he was arrested and detained in 1997 when he was a young man. In support of this claim he provided a newspaper article and translation which states that he and his friend went to see their houses on [Day 1] March 1997 and went missing. They did not return home until last Thursday ([Day 2] March 1997). The newspaper article does not point to any arrest or prolonged detention. The applicant's accounts of how long he was detained for vary. In his arrival interview he stated that he was detained for six months. In his SHEV application he stated that [Day 1] March 1997 went to look at another house and was arrested, detained and tortured at [Location] for twelve days ([Day 4] March 1997). He said he was transferred to [Police] and kept there for two months ([Date]) where there was little food and water. He stated that he was then transferred to [Prison 1] where he appeared in court and was granted bail [in] July 1997 (in total approximately four months of detention). At his SHEV interview he provided a Detention Attestation letter from the International Committee of the Red Cross (ICRC) dated [December] 2014. It states that he was visited by the ICRC delegates for the first time on [Day 2] March 1997 in [Police Station]. This was the time that he had claimed he was still being held in [Location] and being tortured. The letter stated that he was revisited between [Day 3] March 1997 and [May] 1997 in [Police Station], [Prison 1] and [Prison 2] in [City 3]. He was released from [Prison 1] [in] July 1997. The applicant has not claimed he was ever held at a prison in [City 3].
18. DFAT reports that 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. Country information² from Denmark and the United Kingdom, indicates that "round ups" of Tamils were common in 1997 to check for supporters of the LTTE. The *Prevention of Terrorism Act* (PTA) allowed the authorities to arrest anyone reasonably suspected of being connected with or concerned in any offence under the PTA. The Minister for Defence may, where he has reason to believe or suspect that any person is connected with or concerned in any offence under the PTA, issue a detention order valid for up to three months. Such an order may be extended for up to 18 months. When a person is arrested, a document acknowledging the arrest must be issued to the spouse or other close relatives, giving the name and rank of the arresting officer, the date and time of arrest and the place at which the arrested person will be detained. Country information indicates that it was not uncommon for people suspected of having assisted the LTTE to be detained for a year to eighteen months before it was decided whether to proceed with the case or drop it.
19. The applicant has not provided any official documentation from 1997 to indicate that he was arrested or released on bail. The only supporting information is from the ICRC and a news article and both these sources contradict the applicant's own testimony to some extent. Given the passage of time and the applicant's young age, I do accept that he may not have kept all the relevant information about his arrest and detention. I also accept that, due to his young age as a Tamil man living in the North of Sri Lanka he was detained by the SLA on [Day 1] March 1997 on suspicion of being a supporter or member of the LTTE. I consider it likely that during the investigation process he was subject to mistreatment. I consider that the applicant was released at some point between [Day 2] March and [July] 1997 as the PTA allowed people to be detained for three months or more without charge. I note that these

² Danish Immigration Service, "Report on the Fact-finding Mission to Sri Lanka. August 1997", 31 August 1997, CISFCE36B0465; United Kingdom Home Office, Immigration and Nationality Directorate, Country Information and Policy Unit, "Report on the fact-finding mission to Sri Lanka [9-13 July 2001]", 31 July 2001, CISC098D53429

occurrences were common in Sri Lanka during the war and in the immediate post war period and it is now 26 years since those events occurred.

Treatment 1998-2011

20. The applicant claims that after his release from prison he went to [City 2] to make arrangements to get back to [City 1]. The roads were closed and it was not until 1999 before he could return back to [City 1]. In this intervening period he claims he lived with one of his sisters in [City 2] at her home. He claims that during this time he was regularly called in for questioning and would be interrogated whenever there were any bombings. As noted above, such questioning was common during the war and young Tamil males were of particular interest to the authorities and I accept as plausible that this occurred. The applicant has not claimed that he was personally targeted or otherwise harmed by the authorities in this period.
21. The applicant claims he and his family moved back to [City 1] in 1999. He has stated that from 1999 until 2005 he worked in a [business] and then from 2005 until 2011 he worked as a buyer for his sister's shop. He states that in 2008 he obtained a valid passport and in 2010 he travelled legally to [Country 2] through the airport on multiple occasions buying for her business. He also travelled to and from Colombo regularly. At interview he confirmed that he did not face any problems during these travels.
22. DFAT reports that towards the end of the war in 2009, government security forces arrested and detained a large number of LTTE members. Most were sent to government-run rehabilitation centres. A smaller number were prosecuted through Sri Lanka's court system. Security forces also questioned or monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment. The applicant has not indicated that he was detained or sent for rehabilitation. He provided evidence that in 2010 he was settled with his family and included on the family ration card. I consider that the fact that he was living at home, able to work, able to obtain a passport and travel around and in and out of Sri Lanka in the immediate post war period indicates that he was of no particular interest to the Sri Lankan authorities and that he was not under any bail or reporting conditions after his 1997 detention.

Treatment as a Tamil businessman

23. The applicant claims that in 2012 he opened his own shop near to his sister's shop. In his January 2013 arrival interview he stated that he ran this from January to October 2012 and then left for Australia in November 2012. In his SHEV application he stated that he opened the shop in January 2011 and ran it until 2012. In his SHEV interview he stated that he opened the shop in January 2012 but only ran it for about three months. He provided a document indicating that the business was registered [in early] 2012. He did not provide any documents pertaining to the sale or closure of the shop.
24. On arrival in Australia in December 2012 the applicant claimed that between June and October 2012 he had been detained, questioned and beaten by the CID on three separate occasions. He stated that on the third occasion they threatened his life and indicated that they intended to take him to the fourth floor and torture him if they detained him again. He claimed that as a profitable businessman he was accused of having links to the LTTE. The applicant provided a similar account in his January 2013 arrival interview. He stated that in June 2012 he was questioned by the CID. Then in July and August the CID questioned him and

he was beaten up by them and asked to come to the fourth floor of the CID. Fearing more torture and persecution, he left the country.

25. In his 2016 SHEV application the applicant provided an account which contains a number of new claims. His representative stated that the entry interview is not correct for the purpose of this protection application. In his SHEV application he stated that he obtained the finance to open his own business from relatives abroad. The authorities were suspicious of his business and they questioned him as to how obtained the funds to open the business, suspecting that it was from the LTTE. He made the new claim that every day prior to opening his shop he had to report to the SLA/CID to sign in. This consistent demand of having to sign would entail him being subjected to beatings every day for at least an hour. In his SHEV interview the applicant was asked why he could not provide evidence to the authorities that his funding for the shop came from relatives and not the LTTE. He stated that they were not really interested in where the money came from and that they just wanted to extort money from him.
26. In his SHEV application, the applicant went on to claim that in the evening of [Date] June 2012 he was attacked by a group of approximately 12 people who attempted to stab him. He claims he managed to escape and that he was admitted to the hospital and treated there for two days. Afterwards he claims he reported it to the police [in] July 2012. However, there was no investigation into the matter. He claimed he was very fearful for his life and subsequently closed the business. He claimed that shortly after he was phoned and requested to report to the fourth floor CID in Colombo for their inquiries. He stated that he did not attend and then started staying in different places until arrangements could be made for him to leave Sri Lanka.
27. The applicant has always given a consistent and natural account of opening his own business in 2012 and he has supported his claims in this regard by providing business documents and receipts and accounts of his stock, shop size, travel and so on. I accept that the applicant opened his own shop in 2012 using funds from his family. If the applicant had a successful business as claimed I prefer his initial account that it was open until October 2012, after which he made plans to leave the country. It is difficult to believe that his business was successful and profitable as claimed if it was only open for three months and if he was beaten each morning and often could not open as claimed in his SHEV application. Additionally I note that the applicant has not provided any medical reports or other corroboration of his claims that he was beaten so badly that he could not work or that he was hospitalised in 2012.
28. I accept that as a successful Tamil businessman it's not implausible that the applicant was targeted for extortion by the SLA. In his 2012 and 2013 accounts of this he stated that they called him in three times in June, August and October to ask him about the funds. At interview he explained that they were not really interested in where the funds came from but were wanting to extort money from him. He claimed that one of the pressuring tactics was to threaten to take him to the fourth floor. The applicant made no mention of regular reporting on a daily basis nor did he claim to have received a phone call telling him to report to the fourth floor in Colombo. I consider that the applicant embellished his claims in his SHEV application and interview. The applicant has not provided any rational basis on which he would be required to sign in daily at the army camp noting that he was not a person of interest at the end of the war in 2009 and he was able to travel freely in 2010. I do accept as plausible that the applicant was subject to monthly extortion attempts from June 2012 including being pressured and threatened with being taken to the fourth floor. In reaching that conclusion I have had regard to the applicant's profile and the country information

considered by the delegate³ including media reports of a Jaffna based transport owner who stated that the previous government would threaten and extort people if they deposited a hefty amount in the bank; and reports from Human Rights Watch and the United Nations Human Rights Council stating that extortion and enforced disappearances for purely economic purposes were carried out by State officials and affiliated paramilitaries. Given the applicant's lack of LTTE links, his own claims that the SLA weren't really interested in the source of funds and country information about the SLA engaging in extortion, I accept that the applicant was visited and threatened by the SLA at his shop for reasons of financial gain.

29. I also accept as plausible that the applicant was attacked by unknown men [in] June 2012. The applicant does not claim that they identified themselves or told him why they attacked him. Given this occurred at night and as he was leaving work, it could be inferred that it was a robbery attempt. Regardless, the evidence before me does not support that this was an attack on the applicant by the authorities or that it was due to the applicant's Tamil ethnicity or any other reason. I do consider that this event and the extortion by the SLA combined with his previous experience of detention in 1997 would create fear in the applicant such that he wanted to leave the country.
30. I do not accept the applicant's claim that he was actually required to report to the fourth floor of the CID in Colombo. There had been no personal interest in the applicant since 1997 and particularly no interest in the applicant at the end of the war. He was not a member of the LTTE and did not have an LTTE profile beyond being a Tamil from the Northern Province. He has not provided any credible reason why he would be requested to report to the fourth floor. Further, I do not find it plausible that he would be asked by phone to report to the fourth floor CID in Colombo for their inquiries. I consider that if he was wanted on some criminal matter that local police would be sent to arrest or detain him. He has not indicated that charges were laid against him or that he had any problems with the police. Consequently, I do not accept that the applicant started staying in different locations until arrangements could be made for him to leave Sri Lanka. I also do not accept that the CID went to his home looking for him and detained his father because the applicant was wanted by the CID.

Arrest warrant

31. After the decision was made to refuse the grant of the applicant's visa, the applicant's representative provided the IAA with a document purported to be a "Warrant of Arrest" issued [in] December 2016, some four years after the applicant left the country. The applicant's representative claims that the arrest warrant was handed to the applicant's parents by the local post office when they returned to [Village] in December 2016. The applicant's representative has submitted that when the applicant's parents informed the applicant about the warrant, the SHEV interview had concluded and the applicant did not see the need to forward this document at the time to the delegate. As already noted, I don't find this explanation at all plausible. If the applicant was indeed fearful of arrest on his return to Sri Lanka, I consider that he would provide that information to the delegate, noting the warnings given to him to provide all the information relevant to his claims. The fact that this document was not provided earlier raises concerns about its credibility.
32. I have a number of other concerns about the document itself. The date of issue is recorded as [December] 2016. It refers to the 1997 case. I do not accept that the District Court in [City 1]

³ Ceylon Today, "In case of a ransom call, call Police!", 17 September 2015, CXBD6A0DE18351; Sri Lanka Watch, "2 Extortion Gangs arrested", 26 May 2016, X6A26A6E4621; Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358.

would send out an arrest warrant in 2016 pertaining to the applicant's arrest and detention in 1997, almost twenty years later. The applicant was released from detention in 1997. He has not provided any documentation from the court about the arrest or any charges laid. He was able to live in Sri Lanka between 1997 and 2012 without having to attend court. He was issued a passport in 2008, he was not detained or sent to rehabilitation at the end of the war in 2009, he travelled overseas on multiple occasions in 2010 and he ran a successful business in 2012. The applicant departed the country in 2012. He has not claimed to have engaged in any separatist activities in Sri Lanka or Australia. The applicant has not provided any rational basis for the issuing of an arrest warrant in 2016, four years after he left the country. Additionally, I find it surprising that the court would issue a warrant to the applicant's parents in English when the court and the applicant's parents are all located in [City 1], an area where Tamil is the main language spoken. I do not accept that the warrant would be held by the post office in [Village] ready to hand deliver to the applicant's parents (and not the applicant) when they returned to that area after living in another part of [City 1]. Overall, I do not accept that this is a credible document, nor do I accept that the applicant has any outstanding criminal matters in Sri Lanka or that he is wanted by the authorities for any reason aside from his manner of departure.

Failed asylum seeker

33. I accept that the applicant departed the country illegally by boat in 2012 and that the Sri Lankan authorities would not have any record of his departure. I accept that on return, due to the manner of his return, it will be apparent to the Sri Lankan authorities that he departed illegally and is a returning asylum seeker from Australia.

Refugee assessment

34. 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

35. 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.

36. I have found that this applicant is a citizen of Sri Lanka and that Sri Lanka is his receiving country. This applicant was born in the Northern Province of Sri Lanka, and prior to his departure from Sri Lanka, he lived his entire life in the Northern Province mainly between two locations around [City 1] due to displacement caused by the war. The applicant's family continue to live in Sri Lanka and the applicant claims that in 2016 his parents moved back to [Village] in [City 1] where he lived as a young man. In the circumstances, I conclude that if returned to Sri Lanka, this applicant would return and reside in the Northern Province with or near his parents and sisters, as he did in the past. He has not indicated otherwise.
37. I accept that the Northern Province of Sri Lanka is an area which was occupied by the LTTE during the civil war and an area where most Tamils were imputed with some association with the LTTE during the war and in the post war period. I accept that the applicant faced many of the same problems as other Tamil men in that area during the war including harassment, detention and questioning and that he was mistreated when he was detained in 1997. I accept that once he opened a successful business at the end of the war he was subject to regular extortion attempts by members of the SLA. I also accept that in 2012 he was the victim of an attack by unknown people one evening when he was closing the shop. I do not accept that the applicant would be any particular interest the authorities in Sri Lanka aside from his illegal departure in 2012. I accept that the applicant's experiences during the war and the post war period would cause the applicant to be fearful about returning to Sri Lanka.
38. This applicant has claimed his Tamil ethnicity, his residence in the north of Sri Lanka, his previous arrest in 1997 and his previous work as a Tamil businessman would all lead to him facing harm in Sri Lanka if he returned to that country. DFAT reports that ethnicity is a source of tension in Sri Lanka and the Government of Sri Lanka had continued to be suspicious of the Tamil population since the end of the war in 2009. This is unsurprising given the long running civil war in Sri Lanka was fought along ethnic lines with the minority Tamil community seeking to establish a separate state.
39. There have been significant changes in conditions for Tamils in Sri Lanka in the 14 years since the end of the war and 11 years since the applicant left the country. The Sri Lankan 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'. Tamils have a substantial level of political influence. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance. DFAT reports that Tamils do not receive unwarranted attention from authorities because of their political involvement. DFAT assesses there are no barriers to Tamil political participation. Even former members of the LTTE are actively engaged in the Sri Lankan political process.
40. DFAT reports that there are still some classes of people that remain of interest to the authorities. Many Tamils in Sri Lanka report that the authorities continue to monitor public gatherings in Sri Lanka and conduct surveillance on persons of interest; usually people involved in politically sensitive issues such as land rights, missing persons and memorial events. These complaints are most commonly voiced in the north of Sri Lanka where a military presence remains. I have found this applicant would return to the Northern Province. The applicant does not claim to have had any involvement in issues such as land rights, missing persons and memorial events. Even after the end of the war, he lived for another three years in Sri Lanka in areas under Government control. In the circumstances, I am not satisfied that these issues would cause any problems for him now. During his SHEV application process, the applicant indicated he maintains regular contact with his family in Sri Lanka. He has not indicated that they suffer from any ongoing harm merely for being Tamil,

or for residing in the Northern Province or indeed for running a business. It seems unpersuasive to argue that his residence in the north would be a problem now, 14 years after the end of the war. DFAT assesses that surveillance of Tamils in the north and east continues, with particular surveillance of those associated with politically-sensitive issues. DFAT also assesses that physical violence against those being monitored is not common, and that ordinary Tamils living in the north and east of Sri Lanka are at low risk of official harassment. Country information before me does not indicate that merely being a Tamil who resided in the Northern Province when it was under LTTE control would lead to harm. Overall, I am not satisfied that this applicant would face any harm in Sri Lanka due to his Tamil ethnicity or due to his residence in areas formerly controlled by the LTTE in the Northern Province.

41. I have considered whether the applicant's previous arrest in 1997 and the extortion he faced as a businessman in 2012 would lead to him being imputed as an LTTE supporter and facing further problems in Sri Lanka now. I accept that these issues are difficult for the applicant and cause him to be fearful of the Sri Lankan security forces. Information before the delegate, and more recent country information indicates that though the Sri Lankan government remains sensitive to the issue of Tamil separatism, the LTTE no longer exists as an organised movement, and only those persons who were 'high profile' members of the LTTE are still of interest to the Sri Lankan authorities. I have had regard to the submission made on this by the applicant's representative in which it is submitted that the applicant faces a real chance of Convention related persecutory treatment as in the past the applicant has been imputed with LTTE involvement/support, it must also be noted that the applicant's father was killed by the army. The applicant has not claimed that his father is dead or that he had any involvement in the LTTE. I do not find these submissions persuasive. The information before me does not support that his treatment in 1997 and 2012 would raise his profile to one of concern in 2023.
42. In my view, even taking into account the applicant's problems with the authorities during the war and in the post war period and his profile as a Tamil from the north, this applicant cannot fairly be described as anyone with an LTTE profile. I accept that in 1997 the applicant was arrested on suspicion of involvement with the LTTE in the midst of the war when he was only [Age]. Given that was 26 years ago, his successful business endeavours in [City 1] and his regular buying trips to Colombo and [Country 1], I am not satisfied that the Sri Lankan authorities continue to believe this applicant was a member or supporter of the LTTE at the time of his departure from Sri Lanka, I am not satisfied the Sri Lankan authorities hold these views now. I am not satisfied the Sri Lankan authorities would believe him to have any involvement in the LTTE if he returned to Sri Lanka.
43. Overall, I am not satisfied that the applicant's history or profile as set out above would lead to him being of interest to anybody in Sri Lanka now. I am not satisfied he would be suspected to have been a member or supporter of the LTTE. I am not satisfied that he would face a real risk of any harm in Sri Lanka for these reasons. I am not satisfied that the applicant has a well-founded fear of persecution based upon his ethnicity, his period of residence in the LTTE controlled north, his previous employment or his previous arrest and detention.
44. The applicant claims that his illegal departure from Sri Lanka, and his status as a failed Tamil asylum seeker from the North would lead to him facing harm in Sri Lanka. I accept that the applicant departed Sri Lanka by boat without passing through normal Sri Lankan immigration and customs checks. I note that such a departure in Sri Lanka is a breach of ss.34 and 45(1)(b) of the Sri Lankan *Immigrants and Emigrants Act* (I&EA) which governs exit and entry from Sri Lanka. The delegate considered a range of advice regarding the risks to returnees and asylum seekers. Those reports are now somewhat dated, but I accept they indicated risks for some

Tamils in returning to Sri Lanka, particularly for Tamils perceived to have LTTE associations. I have had regard to information from DFAT which is the most up to date country information before me which describes return procedures.

45. Upon return to Sri Lanka, the applicant will likely be identified at the airport. He will likely undergo an investigative process in order to establish his identity. This will likely involve a range of Sri Lankan agencies including Department of Immigration and Emigration, the State Intelligence Service and the CID and, at times, the Terrorism Investigation Department who will interview the applicant in order to determine identity and whether he is subject to any outstanding criminal matters. This processing occurs in arrival groups at the airport and can take several hours. During this time, the applicant can expect to be held at the airport while the entire cohort of returnees is interviewed. These processes are standardised and are applied to all returnees regardless of ethnicity or religion.
46. This applicant has copies of various Sri Lankan identity documentation in his possession which would allow him to identify himself upon return to Sri Lanka. This includes copies of his Sri Lankan Birth Certificate, his Sri Lankan National Identity Card and the biodata page of his Sri Lankan Passport. I have found he would not be of any interest to the Sri Lankan authorities and in the circumstances, I am not satisfied that the questioning this applicant would face upon return would go beyond confirming his identification and citizenship. DFAT is not aware of detainees being subjected to mistreatment during processing at the airport.
47. As the applicant departed illegally, I accept that he would very likely face charges arising from his breach of I&EA. DFAT reports that, once charged returnees are taken to the courts at Negombo where they are bailed and released. Those charged are required to appear in court in the location where the matter was first heard, reportedly Negombo Courts, near the airport, which involves legal and transport costs. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the I&EA appear in court every 3-6 months, regardless of their plea, for bail hearings. In addition to their own court hearings, those charged may be summonsed as witnesses in cases against the facilitators or organisers of people smuggling ventures. The cases of those charged with illegal departure may take years to resolve, requiring on-going court appearances (and illegal departees have no reasonable prospect of a defence). It is unclear to DFAT why such cases take so long. One source suggested that cases are taken forward in court only when all members of a people smuggling venture have been located; while another local source suggested it was simply due to the workings of the Sri Lankan justice system. For many returnees, this means they are subject to the slow processes of the Sri Lankan legal system; some returnees told DFAT that it was difficult and stressful having to return periodically to Colombo for a further hearing in a case where they were uncertain of the outcome.
48. While those convicted of the offence of illegal departure may theoretically face a custodial sentence, in practice, local sources suggest, a fine is always imposed and typically this fine is LKR 50,000 - 200,000 (AUD350-1400). Sources suggest those who are unable to pay the fine are permitted to pay in instalments but, if still unable, may be imprisoned for 14 days. DFAT is not aware of returnees from Australia to Sri Lanka being charged under the PTA. Some returnees from Australia have been charged with immigration offences and with criminal offences allegedly committed before departure.
49. I accept that if returned the applicant would very likely be charged for offences related to his illegal departure from Sri Lanka. I have found that the applicant would not otherwise have a profile of interest to the authorities in Sri Lanka. Having considered the information above, I

conclude that the applicant would very likely face a small fine, and depending on his plea, possibly a period of bail upon return, but would be otherwise free to go. It is possible that the applicant may be held by Sri Lankan authorities for a short period at the airport. I am not satisfied that a short period of detention like this would amount to any serious harm.

50. The evidence before me indicates that the provisions of Sri Lankan immigration law are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am not satisfied that any process the applicant may face on return to Sri Lanka because of his illegal departure would constitute persecution for the purpose of the Act.
51. DFAT assesses that refugees and failed asylum seekers face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation. Multiple local sources said that some returnees, especially those in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits, but DFAT cannot determine if this is the case for all such returnees. I accept that if the applicant is returned to Sri Lanka and returns to the Northern Province where he previously lived, he may be the subject of monitoring for a short period by the authorities. However, I am not satisfied that he would otherwise face any real chance of harm by them.
52. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they were able to reintegrate into their communities and find employment. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to sale of their belongings to fund irregular ventures overseas, but do not experience societal discrimination for seeking asylum elsewhere. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had not experienced significant societal discrimination following their return.
53. The challenges outlined above are everyday difficulties faced by persons seeking to re-establish themselves after being away from the country for an extended period of time. I have found applicant will return and reside in the [City 1] area as he formerly did. His parents and [sisters] remain in Sri Lanka, and may be able to provide him with support upon his return to mitigate some of the challenges he would face. He has been employed in Australia and was able to start a business back in 2012 with the support of his extended family overseas. There is no information before me to suggest that Tamils who have lived abroad are facing harm at the airport or in their home areas on their return to Sri Lanka simply due to the time spent out of Sri Lanka. The applicant has found work in Australia and in the past the applicant has successfully managed his own business and his sister's business in northern Sri Lanka. I am satisfied he has the skills and experience to resume his life in Sri Lanka.

54. Overall, I do not accept that the applicant would face a real chance of persecution arising from his illegal departure or from his status as a failed asylum seeker, or from his time spent overseas, or any combination of these, when considered cumulatively with his other claims.

Refugee: conclusion

55. 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

56. 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

57. 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.
58. 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.
59. I have found that that due to his illegal departure, the applicant will probably be identified on arrival at the airport, arrested and charged with breaches of Sri Lanka immigration law if returned to Sri Lanka. He will likely be detained for several in Negombo and subject to a fine or possibly bail and associated costs. He may face a period of monitoring upon return to his home in the north of Sri Lanka. He may face a number of everyday challenges getting re-established. However, I am not satisfied that any of these issues, either individually or cumulatively would amount to torture, the death penalty, or would result in him being arbitrarily deprived of his life. I am not satisfied that these issues amount to cruel or inhuman treatment or punishment, or degrading treatment or punishment as defined under s.36(2A) of the Act.
60. I have otherwise found that this applicant would not face a real chance of harm arising from any of his claims for protection. As 'real chance' and 'real risk' have been found to meet the same standard, it follows that he would not face a real risk of significant harm for these reasons. I am not satisfied he would face a real risk of significant harm for any other reason.

Complementary protection: conclusion

61. 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.