



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07608

Date and time of decision: 24 January 2020 16:29:00
J McLeod, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) arrived in Australia in October 2012 and applied for a Temporary Protection Visa (TPV) on 13 October 2016. A delegate of the Minister for Immigration (the delegate) accepted some of the applicant's claims but was not ultimately satisfied that the applicant would face a real chance of persecution or real risk of significant harm if returned to Sri Lanka. The delegate refused the grant of visa on 27 November 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). This includes inter alia, a post-interview submission provided to the delegate.
3. No further information has been received from the applicant or anyone on the applicant's behalf.
4. I have however, obtained some new information to consider in this review. From the Department of Foreign Affairs and Trade's (DFAT's), 2019 country report on Sri Lanka¹ I have obtained information on the treatment of Sri Lankans of Tamil ethnicity and those suspected of Liberation Tigers of Tamil Eelam (LTTE) links and returnee citizens who departed Sri Lanka illegally and sought asylum abroad. From that same report I have also obtained information on the views of Sri Lankan Tamils regarding the (then upcoming) 2019 Presidential election, and from The Asian Tribune² I have obtained information on the outcome of that election.
5. I am satisfied that there are exceptional circumstances to justify considering this new information. In reaching this conclusion I take into account that DFAT is a highly authoritative source who has prepared its 2019 report specifically for the purpose of protection status determinations, and specifically to provide an update on its earlier reporting, on which I note the delegate had relied. As for the election outcome reported by the Asian Tribune, there is no information in the review material about this and I consider it to be pertinent to the issues under review.
6. I have considered inviting the applicant to provide new information pursuant to s.473DC. However, I take into account that the determinative issues in this review are the same as those before the delegate, albeit including some which had been overlooked. The information I have obtained from the 2019 DFAT report is also substantially similar to that contained in the 2018 DFAT report, and/or other sources the delegate considered. As for the information I obtained on the election (and Tamils' views on such), I am cognisant that the election has been scheduled for some time and neither the applicant nor his representative raised the election or its potential outcome as a consideration. The information obtained on the matter also does not contradict or weigh adversely against the applicant, and it is considered alongside information from sources that were before the delegate. Given these considerations, while I have turned my mind to it, I am not satisfied the circumstances warrant inviting new information on these matters from the applicant.

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

² The Asian Tribune, "In a clearly emerged ethnic division – Gotabaya Rajapaksa declared winner", 18 November 2019, 20191118110207

Applicant's claims for protection

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

- He is a Tamil Hindu born in [Town 1], Jaffna district, Northern Province, Sri Lanka.
- In 1998, his sister 'K' voluntarily joined the LTTE. She passed away in 2000, the LTTE said, from a misfire while cleaning her rifle.
- In around October 2006, he went to [India] and spent four months in a refugee camp operated by the Tamil Nadu Government. He went by boat with some friends because [Town 1] was under navy control at the time and people and property were being harmed by the navy. Young and unmarried persons like himself were at risk of being targeted for an assumed association with the LTTE and some of his friends were under suspicion of hiding weapons.
- In February 2007 he returned to Sri Lanka because conditions in the camp in India were very poor and he was constantly worried about his family in Sri Lanka.
- From 2007 – 2009 he was a [worker] for the LTTE. He [did specified duties]. He was not actively involved with the LTTE in any other way. He lost his job at the beginning of 2009 when the war intensified and the LTTE began to be defeated.
- In May 2009, he and around 1300 other people surrendered to the army in [a location]. They were taken to a school and interrogated and hit by the Criminal Investigation Department (CID). They assumed everyone had been involved with the LTTE because they were from an LTTE area. He did not disclose his LTTE involvement; he told the CID that he had a sister in the LTTE so the LTTE didn't find it necessary to recruit him. The CID accepted this.
- Around two or three days later, his [Relative A] was killed in a shell attack on the camp and his [specified relatives] all lost limbs.
- He was transferred to [Camp 1] in Vavuniya and was again questioned by the CID and denied having LTTE involvement. He stayed at the camp for approximately one year before being released in 2010 as the CID accepted he was a civilian.
- He returned to [Town 1] and got married in 2011.
- [In] August 2012 the CID arrested him from his home in [Town 1]. He was taken to the Navy Camp and beaten and tortured for two days. He still has a visible scar on his [body]. They accused him of being involved with the LTTE and a particular bombing in 2006, and previously lying to them about it. They said that some other imprisoned LTTE members had informed on him. They said they would release him if he showed them the weapons he kept at home and in his previous home in Vanni. He denied all of this but they didn't believe him.
- [Later in] August 2012, he was released and told to attend an enquiry at a CID jail in [Town 2] on [a date in] September 2012. He knew that if he did attend, he would never come out.
- He returned to [Town 1]. He noticed an increase in the number of CID and Navy officers around his house. He was afraid to go out as he worried he would be kidnapped. In 2007, an acquaintance with the same first name was released from a Navy camp, and later followed and murdered by the CID.
- After about six days he and his wife decided to move to Jaffna city and lived near his wife's family. His mother-in-law told him not to return to [Town 1] because the CID

made more attention to [Town 1] than to Jaffna, but he was also afraid to leave the house in Jaffna in case he was recognised and informed on to the CID, especially as he did not go to [Town 2] as required. He never went outside until he left for Australia.

- It was too risky to apply for a passport so [in] September 2012 he left Jaffna and met an agent in [a city], and then travelled to Galle and left for Australia [in] October 2012.
- Four months after he left Sri Lanka, the Navy CID took and beat his [brother] from his house in [Town 1]. They asked about the applicant and demanded his brother deliver him to them within 15 days, believing he was hiding within Sri Lanka. After this, his brother was too scared to remain and he and his family tried to also come to Australia. However, his brother went missing after leaving Sri Lanka.
- He fears being detained, tortured and killed by Sri Lankan authorities on return to Sri Lanka. He didn't attend the enquiry at [Town 2] and then left the country and this could be seen as proof of his LTTE involvement. He could also be jailed for departing illegally.

Factual Findings

8. The applicant has provided documentary evidence and an adequately consistent and plausible narrative of issues relevant to his identity. There are some minor variances in the applicant's name in the records before me but they appear to result from a shortening of his first name and transliteration. I accept the applicant's claims as they relate to his identity, nationality, ethnicity and origins in Sri Lanka. I accept he is a Tamil from [Town 1] in Jaffna district, in the Northern Province of Sri Lanka (his receiving country).
9. The applicant claims there are a number of reasons he cannot return to Sri Lanka. He claims because he will be harmed by Sri Lankan authorities due to his Tamil race, his familial association to his LTTE martyred sister, his own LTTE activities (working as an LTTE [worker] [with specified duties]), and the authorities' false suspicions of additional anti-government/LTTE activities including: involvement in 2006 bombings; being not in India but fighting with the LTTE in the Vanni from 2006; and having access to hidden LTTE weapons. He claims that his illegal departure while under investigation by the authorities in 2012 will have heightened their suspicions and that this and his return as a failed asylum seeker will also lead to his facing harm on return.
10. I accept several - but not all - of the applicant's claims regarding his past experiences in Sri Lanka (and India). I accept the following: His sister died while voluntarily serving with the LTTE in 2000. He was displaced numerous times during the war. He eventually went to India in 2006 due to the war situation and a fear that he would be targeted for being a young unmarried Tamil male. He spent a difficult few months in India living in a refugee camp, and voluntarily returned to Sri Lanka in February 2007. Upon return, he went directly to [the] Vanni region because he favoured living under LTTE rather than army/navy control (as was the situation in [Town 1], Jaffna). He had admiration for the LTTE and voluntarily worked in a [specified] role from 2007 until the LTTE's defeat in his area in 2009. He surrendered to the Sri Lankan Army (SLA) when the LTTE was defeated in his area, and was detained with many others in a camp, during which time he was questioned about his LTTE links and there were shelling incidents which led to the death of his [Relative A], and his [specified relatives] losing limbs. He was released from [Camp 1] in 2010 and returned to [Town 1]. He departed Sri Lanka illegally in September 2012.
11. However, as alluded to above, there are aspects of the applicant's claims regarding his profile and his claimed interactions with the Sri Lankan authorities over the years which, for the reasons that follow, I do not accept.

12. The applicant has provided no supporting evidence or other contextual information about the accusations of weapons hiding against his friends in 2006. Given this and that the applicant made no mention of this until the TPV interview, I am not satisfied this claim is credible.
13. I note he confirmed in the TPV interview that he was never questioned/interrogated before he left for India and as his evidence overall does not indicate so, I am not satisfied he was of any personal interest to the authorities at the time he departed for India (in 2006), nor returned (in 2007). I note the post-interview submission suggests that the applicant twice surrendered to the authorities – once at the end of the war (as the applicant himself has consistently stated) and once after he returned from India. The submission states that at this point, “...he went to Vanni and surrendered to the authorities and was subsequently questioned about why he had travelled to India” however the applicant had made no mention of this previously, instead suggesting in his Statutory Declaration and TPV interview that he went straight to the Vanni when he returned from India, and worked for the LTTE. I do not accept that this incident of surrender and questioning claimed in the post-interview submission occurred. Further, while I accept the applicant travelled illegally to India by boat and back, the evidence does not suggest the applicant’s departure or re-entry was apparent or of any concern to the Sri Lankan authorities at the time. Nor does the evidence suggest they have since learned of it and/or that they have developed concerns since this time.
14. I have accepted the applicant performed a [specified] role for the LTTE. During the TPV interview the applicant stated that he liked what he did and considered it important. He said it was his desire to join the LTTE but for some reason they did not recruit him into their force; he never wore an LTTE uniform or undertook any arms/weapons training, or had involvement in any active fighting or bombings. Rather they just used him “like a worker”. Given these considerations, while the applicant claims that he [did specified duties], I am not satisfied he had involvement in any battlefields with active fighting or in using any weapons. The applicant also commented in the interview that whilst living and working amongst the LTTE he was living his life “as if I was an LTTE fighter myself”, and that his contribution to the LTTE was much bigger than an LTTE member or cadre would have made. Claims and submissions have also been made about the applicant “living with the LTTE”, being “part of the LTTE”, being a “high level LTTE member” or “ex-LTTE member”. His overall evidence does not support that he performed any other role or work apart from [his stated duties] or that he was anything other than a civilian living in an LTTE controlled area and working for them, as I accept many Tamils in LTTE controlled areas did at the time. I find the applicant’s comments/claims/submissions were made in an attempt to embellish on his LTTE role and profile and I do not accept the proffered descriptions of his profile.
15. I have accepted the applicant surrendered to the army in 2009 and was detained in a camp. I accept too, the evidence he gave in his TPV interview that like everyone else, he was required to have his photograph taken for his camp identity (ID), and some personal details taken down. He claims that his details were run against a computer program and was identified as having a match with an LTTE profile. He claims he was then required to have his photograph taken while holding a notice identifying him as an LTTE member, but he managed to hide the notice by folding it up and putting it in his pocket. The post-interview submission also refers to the applicant hiding “the documents that evidenced that he was an LTTE supporter/cadre”. As a result, he received a normal camp ID as opposed to one which labelled him as an LTTE member and 10 months later was able to be released.
16. However, even if I were to accept the applicant’s claims about avoiding the LTTE marker on his ID card, as the delegate put to him during the TPV interview, it is difficult to accept he wouldn’t have been so identified anyway, given his claims that they had the details in their computer. The

applicant responded that the UNHCR³, ICRC⁴ and other agencies were present while the photographs were being taken and it is also proffered in the post-interview submission that this is why the Sri Lankan Army (SLA) did not harm him at this point. However, I do not accept this would have saved the applicant from being so identified, and from being harmed by the SLA at some point in the next 10 months had they wanted to do so. In any event, if it was the requirement that the applicant hold the notice in the photograph, I do not consider it plausible that he would be able to avoid the requirement simply by putting it in his pocket. I also have concerns because the applicant's evidence on this matter suggests his LTTE links went undiscovered in the camp but this does not gel with his later evidence that he was questioned about his LTTE connections in the camp, and willingly disclosed them.

17. According to the applicant's own evidence, in the early stages of his time in the camp he underwent some basic questioning where he disclosed his sister's involvement and death and that he was a [worker] for the LTTE. However he claims he did not provide specifics about his [specified] role and the Sri Lankan authorities in the camp did not take issue with it. They accepted his explanation that he was not required to fight because his family had already given one member - his sister who had been martyred for the cause. He confirmed he was released in 2010 and was not questioned again before then, and had no issues with the authorities until he was picked up by the CID in [Town 1] in August 2012.
18. The applicant claims he was detained by the CID for two days in August 2012, during which time he was interrogated, hung upside down and severely beaten. He claims he was dobbed in by some former LTTE members who had undergone rehabilitation and returned to the area. He claims the CID accused him of lying to authorities to get released from the camp. They didn't believe he had ever gone to India and put to him that he had been an active LTTE member even while living in the army controlled area from 2000 -2006 and that he fought with them in the Vanni. They also accused him of hiding LTTE weapons, and of being involved in a bombing in 2006, and two of his friends had also been accused. He said they were making arrangements for him to go to [Town 2] jail, and to the Fourth Floor.
19. However, the applicant has provided no supporting evidence of the 2006 bombings with which he claims he and his friends had been accused, nor any other contextual information about these friends. His evidence on all of these matters has also been problematic on several fronts. His evidence as to how he learned that someone had dobbed him in was unconvincing, as were his claims that the authorities believe he has access to hidden LTTE arms supplies. He claims that some ex-LTTE members who had returned to the area after being rehabilitated had informed on him, but he does not know them personally or have any relationship with them. Given this, the low-level nature of the applicant's LTTE [specified] support role, that he had already disclosed his and his sister's involvement to authorities in the camps and had no issue with the authorities from 2010 – August 2012, I have difficulty accepting the applicant was suddenly suspected of these multiple things (LTTE involvement since 2000, being involved in fighting and bombings and harbouring hidden weapons). I note too that the applicant has not claimed (and there is no other indication on the material) the authorities searched his home or that of any relatives, nor any places he frequented, looking for hidden weapons (or clues to such). I have difficulty too, with the plausibility of the applicant being released by the CID after just two days if he was in fact under suspicion of harbouring and hiding LTTE arms or having involvement in any bombings or LTTE fighting.

³ United Nations High Commissioner for Refugees

⁴ International Committee for the Red Cross

20. The applicant also gave unconvincing evidence about why he was released by the CID after two days. In the TPV interview he responded that the CID couldn't do much about it. He said they couldn't have arrested him or made him disappear because everyone in his area had been aware that he had been taken away, but they were making arrangements to take him to [Town 2] for further interrogation. He said this is the normal practice in Sri Lanka; if someone is taken by the CID in the presence of the public, they interrogate them but have to release them. However he said that once he returned home, he noticed an increased presence of CID in the area, and that unidentified people were watching and monitoring him, and he came to know they were planning to abduct and possibly kill him in secret.
21. The applicant's evidence about going to [Town 2] was also discordant. In his TPV application he said he was instructed to himself attend [Town 2] on [a date in] September, and while early in his TPV interview he mentioned he had failed to report for questioning/interrogation when summoned, when specifically asked about [Town 2] later on, he made no mention of any requirement to report. He instead indicated that he noticed an increase of CID presence and believed he was being monitored, and feared he would just be abducted and taken there. The delegate twice asked him if he was asked to report after his release, at all or on any specified date, and he answered in the negative, stating the CID told him they were making arrangements and would be taking him there for further interrogation. However, the post-interview submission submits that the applicant *"failed to report for further questioning and interrogation when summoned to do by the SLA"*. I find the applicant's specificity as his required attendance on [a date in] September on the one hand and his vague suggestion that he was being monitored and may be taken there on the other, undermines his persuasiveness in respect of these claims. The inconsistency between whether he was or wasn't required to report is also concerning, as is the inconsistency between whether it was the CID who were wanting him to report, or the SLA.
22. The applicant claims that he went to Jaffna and stayed inside his wife's parents' house until he left for Australia. However on his own evidence, the authorities did not search for him there during this time and nor did they seek him, or information about him, at this location after he left. However, he claims that they have sought to find him by making enquiries at his mother's house, and with his brother since he left the country. In the TPV interview the applicant said that as recently as "last year" (which, as the TPV interview was conducted in 2019, I accept to mean 2018) the authorities had visited his mother's house and showed them a (false) photograph depicting him in an LTTE uniform. They showed his family and said *"[S]ee, we have proof that he was in the LTTE. This is the photo of him wearing LTTE uniform"* and asked for more information about him.
23. In the TPV interview the applicant sought to explain why his mother in [Town 1] has faced enquiries about him but his wife who is living in Jaffna (where he lived with her parents before leaving for Australia), has not. He said that it is the navy people who are looking for him and whereas his mother lives in a navy controlled area, his wife lives under army control and the CID do not know much information about her area. I find this explanation to be unconvincing and implausible. The suggestion of [Town 1] and Jaffna being under the control of separate authorities in post-war Sri Lanka is problematic and in any event, I do not accept these branches of the authorities would not have shared intelligence in looking for someone suspected of the claimed crimes. Also given the applicant's hiding place was only in Jaffna (which I consider to be in close proximity to [Town 1]) and at his wife's parents' house, and that his wife and children have remained there ever since, I consider that had the authorities wanted the applicant, they would have located him at his in-law's house in Jaffna while he was there, and/or made enquiries with his wife and in-laws.

24. The applicant claims that after he arrived in Australia the authorities took his brother away for questioning about him. I note his evidence in his TPV application and interview differed between whether his brother was taken four months after the applicant left Sri Lanka ([in] October 2012, so approximately February 2013), or two months after he arrived in Australia ([in] October 2012, so approximately mid-December 2012). This is a significant variance. Even so, while there may be a plausible explanation for such variances in certain circumstances I do not consider that this is one of those circumstances. I do not consider it plausible that the authorities would wait until December or February to question the applicant's family members if he failed to attend [Town 2] on [a date in] September as (according to his TPV application at least) he claims was required. Even considering the alternative version of events offered in his TPV interview (that there was no specified date for the applicant to himself report but the CID were just going to take him there at some stage), I do not consider it plausible that the applicant would not have been sought for the further enquiries sooner than when the authorities eventually purportedly questioned his brother. I do not accept this claim and it follows that I do not accept the applicant's brother and family were influenced to leave Sri Lanka because of this incident. I am prepared to accept the brother's family have tragically disappeared after leaving Sri Lanka on a boat but I do not accept their leaving Sri Lanka was influenced by the applicant's profile or circumstances.
25. I also consider implausible, the applicant's claims about the 2018 visit to his mother with a false photograph of himself in LTTE uniform. Given the applicant's evidence that he never wore a uniform and taking into account that it has now been 10 years since the LTTE were defeated (and taking into account the authorities' shift in security focus discussed below), and that it has been seven years since the authorities had any contact with the applicant, and that there is no evidence to suggest they approached his wife or other relatives about this or any other matters connected with him in recent years, I do not find this claim, to be credible.
26. I have outlined a myriad of concerns above. Overall, I do not find the applicant's claims regarding the 2012 and subsequent incidents to be credible. I do not accept he has been questioned or of interest to the Sri Lankan authorities since the early enquiries made in the camp where he disclosed his sister's historical LTTE involvement and his own more recent LTTE [work]. I do not accept he has ever been suspected of being an LTTE member, hiding weapons or having involvement in any bombing incidents. I am not satisfied the authorities maintained any interest in the applicant – for any reason - after his release from [Camp 1] in 2010. It follows that I do not accept the authorities detained and questioned his brother or have made enquiries at his mother's house looking for him.

Refugee assessment

27. 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

28. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

29. I have accepted the applicant has experienced some difficult times, but I also find he has attempted to embellish on his perceived profile with the authorities and has fabricated some of his claims for protection. Significantly, I have found above that the applicant's claims of being pursued by the authorities in 2012 over LTTE links and weapons and a bombing incident is not credible, and that despite them knowing about the applicant's LTTE [work] and his sister's LTTE membership and death, the authorities did not charge the applicant or send him for rehabilitation or treat him with any significant concern over his and his sister's LTTE activities while he was being held in [Camp 1] in 2009-2010. On his own evidence they treated him as a civilian and I am satisfied they did not maintain any interest in the applicant after his release from there in 2010 – around a decade ago now. The applicant claims he did not disclose the specifics of his role to the SLA but even if he had, or the authorities have otherwise become aware of it, I am not satisfied the applicant would be regarded by the authorities as an LTTE member, or as having done anything more than a low-level support role or that he would be of concern to the authorities now, or in the reasonably foreseeable future.

30. The country information before me demonstrates that a lot has changed in Sri Lanka over this decade, and particularly in the seven years that the applicant has been in Australia. Information before me from the various independent sources indicates that the situation for Tamils (including those who formerly worked for, or had family members in the LTTE) has improved significantly, both politically and socially since the end of the war, since applicant came to Australia and particularly since 2015 when there was a change in Presidency. The information that was before the delegate and is included in the review material indicates that the LTTE are now 10 years defeated and the security and political landscape has radically changed. The north and east has been significantly demilitarised and while it remains in force, the Prevention of Terrorism Act (PTA) is now only used in isolated instances. Former President Sirisena and a new Parliament were elected in 2015 processes the international community described as credible and relatively peaceful on platforms of economic reform, human rights, reconciliation, transparency, transitional justice and overall good governance, and while the Sirisena government was criticised for a lack of progress in meeting objectives under these commitments, significant gains were made nonetheless. DFAT (2018, 2019) assesses that Tamils now have greater representation in the political mainstream and a substantial level of political influence, and their inclusion in political dialogue has increased. DFAT considers Tamils now face a low risk of official or societal discrimination on the basis of their ethnicity.

31. Sri Lanka is not devoid of problems. It is clear that true reconciliation has not been achieved and several of the Sirisena government's election commitments went unmet. The post-interview submission provides examples of such. Even with the LTTE long defeated DFAT (2018, 2019), the UKHO (2017) and others have indicated that the government still keeps a close eye on the north and east of the country and is sensitive about possible Tamil separatist activity and a potential

re-emergence of the LTTE as well as certain other types of political activism. DFAT's 2019 reporting indicates that Tamils continue to claim that authorities monitor public gatherings and protests and engage in targeted surveillance and questioning of individuals and groups, particularly those associated with politically sensitive issues such as missing persons, land release and memorial events and those with links to foreign groups, including some in the Tamil diaspora. DFAT (2018, 2019), the United States' State Department (USSD; 2018), the United Kingdom Home Office (UKHO; 2017), UN Special Rapporteur Ben Emmerson, Freedom from Torture, the International Truth and Justice Project (ITJP; 2016, 2017, 2018), Human Rights Watch, London Associated Press (AP) and other sources referenced in the post-interview submission and/or considered by the delegate also note continuing reports of mistreatment including arbitrary detention, torture and other harms particularly against Tamils, perpetrated by Sri Lankan police and security forces. The post-interview submission also reports on specific developments in recent years including inter alia, increased tensions in Vadamadachi and northern areas which resulted in protests and some violent crackdowns from the authorities in 2017.

32. However, the information before me suggests that Tamils of a certain demography and geography would no longer come to the adverse attention to authorities on such basis and nor, necessarily would all those who might once have carried a 'risk profile' as identified in the now dated UNHCR guidelines of 2012 that DFAT referenced in its 2018 report. DFAT (2018, 2019) considers Tamils now face a low risk of official or societal discrimination on the basis of their ethnicity. There has been a noticeable demilitarisation of the north and east; and the prevalence of monitoring of Tamils in day-to-day life has decreased significantly, with DFAT suggesting that only those associated with politically sensitive issues would now attract monitoring, and even then, DFAT's most recent report suggests it is done so more subtly, and commonly without violence. DFAT (2018, 2019) and the UKHO approach discussed therein indicates that the authorities' focus has shifted to identifying those active in post-conflict separatism, those on stop and watch lists (whom I accept may include former LTTE members) and who may otherwise be considered a threat to the Sri Lankan state. DFAT's view (2018/2019) is that high profile and low-profile former LTTE members would still attract adverse attention from the authorities, although the action against them would vary according to the extent of their involvement and that close relatives of high profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring.
33. I note the Asian Tribune reporting that Gotabaya Rajapaksa was elected President on 16 November 2019 against the voting wishes of the Tamil majority, who reportedly await the future insecurely and with uncertainty. DFAT (2019) too reported that local Tamil sources had in the past expressed concern about the reversal of the human rights improvements achieved since 2015 if former Presidential Mahinda Rajapaksa or someone close to him including his brother, former Defence Secretary Gotabaya Rajapaksa returned to power. I am aware therefore, of concerns among the Tamil population fearing a potential return to the abuses of government carried out during the war, and its immediate aftermath under the Mahinda Rajapaksa presidency (and Gotabaya's defence portfolio).
34. The country is no longer in the throes of civil war or an aftermath of such, the LTTE is long defeated, there is no indication in the material of any actual LTTE resurgence or rising of any similar strong separatist force, and the culture of impunity no longer exists as it did before. Presidents may now only serve two terms, and I am satisfied that overall, Sri Lanka's democratic landscape is more robust. I consider the nature of the changes across a range of political, security and social measures over the past four to five years in Sri Lanka have been significant and have extended beyond the levels of governance and administration. Societal attitudes have

also shifted, and consecutive 2018 and 2019 DFAT reports have assessed the risk of official or societal discrimination against Tamils to be low.

35. The evidence does not suggest the situation in Sri Lanka will change in the reasonably foreseeable future such that there will be a regression from the overarching positive developments or that it would otherwise result in Tamils facing a real chance of harm. Country information which I am satisfied applies to the whole of the country, suggests that monitoring and harassment against Tamils has reduced dramatically and that Tamils now face a low risk of official discrimination. It does not support that Tamils of any gender, age, or geographic origin or residence within Sri Lanka are persecuted, even if they are living in an area such as [Town 1], Jaffna, in the Northern Province, and even if they lived in the Vanni in the final years of the war.
36. I refer to the findings I made above in relation to the applicant's profile and I am not satisfied the authorities have had an ongoing interest in the applicant, or more broadly, the family. Apart from prosecuting the applicant for his illegal departure (discussed below) the evidence does not suggest that the applicant would be of any interest to the authorities now, or in the reasonably foreseeable future for any reason.
37. The post-interview submission suggests the applicant would be viewed as having pro-separatist sentiments given his links to the LTTE and that he has been in the Tamil diaspora in Australia for several years, however I have not accepted the applicant's former LTTE links (including those through his sister) were of concern to the authorities from 2010 onwards and the applicant has not given any indication that he has participated in any political activism in Australia (pro-LTTE, opposed to any particular party/government or otherwise) with the Tamil diaspora or otherwise, or that there have been any other developments in his personal circumstances which would lead the authorities to now be concerned about him.
38. The post-interview submission claims the applicant's support and likeness for the LTTE persists, and that he holds zealous pro-LTTE sentiments which if he were forced to return to Sri Lanka he would be unable to keep to himself. However, I do not find this credible. I am not satisfied the applicant's behaviour in Sri Lanka or in Australia demonstrates that he has maintained strong opinions and support or has expressed any such sentiments in the several years he has been in Australia. I am not satisfied the applicant would be imputed as being pro-LTTE or anti-government or pro-separatist on the basis of his sister's LTTE profile, which I now consider to be historical, nor for his own LTTE [work], or for any other reason. Nor am I satisfied the applicant would express, or would wish to promote or otherwise express pro-LTTE or separatist opinions upon return and as above, the Sri Lankan government's focus has now shifted and I do not accept the applicant would be of concern to them. I am satisfied the applicant would not now or in the reasonably foreseeable future be wanted by authorities on account of any LTTE or separatist related matters, or any other security matters.
39. Overall, having regard to the applicant's particular circumstances and profile and the country situation in Sri Lanka, I am satisfied the applicant does not face a real chance of being detained under the PTA, subject to rehabilitation or otherwise harmed on account of his Tamil race, nor any LTTE/separatist/anti-government imputations arising from his race, gender, age, nor any other factors in his or his family's profile or circumstances.
40. I accept the applicant has never held a passport and would be returning to Sri Lanka using temporary travel documents. I accept he would be identifiable to authorities at the airport as a failed or returning asylum seeker.

41. DFAT's 2019 reporting on the processing and treatment of such persons is substantially similar to DFAT's 2018 information which was before the delegate. According to DFAT, the applicant will be processed in groups with other returnees and while it may be several hours before the applicant and the other returnees can leave, returnees are free to go to the bathroom and to talk to one another during this time.
42. From DFAT's advice I accept that as part of this process, the authorities will look into the applicant's personal history and check his information against immigration and intelligence databases, criminal and court records, in order to confirm his identity and identify any possible terrorist or criminal background, or any other security concerns. I accept they may check his documentation, and I am satisfied that his nationality and identity will be evident from the copies of his birth certificate and national identity card he has in his possession.
43. The applicant may also be interviewed and police, neighbours and family may be contacted in [Town 1]/Jaffna. However given my findings on the applicant's profile I am not satisfied this investigation will uncover anything of concern and I am not satisfied he will be harmed or that the authorities will otherwise take an adverse interest in him (at this point, or afterwards). I do not accept the post-interview submissions about Sri Lankan government systems linking the applicant with the LTTE on the basis of his past record, his *"involvement with the Tamil diaspora in Australia and involvement with the Tamil separatist cause"* (which I do not find credible) or any factors. Nor do I accept the submissions that the applicant will be of concern because of his appearance, because he *"left after the war"* (especially noting he did not leave until more than three years after the war ended and was not of interest when he did leave), or that his return from Australia/a western country where he has now lived almost eight years or in the event that he returns with IOM assistance will elevate his profile to one of concern. I am satisfied that through the questioning and investigation processes, the authorities will determine that the applicant is not and has never been of adverse security or criminal interest and does not, contrary to the representative's submissions, appear on a 'stop' or 'watch' list. I am satisfied that the authorities will not perceive him as a person who present as a risk or threat to the integrity of the Sri Lankan state.
44. Although as I have not accepted the claimed occurrence of the 2012 detention incident from which he claims he sustained scarring and I am not in a position to determine the true original source/cause, I am prepared to accept nonetheless that the applicant has some visible scarring. Consecutive 2018 and 2019 DFAT reports have noted reports from sources such as Freedom from Torture which have suggested that people with scarring have attracted adverse attention. However DFAT notes these cases date from the immediate end of the war and DFAT is unaware of more recent evidence of individuals being detained because of scarring. Other sources before the delegate also do not suggest that scarring remains an issue in modern day Sri Lanka. Should the applicant's scarring be noticed by Sri Lankan authorities processing the applicant on return, or by anyone afterwards, I am not satisfied it will lead to any adverse concerns or harm direction against the applicant.
45. The post-interview submission submits that the UN has urged member states not to return Tamils back to Sri Lanka and pointed to reporting from the ITJP (2016, 2017, 2018), UN Special Rapporteurs Ben Emmerson and Juan Mendez and other sources including media reports indicating that torture and other ill-treatment (including sexual ill-treatment) of Tamils by members of the authorities in Sri Lanka is still occurring, including for reasons of extracting confessions. The USSD (2018) and DFAT (2017, 2018, 2019) also report there are continued allegations of torture and mistreatment of returnees and Tamils. However, as the delegate noted in her decision, the reported allegations have reduced in recent years and I am not in any event satisfied that they are reflective of the treatment faced by all Tamils on return. I do not

accept the reported allegations are informative of the circumstance that would be faced by the applicant, whom I have found would not be of adverse interest to the authorities upon return. DFAT (2018, 2019) advise that all returnees are subject to these standard procedures, regardless of ethnicity and religion and understand that detainees are not subject to mistreatment during processing at the airport. This is in accordance with reporting from other sources considered by the delegate including the Canadian Immigration and Refugee Board (2013, 2017).

46. Having regard to my findings on the applicant's profile and the country information above, I am not satisfied the applicant will be on a 'stop' or 'watch' list, that he will be considered a criminal or threat to security, or that he will otherwise be found to have an adverse profile of any kind on return. I am not satisfied that the processing itself amounts to serious harm or that the applicant would for any reason face a real chance of suffering a threat to his life or liberty or other harm amounting to serious harm during returnee processing.
47. I have found above that I am not satisfied the Sri Lankan authorities are aware of, or would be concerned about, the applicant's previous illegal journey to and from India, but I accept the applicant may be arrested and charged in relation to his illegal departure from Sri Lanka to Australia.
48. Based on information in DFAT's 2017, 2018 and 2019 reports I accept he will be charged, and that this may involve having photographs and fingerprint, and a statement taken. He will be brought before the closest Magistrate's Court at the earliest opportunity, though DFAT (2018, 2019) notes that subject to Magistrate availability, returnees may be held for up to two days in the airport holding cell awaiting this transfer. DFAT (2019) states it is not aware of mistreatment during this process either, and nor am I satisfied on the basis of any other information before me, that the applicant would be mistreated in this process.
49. Once in court, the Magistrate will determine the next steps to be taken. DFAT (2019) advises that bail is normally granted to fare-paying passengers of a people smuggling venture. Bail conditions are imposed on a discretionary basis and according to DFAT, this can involve monthly reporting to police at the returnee's own expense. On DFAT's 2019 information I accept the applicant would be required to appear in court in the area where he illegally departed from (which from the applicant's Entry Interview appears to be in Galle, all the way down on the Southern coast). He may have to return a number of times (at his own expense), for his own case, and in the event that he is summonsed as a witness. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the I&E Act appear in court every 3-6 months, with protracted delays, with cases only properly progressed when all members of a people smuggling venture have been located.
50. There is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger and according to DFAT (2017, 2018, 2019), the Sri Lankan Attorney-General's Department has advised that no custodial sentences have ever been issued to such persons. I am not satisfied there is a real chance he would be imprisoned at all for any period.
51. From DFAT's information, I surmise that should the applicant plead guilty to departing illegally, he may be fined up to LKR 200,000 (approximately AUD 1,633), though well-placed sources have told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163).
52. If a not-guilty plea is entered, usually in these circumstances the magistrate would grant bail on the basis of personal surety or guarantee by a family member and the returnee may need to

wait for the guarantor to come to court. I am not satisfied there is any reason he would not be granted bail on his own personal surety. The applicant confirmed in the TPV interview that his parents and [sister] are still living in Jaffna, Sri Lanka, as I note his wife and children and her family are. The evidence before me does not suggest the applicant is estranged from any of his family or that he would not have a willing family member who could go guarantor and provide some other support should he require it on return.

53. DFAT (2019) notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances over protracted lengths of time can be high, and disruptive to the returnee's lifestyle. DFAT also reports that returnees receive limited integration assistance and many have difficulty finding suitable employment and reliable housing on return. The applicant's representative's submissions have raised concerns about the difficulties returnees can face finding suitable employment and reliable housing and with other financial issues on return. However the applicant has varied work experience as a [worker], in agriculture (previously [specified duties]) and in the [specified] industry in Australia. And as noted above, he has family members on his own side and his wife's side in Jaffna, and the evidence does not suggest he would be unable to draw on them for some initial support, or that he would not be able to draw on his own work and life experience, and any community networks (however dated) he had before, for assistance in making connections and finding employment. I am not satisfied the applicant could not pay a fine, even if by instalment and manage arrangements for his travel and court appearance/s, and nor am I satisfied he would otherwise face serious harm arising from financial hardship in the reasonably foreseeable future. Nor am I satisfied that any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with the applicant's court appearance/s would constitute serious harm to the applicant.
54. Additionally, I am satisfied the arrest and judicial processes the applicant may face result from the lawful prosecution of a crime and there is no evidence before me that laws relating to illegal departure are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. I find that the process leading to arrest, charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to all Sri Lankans who depart illegally and/or are subject to bail conditions and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
55. I am not satisfied that the applicant faces a real chance of persecution arising from the circumstances he may face in returnee processing, nor from the processes and consequences arising from his illegal departure.
56. The applicant has raised concerns about facing problems beyond the airport. DFAT's 2019 reporting indicates that some returnees have been the subject of monitoring by the authorities, these are persons with suspected LTTE links. DFAT reports that most returnees, including failed asylum seekers are not actively monitored on an ongoing basis, and it is not aware of them being treated in a way that endangers their safety and security. DFAT notes that failed Tamil asylum seekers who returned from Australia to the Northern Province have told DFAT that they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits nor experienced societal discrimination following their return. While there are some reports of social stigma against returnees and failed asylum seekers, DFAT assesses that societal discrimination is not a major concern and there is a low risk of it occurring. Sources told DFAT that locals were generally welcoming and returnees did not feel they were treated differently.

57. Given my findings above, I am not satisfied there is a real chance that the applicant will be monitored upon return. I am satisfied there is only a low risk of societal discrimination and in the event that this, or any social stigma is experienced by the applicant I am satisfied it would only be low-level and temporary. In all the circumstances I am not satisfied that any such discrimination or stigma or related difficulties would consist of or cause or result in any threat to the applicant's life, or significant physical harassment or ill-treatment, or threatened access to basic services or any capacity to earn a living of any kind, such as to threaten his capacity to subsist. I am not satisfied the applicant would otherwise face serious harm for these reasons in the reasonably foreseeable future.
58. Considering the applicant's circumstances and relevant country information overall, I am not satisfied that the applicant has a well-founded fear of persecution nor or in the reasonably foreseeable for any of the reasons claimed, either individually, or when any or all of them are considered together.

Refugee: conclusion

59. 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

60. 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

61. 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.
62. 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.
63. As set out above, I have found the applicant would not face a real chance of being detained under the Prevention of Terrorism Act (PTA), being subject to rehabilitation or suffering any manifestation of serious harm on account of his Tamil race, nor any LTTE/separatist/anti-government imputations arising from his race, gender, age, geography or demography nor (taking into account all relevant factors including - inter alia- his LTTE work and his sister's LTTE membership and martyrdom, his travel to India, time in the Vanni and in the camp after the war where he was questioned) any other factors in the applicant's or his sister's/family's profile or circumstances. For the same reasons, I am also satisfied they will not face a real risk of suffering

the death penalty, being arbitrarily deprived of their lives or being subjected to torture nor cruel or inhuman treatment or punishment and degrading treatment or punishment.

64. I am not satisfied there is a real risk that the applicant would be monitored upon return, but on the small chance that he experiences some societal discrimination or social stigma, I am satisfied it would be low-level and temporary, and would not in any event, involve any acts or omissions at the official or societal level which would constitute significant harm as defined in the Act.
65. I have found the applicant would do not face a real chance of suffering serious harm arising from financial circumstances. I have noted the applicant's varied work experience and his family's presence in the north, and there is no information to suggest he will be denied an opportunity to earn a livelihood to support himself. I am satisfied that he would not face any difficulties or harm arising from financial issues which would amount to significant harm, under any of its limbs.
66. I am not satisfied the applicant would face a real risk of significant harm arising from his profile and circumstances, nor through any act or omission arising out of the returnee/illegal departee processing, any questioning or investigation into the applicant arising out of these processes, and any related judicial actions against the applicant arising from his illegal departure. I am not satisfied the applicant faces a real risk of being subjected to any manifestation of the limbs of significant harm.
67. I have otherwise found the applicant would not face a real chance of harm on return. For the same reasons, I am not satisfied he would face a real risk of harm, including significant harm – from anyone in Sri Lanka.

Complementary protection: conclusion

68. 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.