



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07524

Date and time of decision: 6 January 2020 09:28:00
C Wilson, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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 Christian Tamil from the north of Sri Lanka. He arrived in Australia as an unauthorised maritime arrival [in] September 2012. On 12 May 2017 he applied for a Safe Haven Enterprise Visa (SHEV).
2. On 23 February 2013 a delegate of the Minister for Home Affairs (the delegate) refused the application. The delegate considered the applicant an ordinary Tamil from the north with low level links to the Liberation Tigers of Tamil Eelam (LTTE), who would not be of adverse interest to the authorities if he returned.
3. On 21 May 2018 a reviewer of the IAA affirmed the delegate's decision.¹ The applicant sought judicial review and the matter was remitted by consent order for re-determination. On 9 November 2018 another reviewer of the IAA affirmed the decision a second time.² The applicant again sought judicial review and the matter was remitted by consent order dated 8 November 2019 for re-determination.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant's representative provided submissions to the Authority dated 16 April 2018. On 28 November 2019 the representative advised the Authority that those submissions were withdrawn, and were replaced by more updated submissions. I have accepted that withdrawal and have therefore not considered the submissions dated 16 April 2018.
6. On 28 November 2019 the representative provided written submissions containing legal argument and commenting on the delegate's decision. They also provided new information including: 4 support letters from persons in Sri Lanka; country information regarding recent elections and changes in government in Sri Lanka; and copies of the Department of Foreign Affairs and Trade (DFAT) Country Information Reports on Sri Lanka dated 23 May 2018 and 4 November 2019.
7. The four letters of support are from: [a] solicitor in Mannar; Grama Niladhari of the [Division] Divisional Secretariat; Rev Fr [name] parish priest in Mannar; and [a] Bishop of Mannar. All four claim to know the applicant or his family personally. All the letters post-date the delegate's decision, and whilst arguably much of the information could have been provided prior to the decision, they contain credible personal information that may have affected the consideration of the applicant's claims. I am satisfied s.473DD(b) is met. For reasons given in the decision, I find the applicant's oral evidence is not reliable due to his lack of competency. In these unusual circumstances, I consider evidence from people who knew him in Sri Lanka ought to be considered. I am satisfied there are exceptional circumstances to justify considering the support letters when the applicant is unable to provide reliable oral evidence himself. I am satisfied s.473DD(a) is met.

¹ IAA18/04636

² IAA18/05858

8. The 2018 DFAT report on Sri Lanka is already before me, as a previous reviewer obtained it as new information. I adopt their reasoning to find s.473DD is met. In relation to the 2019 DFAT report, I accept this could not have been provided prior to the delegate's decision being made. The report contains recent country information on issues central to the applicant's claims, such as the conditions for returning Tamils, the security situation in the north of Sri Lanka, and the treatment of persons associated with the LTTE. I acknowledge this is an exceptional case where due to court remittals I am reviewing the application 18 months after the delegate's decision, and therefore much of the country information before me is not current. In these circumstances I accept there are exceptional circumstances to justify considering the latest DFAT report and I find s.473DD is met.
9. The other country information provided by the representative included articles regarding recent elections in Sri Lanka, the new President Gotabaya Rajapaska and new Prime Minister Mahinda Rajapaksa, and fears the return to power of the Rajapaska brothers may lead to the deterioration in human rights in Sri Lanka. I accept the country information could not have been provided to the delegate before the decision was made as the elections only recently occurred. The representative says the new information is essential to any meaningful assessment of the applicant's claims, however I am not persuaded that it is. They do not contain information that persons with the applicant's profile or Tamils in the north generally are being treated any differently under the change in government. The fears expressed by the applicant, and in the articles, in relation to recent election results are largely speculative. I consider they are too speculative to be satisfied there are exceptional circumstances to justify considering the information. I find s.473DD(a) is not met and I must not consider this information.
10. The representative also provided a screenshot from a Sri Lankan website regarding psychiatric health and alcohol, smoking and drugs. The screenshot contains information referred to in the submissions regarding access to health and medical services in Sri Lanka. I consider this information is of little relevance to the review, as I do not accept the representative's submission that I should consider the adequacy and access to treatment in Sri Lanka as part of my assessment of whether the applicant meets the definition of refugee in s.5H(1). I am not satisfied there are exceptional circumstances to justify considering this information. I find s.473DD(a) is not met and I must not consider this information.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:
 - The applicant is of Tamil ethnicity and Christian religion. He was born in the Northern Province and lived mostly in Mannar district. His wife and [number of] children continue to live in Mannar.
 - His family were displaced during the civil war, including spending 3 years in India from around 1990 to 1993.
 - As a Tamil he was harassed and threatened by the Sri Lankan Army (SLA). In 2003 he was briefly detained and beaten at an SLA camp, because he returned after curfew from fishing. He was also beaten by drunk SLA officers a second time in 2003.
 - The applicant changed jobs from fishing to [Occupation] for a government department. Because his area was under LTTE control he also sometimes [did a job task] for the LTTE.

- The CID suspected his brother to be an LTTE supporter and thus suspected the applicant was also an LTTE supporter. His brother was detained for 2 years and suffered serious physical and mental harm during his detention. The family paid for him to be released. The brother then fled to India causing the authorities to increase their harassment of the applicant.
- The applicant left Sri Lanka illegally because the authorities were threatening to kill him unless his brother returned.
- He cannot return to Sri Lanka because since he's been in Australia he's suffered significant health problems. He will not get the medical treatment in Sri Lanka that he needs.
- If he returns to Sri Lanka he will be detained and will suffer harm, possibly be killed, because of his brother, suspicions the applicant was associated with the LTTE, and because he is a failed asylum seeker who left Sri Lanka illegally.

Refugee assessment

12. 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

13. 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.
14. I accept the applicant is a citizen of Sri Lanka, based on the identity documents he has provided to the Department. The applicant lived most of his life in Sri Lanka in Mannar district, and this is where his family continue to live. I find Sri Lanka is his receiving country and Mannar district is his home area.
15. The applicant claims to fear harassment and harm from the authorities in Sri Lanka primarily because he is a Tamil from the north with suspected LTTE links and because he has a close relative (brother) with suspected LTTE links. The applicant says his brother was suspected of

involvement with the LTTE because he had provided food for them during the conflict. He claims his brother was detained, and mistreated, for two years and that due to ongoing harassment he fled to India in December 2014. He says his brother returned to Sri Lanka for family reasons in 2017, but despite trying to keep a low profile he was again detained and beaten by the CID. Although he was released he continues to suffer monitoring and harassment. He also says his brother suffered [an] injury whilst in detention which required hospitalisation and has left him disabled. He did not however provide any medical evidence of this.

16. The applicant has significant health problems that would have impacted his ability to put forward his claims. As noted in the delegate's decision, the applicant has a history of chronic alcohol addiction, an acquired brain injury [and physical conditions]. He suffered [health events] in 2013 and 2014. The delegate appropriately questioned the applicant at the beginning of the interview to ascertain whether he felt well enough to participate. The applicant said he did and that he would answer any questions, but that he also suffered with memory problems. The delegate noted the applicant appeared lucid and was able to respond to questions, but that she took into account his health conditions when assessing his credibility.
17. There is information before me that the applicant was found in late 2017, shortly before the SHEV interview, to have a mental incapacity. For this reason the Victorian Civil and Administrative Tribunal appointed him a guardian and administrator for health and financial decisions. Clinical neuropsychologist, [Dr B], assessed the applicant in November 2017. Testing indicated the applicant was in the very low range for intellect and cognition, and had significant difficulties with attention, memory and processing. [Dr B] noted the applicant had longstanding heavy alcohol abuse and that this had significantly impaired his cognitive functioning. He also noted the applicant superficially engages however testing showed his cognitive capacity remained limited and it should not be assumed he was grasping complex issues. As an example, the applicant told [Dr B] he reads newspapers, but when asked to talk about current affairs he could not give any examples. The applicant was able to learn new information with repetition in the testing, but after a delay could not recall the information. Psychiatrist [Dr C] also gave an opinion that the applicant had suffered a brain injury resulting in impaired cognitive functioning, which affected his memory and capacity to make appropriate and realistic decisions.
18. Other medical information before me indicates the applicant presented to hospital 45 times in 2017 alone, and presented to hospital more than 140 times from 2014 to 2017. The medical reports state the applicant was generally suffering deteriorating physical and mental health, and lacked insight into the seriousness of his condition. There is also information the applicant has allegedly sexually assaulted, or attempted to, other females in the detox programs as well as allegations of actual or attempted assaults against female staff. In addition to his risk to others, he has self-harmed with three suicide attempts.
19. I do not have any more current medical information before me. I note the applicant is now in detention, and I assume his alcohol addiction is currently under control. However, given his complex history of medical conditions, longstanding addiction, and brain injury, I consider it unlikely there has been much improvement in his health. I consider he likely continues to suffer the effects of cognitive impairment and is also likely to return to alcohol abuse.
20. Given this background, and relying in particular on the reports of [Dr B] and [Dr C], I consider the oral evidence given by the applicant in his interview in February 2018 is not credible. The applicant engaged with the interview and was willing to answer questions, but his answers

lacked detail and were at times confused. I accept [Dr B]'s opinion that the applicant has impaired cognitive functioning and impaired memory. He appears to superficially engage and comprehend but is not in fact grasping the issues. I consider the applicant was trying to answer questions, but given his memory issues, impaired cognitive functioning and superficial engagement, I find the information and evidence he gave is not reliable. I consider this also applies to information he would have given his representative.

21. I have had regard to the recent information provided by the four support letters from Sri Lanka. They are provided from a number of different perspectives, that of a lawyer, local official, and two clergy. They are dated from 2018 and 2019 and although they were all organised by his wife, the letters are all different. That is, they are not just a form letter signed by four different people but are four individual letters. I consider they may contain some embellishments to enhance the applicant's claim for protection. For example, the lawyer and public official both state the applicant and his brother were actually LTTE cadres. Some of the information appears to have come from his wife, but some appears to be from their first-hand knowledge. I give particular weight to the letter from the Parish Priest who states he has personally known the applicant and his family since 2009, and that the applicant shared with the priest his worries and fears about being detained and the ongoing harassment that led him to flee Sri Lanka. All the letters support his core claims that the applicant and his brother had some adverse attention from the authorities because they were Tamils living in an LTTE controlled area and had assisted the LTTE in transporting goods. They all claim the applicant would be of adverse interest if he returned to Sri Lanka. I give the four letters weight as supporting the applicant's claim that he and his brother have in the past been of some adverse interest to the CID and SLA for suspected low level involvement with the LTTE.
22. The applicant claimed at his Entry Interview in January 2013 that his brother was suspected of LTTE involvement and for this reason his brother had fled to India. The applicant also claims his brother was detained for a period of time, and that during his detention he was physically mistreated. For the reasons given above, I have concerns about the reliability of the applicant's evidence, but the letters from Sri Lanka support this claim. The treatment of his brother is also consistent with country information. From 2009, when the conflict between the LTTE and the Sri Lankan military ended, large numbers of LTTE members, or suspected members, were arrested and detained by government security forces. The Sri Lankan authorities managed a large-scale 'rehabilitation' process for former LTTE members, with 24 rehabilitation centres in Northern, Eastern and Western Provinces for around 12,000 people. Any association with the LTTE at that time could be grounds for arrest. Many civilians were also questioned or monitored.³
23. The applicant's actual involvement with the LTTE is unclear. The applicant has at times denied any involvement with the LTTE, but has also said he was sometimes [working] for them. In the recent support letters he is also described as an LTTE cadre. I make no adverse finding regarding this inconsistency as, for the reasons given above, I find the applicant's own evidence is unreliable. I note DFAT reports the majority of Tamils living in areas controlled by the LTTE, such as in the north of Sri Lanka, were required to interact with the LTTE. It is plausible he had some involvement with them and that because he worked as [an Occupation] and fisherman that at times he was asked, or forced, to [do a job task] for the LTTE. Given the issues with his mental capacity and impairments, I consider it is possible he may now either underplay or embellish the level of involvement he had. I consider he would

³ DFAT Country Information Report Sri Lanka, 23 May 2018; DFAT Country Information Report Sri Lanka, 4 November 2019.

be vulnerable in any interrogation with the CID or SLA and may confess to a level of involvement with the LTTE that he did not in fact have.

24. Monitoring and harassment of Tamils in northern Sri Lanka was widely reported during the conflict, as all Tamils in that area were imputed at some level to be LTTE supporters. DFAT advises the Sri Lankan military, intelligence and police continue to maintain a high level of awareness of returned internally displaced persons to the north and east of the country. Whilst the LTTE is a spent force, the Sri Lankan authorities remain sensitive to the issue of Tamil separatism and for this reason monitoring is ongoing for suspected groups and targeted individuals. DFAT reports monitoring and surveillance of ordinary Tamils has decreased significantly, but does still occur for people associated with politically sensitive issues.⁴ The applicant claims he and his brother were monitored and harassed because they were suspected of links to the LTTE. How strong those links were is not clear, given the unreliability of the applicant's evidence. I accept the support letters from Sri Lanka indicate there is some truth in the claim he and/or his brother were suspected as persons with some link to the LTTE, and that the family has received some adverse attention in the past.
25. The country information indicates the prevalence of detention of Tamils with suspected or actual links to the LTTE has significantly reduced, such that an ordinary Tamil from the north would now not normally face a real chance of such harm. However, I consider the applicant would not be returning to Sri Lanka as an ordinary Tamil from the north with actual or suspected low level links to the LTTE. He would be returning as a Tamil from the north with suspected low level LTTE links who is likely to be problematic and make poor decisions because of his brain injury, cognitive impairment and alcohol addiction. I consider he would not be low profile in his community. I consider his impairments and associated poor decision making and behaviour would make him stand out in his community, as it has done in Australia. I consider it is not farfetched that his behaviour would attract an increased level of monitoring and harassment than an ordinary Tamil returning to the north of Sri Lanka. I consider it is not farfetched he may be detained by local authorities, including the CID or SLA, because of likely poor behaviour (including a risk to others as well as self-harming behaviour) in combination with a suspicion of past LTTE links. I consider it is not farfetched he would face serious harm during such detention, as numerous sources of country information have reported on the mistreatment of Tamils, particularly those suspected of LTTE involvement, whilst in detention. There is evidence of forceful interrogations, beatings, sexual assault and torture.⁵
26. Taking into account the applicant's personal circumstances, I consider there is a real chance he will be detained if he returns to Sri Lanka in the reasonably foreseeable future. Having regard to country information on the history of mistreatment amounting to torture in Sri Lankan detention facilities, and the applicant's personal vulnerabilities, I find there is a real chance he will face treatment amounting to serious harm during any period of detention. I find the applicant faces a real chance of persecution by the Sri Lankan authorities for the essential and significant reason of his ethnicity and imputed political opinion (pro-LTTE and Tamil separatist). I find the persecution involves systematic and discriminatory conduct. As the state is the agent of persecution, I find issues of state protection do not arise. I also find the real chance of persecution relates to all areas of Sri Lanka, noting DFAT's advice that the

⁴ DFAT Country Information Report Sri Lanka, 23 May 2018; DFAT Country Information Report Sri Lanka, 4 November 2019.

⁵ DFAT Country Information Report Sri Lanka, 23 May 2018; DFAT Country Information Report Sri Lanka, 4 November 2019; US Department of State Country Reports on Human Rights Practices for 2016 Sri Lanka, 3 March 2017; UK Home Office Report of Home Office Fact-Finding Mission Sri Lanka: Treatment of Tamils and people who have real or perceived association with the former LTTE, March 2017; Freedom from Torture, Sri Lanka – Update on torture since 2009, 6 May 2016.

Sri Lanka authorities maintain effective control throughout Sri Lanka and that individuals are unlikely to be able to relocate internally with anonymity.⁶

27. For these reasons I find the applicant's fear of persecution is well-founded. Given this finding it is not necessary to make further findings on his other claims.

Refugee: conclusion

28. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

⁶ DFAT Country Information Report Sri Lanka, 23 May 2018; DFAT Country Information Report Sri Lanka, 4 November 2019.

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.