



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/07824

Date and time of decision: 19 March 2020 15:19:00
M Simmons, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu and Sri Lankan national. He entered Australia in May 2013 and on 11 May 2017 he lodged an application for a safe haven enterprise visa. On 30 January 2020 a delegate of the Minister for Immigration refused that application.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 25 February 2020 the IAA received correspondence in relation to the applicant's matter. This comprised a legal submission, an article from Human Rights Watch, a further statutory declaration from the applicant including a neuropsychological assessment, and a new information submission. This material was submitted by a lawyer from a legal centre who advised that they were not representing the applicant and only providing one off assistance.
4. To the extent the legal submissions convey legal argument they are not seeking to adduce new information and I have had regard to them. The legal submissions includes an extract from a Human Rights Watch article dated 16 February 2020, a copy of which was also submitted. This article postdates the delegate's decision and I am satisfied it could not have been provided prior to it. The article concerns threats made against relatives of disappeared persons. It is submitted that there is evidence that Sri Lanka has a current Prime Minister whose actions, both previous and current, condone discrimination against Tamils. However neither the extract nor the article as a whole appears to support that contention. The extract concerns President Rajapaksa resisting demands for justice, including for the relatives of missing persons. The applicant has not claimed that he has any missing relatives or that he fears harm in Sri Lanka for this reason. I am not satisfied that there are exceptional circumstances justifying my consideration of this new information as it does not appear to be materially relevant to the applicants claims for protection.
5. The statutory declaration explains why the applicant does not agree with the conclusions of the delegate, for the most part it does not include new information and I have considered it. The new information it does convey is an attached neuropsychological assessment for the applicant dated 10 December 2019. It reports on assessments undertaken on 26 November and 3 December 2019 and comprises part of a larger neuropsychological report referred to in the delegate's decision that was unavailable to the delegate due to unspecified legal reasons, the remainder of which is also not available to the IAA. Correspondence before me indicates that the delegate delayed making her decision while awaiting the neuropsychological assessment but this was ultimately not forthcoming and she proceeded to make a decision without it. I am satisfied that the neuropsychological assessment conveys credible personal information about the applicant, which had it been known, may have affected consideration of his claims. There are exceptional circumstances justifying my consideration of this document. They included that the assessment provides current and specific information, based on recent clinical assessments, about the applicant's memory and thinking abilities and the ongoing impacts of his brain injury. It updates the medical evidence before me, most of which is more general in nature. I have had regard to the neuropsychological assessment.

6. Included in the submissions was a request for the IAA to interview the applicant. There was no indication of what information he wishes to provide at an interview or why he could not provide such information to the delegate or in writing to the IAA. I note that the applicant struggled to respond to the substance of many of the delegate's questions at the interview she conducted, seemingly for reasons related to an acquired brain injury, as I discuss further below. There is no indication that his circumstances have changed since then such that an interview would be of assistance. He attended the interview with the delegate alone. After the interview written submissions were made on the applicant's behalf from a refugee legal clinic providing ad hoc assistance. I consider he had a reasonable opportunity to present his case, and in these circumstances, and also having regard to the fast-track framework provided for in Part 7AA of the Act, I do not consider an interview is warranted in this matter.

Applicant's claims for protection

7. The applicant's claims as set out in his visa application can be summarised as follows:
- He was born in [Village] in Trincomalee District in Sri Lanka's East. There was a civil war between Sinhalese and Tamil people. Their village was located in a majority Sinhalese area.
 - In 1984, when the applicant was [Age], his family fled to India to escape the war and the mistreatment suffered by Tamils at the hands of Sinhalese people. Many other Tamils left Sri Lanka at that time. They fled to a refugee camp in Tamil Nadu.
 - Around 3 months after arriving in India there was a change in government and they were forced to return to Sri Lanka. They returned to [Village] and found that their home and had been destroyed. The family lived in a refugee camp in Sri Lanka. Life in the camp was difficult and there were a lot of illnesses.
 - During 1990 the applicant's father went to work in the rice fields but did not return. Three days later his injured body was discovered. The family never learned who killed him. They suspect it was the Sinhalese military forces.
 - The applicant's mother decided the family had to leave Sri Lanka due to the poor security situation. They departed when the applicant was around [Age] years of age and went back to Tamil Nadu. The applicant has not returned to Sri Lanka since.
 - He resided in India in a refugee camp for [a number of] years. In India refugees lacked rights and were treated poorly. They were often restricted to the camp, the applicant felt like a prisoner.
 - The applicant has no identity documents from Sri Lanka. He has no family in Sri Lanka, the rest of his relatives remain in India including his wife and children.
 - The applicant suffered a brain injury in 2017 in Australia. He underwent brain surgery and continues to receive treatment. This injury has impacted on his cognitive functioning and his memory.
 - If he returns to Sri Lanka he fears being harmed because he is a Tamil and because he left Sri Lanka illegally. He fears the Sri Lankan authorities, including the Criminal Investigation Department (CID) or the Sri Lankan Army (SLA) will seek to harm him.
8. The applicant has had intermittent assistance from a legal service but has not had ongoing representation. After the interview written submissions were made on the applicant's behalf. The post-interview submission claims that due to the applicant's brain injury he is not capable of working in physically strenuous circumstances and would be unable to support himself if he is

returned to Sri Lanka. The limited disability support programs available in Sri Lanka would not be sufficient to support the cost of living for the applicant. The submissions assert the applicant has been receiving mental health support following his brain surgery including seeing a psychologist and that it would be difficult for him to access similar support in Sri Lanka. He would be unable to afford his required medication should he return to Sri Lanka. The applicant would not have any support from family, friends or any social network, because his relatives are located in India and he left Sri Lanka as a child. Consequently, he would be at a significant risk of homelessness should he be returned to Sri Lanka. The submissions also assert that the applicant will be discriminatorily denied the right to health care, employment, housing and basic services which in combination will threaten his capacity to subsist. In addition, he fears that he will suffer serious physical and psychological illness, and will be targeted for discrimination and ostracism and serious harm including the possibility of being beaten and detained or having his freedom of movement severely restricted as a result of being a Tamil with a brain injury, a disability and poor mental health. The applicant will face an increased risk of infection due to the hot and humid weather in Sri Lanka. He also faces a real chance of harm due to the heightened security situation in Sri Lanka following the Easter 2019 bombings and because of Gotabaya Rajapakse's election in November 2019.

9. It is claimed that the applicant faces a real chance of serious harm for reasons of his Tamil ethnicity; and/or his membership of particular social groups, namely:
 - Tamil males originating from former LTTE controlled areas; and/or
 - Failed Tamil asylum seekers; and/or
 - Tamil illegal departees and
 - Tamils with a brain injury
 - Tamils with a disability
 - Homeless Tamils
 - Tamil males with poor mental health.
10. It is further claimed that he faces potential harm due to actual and/or imputed political opinion against the Sri Lanka government and in support of the Liberation Tigers of Tamil Eelam (LTTE), on account of:
 - his Tamil ethnicity; and/or
 - his origins from former LTTE controlled areas; and/or
 - his fleeing Sri Lanka illegally ; and/or
 - his prolonged residence in Australia; and/or
 - his imputed ties to the Tamil diaspora due to his prolonged presence in Australia; and/or
 - his application for asylum, prolonged presence in Australia and undetermined immigration status in Australia for approximately 7 years; and/or
 - the adverse information he has disclosed to the Australian government about the Sri Lankan government and authorities throughout his protection assessment processes; and/or
 - his status as a returnee / failed asylum seeker should he be returned to Sri Lanka.

Factual findings

Identity and background

11. The applicant provided copies of a Sri Lankan Refugee identity documents issued by the government of Tamil Nadu, and an asylum seeker certificate issued by the UNHCR in [Country 1]. The details in the documents are consistent with his claimed identity. It is claimed the applicant has no Sri Lankan identity documents as he resided for most of his life in Tamil Nadu. DFAT reports that approximately 95,000 Sri Lankan Tamil refugees live in the southern Indian state of Tamil Nadu, most of whom fled the war in the mid-1980s.¹ The applicant has provided a consistent and plausible narrative in respect of his residency in Tamil Nadu. As such I accept his explanation for his lack of documentation from Sri Lanka. Relying on the documentary evidence provided and the applicant's narrative I am satisfied that the applicant is a Sri Lankan national and a Tamil Hindu as claimed. I accept his family originates from Trincomalee District in Sri Lanka's East but that they continue to reside in Tamil Nadu, India, where the applicant also lived for an extended period. He has not claimed and there is no evidence that he has Indian citizenship. Sri Lanka is the receiving country for the purpose of this assessment.
12. He has provided a consistent and plausible account of his father being killed when he was a relatively young child, having been shot whilst he was working in a field. Sri Lanka's 26-year civil war began in the 1980s and is estimated to have claimed 100,000 lives; the North and East, where the applicant originates from, were particularly affected.² Details around the death of the applicant's father were also provided during his arrival and induction interview and in his visa application, both of which predate the applicant's brain injury, which is discussed further below. I accept that the applicant's father was killed as claimed and that the applicant is unsure who is responsible. I also accept that his death contributed to his family's decision to flee to India.

Departure

13. I accept that the applicant left Sri Lanka by unofficial means as claimed when he was approximately [Age] years old, contrary to Sri Lankan law including the Immigrants and Emigrants Act 1949 (I&E Act). I also accept that the Sri Lankan government may assume, due to his mode of departure and because return to Sri Lanka would occur on temporary travel documentation, that the applicant sought asylum from Sri Lanka in Australia.

Brain injury

14. The applicant has had intermittent assistance from a free legal service but has not had ongoing representation. He attended the interview with the delegate in September 2019 alone. At the beginning of that interview he disclosed that he has a brain injury which has impacted his memory. From the outset it was apparent that the applicant had difficulty understanding and responding the delegate's questioning. When asked whether he had received, read and understood an information sheet explaining Australia's protection obligations and the purpose of the interview, the applicant did not answer the question but responded that he has medical issues, that it is hard for him to read and understand, and that he forgets things that happened to him in the past and that in order to remember he has to phone his wife. The delegate then asked if he understood what it is to be a refugee, without further elaboration, and he responded yes.

¹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

15. The applicant struggled to provide details about his accident, the symptoms of his injury and his ongoing treatment when questioned by the delegate. He frequently responded that he “did not know” or “could not remember”. Mostly the delegate read out details from the documentation the applicant brought to the interview then asked the applicant to confirm whether it was accurate, which he was occasionally able to do though often replied that he was unsure. At the end of the interview the delegate obtained the applicant’s consent to have his medical records released to her and this subsequently occurred.
16. The medical information indicates that in September 2017 the applicant suffered a brain injury after a fall. Around two week later, after experiencing seizures, he underwent surgery to remove pressure on his brain from internal bleeding. This required the removal of part of his skull for a number of months. His recovery was complicated by the pooling of cerebrospinal fluid near the site of his injury which created pressure on his brain. He underwent a second surgery in April 2018 to repair his skull. Since his injury the applicant remains at risk of experiencing seizures and continues to take anti-seizure medication.
17. The documentation about the applicant’s medical history includes a complete record of his dealings with [a Health service], where he was referred after his first surgery. He has been a patient of [Dr A] at that health service since October 2017. She is a general practitioner of 19 year standing. [Dr A] provided a letter dated 18 December 2019 which summarises the applicant’s condition and treatment and provides some explanation of aspects of the medical records. [Doctor A] expressed significant concerns about the applicant’s ability to care for himself without support, to work, and his capacity to make significant decisions. She reports that frontal lobe injuries such as the applicant’s can cause impulsivity, irritability, and changes in social behaviour that may include difficulty complying with rules and taking greater risks. It may also diminish memory, problem solving skills, attention and concentration. Various pieces of medical evidence before me indicate that for more than 2 years since his injury the applicant has reported difficult with memory, particularly for events that predate his injury. The doctor reports the applicant has depressive and anxiety symptoms and continues to experience recurring headaches. She cautions that due to his traumatic brain injury, the applicant’s level of insight may also be impaired, in turn making it very difficult to determine his capacity to make significant decisions about his future. [Doctor A] referred the applicant for a neuropsychology assessment and part of the report from that assessment is before me.
18. The neuropsychologist assessment is dated 10 December 2019 and is based on appointments with the applicant in November and December 2019. It indicates the applicant has significant gaps in his cognitive functioning, particularly his memory. Prepared by a psychologist and a clinical neuropsychologist at [a Psychology Clinic], and based on two in-person assessments with the applicant, the report considers various areas of thinking and memory, including attention, speed of information processing, problem solving skills, planning, reasoning, new learning and memory, spelling and reading, It concludes the applicant’s abilities fall in the borderline to low average ranges. His performance measures fell within the extremely low range in relation to verbal and visual reasoning, working memory, information processing, immediate and delayed recall. He also demonstrated some difficulties with response inhibition and suppression. The neuropsychologist assessment also reports the applicant has symptoms that are consistent with depression.
19. The medical records from [the Health service] are from October 2017 to September 2019. These indicate that over time there have been some improvements in the applicant’s prognosis and he has reported some improvements in his mood and a desire to return to work, though as yet has been unable to do so. They also indicate examples of the impulsiveness described by the doctor, such as the applicant throwing out his medication prescriptions. The records indicate he has

periodically denied being depressed, and has intermittently engaged and disengaged with mental health counselling. However over the duration of the medical records his mood is frequently over observed as being low or sad, and both the December 2019 neuropsychologist assessment and letter from [Doctor A] report he continues to demonstrate depressive symptoms. Communication between health professionals and the applicant's housemates indicate they observed him experiencing memory problems and low mood, and acting irrationally and impulsively after his injury. The housemates report they have been providing care and support with various daily tasks such as cooking and assisting him in the bathroom. I have had regard to all the medical evidence before me, however I note that the neurological assessment and letter from [Doctor A] are more current than the [Health service] medical records, and give a more specific account of the applicant's condition, symptoms and treatment, whereas the [Health service] records are a general (and more dated) record of all the applicant's dealings with that agency.

20. Based on the medical evidence I accept the applicant acquired a significant brain injury in September 2017 as claimed. I accept that this has greatly impacted his memory, that it causes him to act at times impulsively or irrationally, and he continues to exhibit depressive symptoms. The evidence before me indicates that two and a half years after the accident he is unable to live independently and has been unable to return to work despite a desire to so. I accept that he needs ongoing treatment including anti-seizure medication. I accept that the doctor who has had a relationship with the applicant for an extended period has concerns about his capacity to make significant decisions about his future.
21. My impression of the applicant's testimony at the interview with the delegate was that he was sincerely attempting to respond to the delegate's questions but that he frequently struggled to do so. At times he became upset and he often seemed confused or unsure. Many of his responses were simply that he could not remember. For instance he was unable to recall his current residential address when asked multiple times. He also could not recall whether he ever had a driver's license in Australia. He twice suggested that he never held a driver's license in Australia. This was even after the delegate alluded to a court outcome that she was aware of which indicated that his driver's license had actually been cancelled. His performance at the delegate's interview was markedly different from that at the arrival interview in 2013, of which an audio recording is before me, and in which the applicant was forthcoming with reasonably detailed answers about his identity and background. As outlined above, the medical evidence before me indicates, and I accept, that the applicant has poor memory and diminished cognitive functioning. This includes two separate assessments undertaken after the interview with the delegate. When questioned by the delegate, the applicant's answers lacked detail and were at times confused. During the interview he appeared to superficially engage and comprehend but not in fact grasp the matters in issue or the substance of the delegate's questioning.

Poor mental health

22. The applicant's treating doctor reports that he has symptoms of depression and anxiety. He indicated that he has seen a psychologist. As it is noted a number of times over an extended period in his medical records I accept that he has and continues to exhibit symptoms of depression and anxiety.

Refugee assessment

23. 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

24. 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.

25. The situation in Sri Lanka has shifted considerably since the end of the civil war in 2009. While reports indicate the government remains sensitive to the potential re-emergence of the LTTE or other Tamil separatist groups, its present focus is on identifying persons who pose a current threat to the country’s unity rather than identifying a person’s past LTTE links. There is no suggestion that this applicant or any of his relatives have had any involvement with any Tamil separatist group including the LTTE. Although reports persist of some ongoing monitoring and surveillance of the Tamil community, security measures such as military checkpoints and restrictions on travel to the north and east have been lifted and monitoring in day to day life has decreased.³ The material before me does not support a conclusion that Tamils currently face a real chance of harm in Sri Lanka purely on account of their race, religion or language. It does not indicate that in recent times Tamil ethnicity or identity of itself imputes LTTE membership or a pro-LTTE or anti-government opinion, even when combined with other factors, gender, age, occupation, having departed Sri Lanka unlawfully, or place of origin (such a from an area previously under LTTE control).⁴

26. During the interview with the delegate the applicant raised fears in relation to Buddhist temples being established in Tamil areas, though did not clearly explain what consequences he fears as a result of this. DFAT is aware that some Sinhalese from the south have resettled in the North and East with government assistance in the post-war period. Local sources in the north expressed concern about the construction of Buddhist statues and temples in non-Buddhist populated

³ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil separatism”, 15 June 2017, OG6E7028826.

⁴ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil separatism”, 15 June 2017, OG6E7028826; US Department of State, ‘Country Reports on Human Rights Practices for 2018 - Sri Lanka’, 13 March 2019, 20190314103240.

areas.⁵ I accept that some Buddhist communities have been established in areas traditionally inhabited by Hindus. A majority of the population in the Northern and Eastern Provinces are Hindu, like the applicant, and DFAT assesses that Hindus are able to practise their faith freely there and across Sri Lanka.⁶ The material before me does not suggest Hindus face a real chance of harm for reasons of their religion.

27. The applicant has raised claims regarding recent event in Sri Lanka. Gotabaya Rajapaksa was elected president of Sri Lanka on 21 November 2019.⁷ The applicant submits Tamils have been subjected to additional pressures since the election of the new government. Reports indicate the Tamil community opposed the election of Gotabaya Rajapaksa amid concerns about his role in ending the civil war and his commitment to reconciliation and accountability.⁸ However the material before me does not support a conclusion that the Tamils have been targeted for harm for reasons of their ethnicity under the new president. Certain political opponents and journalists critical of the president have reportedly been arrested or questioned since the election.⁹ There is no indication that the applicant has ever been politically active and he does not have a role in the media.
28. Coordinated terrorist bombings on Easter Sunday 2019 targeted Catholic churches and sites frequented by foreign nationals. The government responded to the Easter Sunday bombings and the resulting communal violence with a declaration of a state of emergency (which has since been ended),¹⁰ and measures which have since been wound back including heavy security deployments, intermittent curfews and a social media blackout.¹¹ I note these attacks mostly occurred in the Western Province, have been attributed to Muslim extremists and targeted Catholics and foreign nationals. The applicant is Hindu, originates from the Eastern Province and has no apparent family members directly impacted by the April 2019 terror attacks. There is no suggestion that persons of the applicant's profile were either the target of these attacks or were seen to be responsible for these attacks.
29. Country information does not indicate that a person with the applicant's background faces a real chance of harm on return to Sri Lanka because they requested asylum in another country. Nor does it suggest he would be imputed with any adverse opinion because of his prolonged presence in Australia or that it may be assumed he disclosed information adverse to the Sri Lankan authorities to the Australian government. DFAT reports that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil, and DFAT advised it is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security after their return.¹² In 2019, Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection

⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

⁷ International Crisis Group (ICG), 'Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure', 18 November 2019, 20191119144914.

⁸ Eurasia Review, 'Sri Lanka: Presidential Election And Tamil Politics – OpEd', 27 November 2019, 20191128103208; The Hindu, 'Unfair to attribute racist dimension to Tamil vote, says Sampanthan', 18 November 2019, 20191121095223.

⁹ Associated Press, 'Sri Lankan police arrest second former Cabinet minister', 28 December 2019, 20191230112949.

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; Human Rights Watch 'Fear returns to Sri Lanka after bombings', 10 May 2019, 20190513142002;

¹¹ The Economist, 'The suicide bombs in Sri Lanka might have been prevented', 27 April 2019, 20190423144009; Al Jazeera 'Sri Lanka orders nationwide curfew amid anti-Muslim riots', 14 May 2019, 20190516114013.

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

concerns and had not experienced harassment by the authorities, nor received monitoring visits.¹³ Any reintegration issues that a returnee may face are not considered by DFAT to be due to a failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. There were also some reports of social stigma from their communities upon return including resentment of the financial support provided to returnees; however the information before me does not indicate this amounts to serious harm. Overall, DFAT's assessment over a number of years has been that societal discrimination is not a major concern for returnees, including failed asylum seekers.¹⁴

30. This applicant was approximately [Age] years of age at the time of this departure. DFAT reports that no charges are imposed against children under [Age] years of age or those persons who were younger than [Age] at the time of the alleged offence.¹⁵ Given the applicant may have been below the age of criminal responsibility at the time of his departure, and that it is been 30 years since that departure occurred, it is unclear whether the Sri Lankan authorities would necessarily charge the applicant. Given his illegal departure, I accept the applicant may be arrested and charged under the I & E Act on return, and enquiries may be made about him. DFAT assesses that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during this processing. Notably, the most recent reports from DFAT indicate that it is very unlikely that the applicant would be detained in a prison while awaiting any court appearance.¹⁶ Returnees will be brought before the Magistrate's Court at the earliest opportunity but subject to magistrate availability, he or she may be detained for up to two days in an airport holding cell.¹⁷ There is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger on the boat journey; according to the Sri Lankan Attorney-General's Department no custodial sentences have ever been issued to such persons.¹⁸
31. Assuming he is charged, should the applicant plead guilty to departing illegally, he may be fined a penalty of up to LKR 200 000 and will then be free to go. Well-placed sources told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163), which can be paid in instalments. If a not-guilty plea is entered usually a magistrate would grant bail either on the basis of personal surety or guarantee by a family member. I am not satisfied there is a real chance the applicant would not be granted bail in the event he is charged and does plead not guilty (although he has not suggested he would do so). DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances, if required, over protracted lengths of time can be high.¹⁹
32. The applicant has an acquired brain injury and experiences memory problems and diminished cognitive functioning. Sri Lankan law forbids discrimination against any person with physical, sensory, intellectual or mental disabilities in employment, education, health care, public transportation and air travel. In practice, persons with disabilities experience discrimination in accessing employment, education, justice and health services; and support services for persons with disabilities are widely considered inadequate.²⁰ People with a disability in Sri Lanka typically face significant stigma and discrimination, and cultural factors including superstitions mean that

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

¹⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

people with disability are perceived as omens of bad luck.²¹ In 2014, it was reported that rates of unemployment are higher among people with disability, and there is limited access to education and training for people with disability.²² The Sri Lankan government provides some limited financial support to certain persons living with disability. A 2014 report observed that the incidence of poverty amongst households receiving disability payments was reported as being 52% higher than the national average.²³ In April 2017, the Disability Organizations Joint Front reported that the state draws an inevitable link between disability and poverty. Disability support funds are largely distributed as welfare to bail out indigent families with persons with disability. In providing a monthly allowance of around LKR 3,000 (as at 2017), priority is given for families where the breadwinner is disabled and the disability is severe.²⁴ The monthly allowance is largely insufficient to cover the cost of living, and as such persons with a disability are viewed as dependent upon family members.²⁵

33. I have accepted that this applicant does not have access to familial support in Sri Lanka, as his wife, children and other relatives remain in Tamil Nadu. Evidence before me indicates that two and a half years after his accident the applicant is not able to live independently. He has been unable to return to work, despite an apparent desire to do so, and remains reliant upon his housemates for assistance with day to day tasks including cooking and cleaning. There is nothing before me to indicate his prognosis is likely to materially alter in the foreseeable future, noting the medical material indicates since his accident his symptoms have remained relatively consistent.
34. Legal submissions from the refugee legal clinic contend that *“the applicant is of Tamil ethnicity, therefore we submit that the risk of being discriminatorily denied medical treatment is also a real risk, as is a risk of harm if he was detained as a result of being homeless on account of his medical condition.”* These various general assertions were not accompanied by corroborative material, and the information before me does not indicate that medical treatment is discriminatorily denied on ethnic grounds in Sri Lanka, or that persons who are homeless and/or have a brain injury are routinely subjected to detention in Sri Lanka. DFAT reports that Sri Lanka’s public health system offers universal free health care; however, regional disparities exist in the quality of care and facilities, particularly between urban and rural areas. Health outcomes are worse in the north and east, partly because of the delay in rebuilding destroyed infrastructure and diminution of human capital during the war.²⁶
35. Reports I have referred to indicate, and I accept, that there is a real chance the applicant will experience social stigma because of his disability should he return to Sri Lanka. There is little detail in the information before me about the nature and prevalence of this discrimination, or the types of disabilities which are prone to attracting such stigma. Given this absence of information I am not satisfied that any such stigma would constitute serious harm for this applicant.
36. Given the applicant’s ongoing difficulties associated with his brain injury, that he has been unable to return to work following his injury two and a half years ago, the reported discrimination against persons with a disability in obtaining employment, and the difficulties

²¹ CMB Australia, “Sri Lanka Disability Information Sheet”, May 2014.

²² CMB Australia, “Sri Lanka Disability Information Sheet”, May 2014.

²³ CMB Australia, “Sri Lanka Disability Information Sheet”, May 2014.

²⁴ Disability Organizations Joint Front, “The State of Economic, Social and Cultural Rights of Persons with Disabilities in Sri Lanka”, April 2017, CISED50AD7779.

²⁵ Disability Organizations Joint Front, “The State of Economic, Social and Cultural Rights of Persons with Disabilities in Sri Lanka”, April 2017, CISED50AD7779.

²⁶ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244.

faced by returnees without a support network seeking to establish themselves, I consider it very unlikely the applicant will be able to secure appropriate employment on return to Sri Lanka. As such he is unlikely to have access to adequate income to afford accommodation and to meet his basic needs, noting that government welfare payments for persons with a disability are widely viewed as inadequate and that recipients of those payments are still dependent on their family. I accept he may be unable to afford ongoing medical expenses relating to his brain injury. The applicant has no relatives in Sri Lanka who could support him financially or assist in providing him with care and accommodation. His inability to support himself financially may be further exacerbated by a fine and expenses associated with the legal process relating to his likely charge for unlawfully departing Sri Lanka. I am satisfied there is a real chance this applicant will suffer significant economic hardship that will threaten his capacity to subsist. This constitutes serious harm as relevantly defined.

37. In addition to involving serious harm, persecution must also be feared for one or more of the reasons mentioned in s.5J(1)(a) and that reason must be the essential and significant reason for the persecution. The material before me does not suggest that what limited disability support services are available in Sri Lanka may be discriminatorily withheld from this applicant for any reason, including for reasons relating to his ethnicity, race, religion, because of any actual or imputed political opinion, or due to his perceived or actual membership of any particular social group. Country information indicates, and I accept, that persons with a disability face some discrimination when seeking to obtain employment in Sri Lanka. However I note that this applicant has been unable to secure employment in Australia following his injury. This suggests that in the foreseeable future in Sri Lanka, regardless of any discrimination he might face as a disabled job seeker, his inability to obtain employment is most likely to be attributable to his injury curtailing the types of work that he may be able to undertake. I am not satisfied that the consequences of his condition arise for an essential and significant reason specified in s.5J(1)(a) of the Act. Rather I consider them to be essentially a consequence of a lack of adequate support services in Sri Lanka for persons living with a disability, and his own limitations in the kind of work he may feasibly be able to undertake.

38. The applicant has claimed to fear harm due to potentially becoming homeless in the future. I consider that due to lack of income this applicant may be unable to secure appropriate accommodation were he to return to Sri Lanka and as such I accept that there is a real chance he may become homeless. As such I accept that in the foreseeable future he may become a member of a particular social group such as “homeless people in Sri Lanka” and/or “Homeless Tamils”, as being homeless would be an identifiable characteristic that would distinguish those groups from society at large. However I do not accept that this applicant faces a real chance of harm for reasons of his membership of those particular social groups, as the country information before me does not support a conclusion that homeless persons or subgroups of homeless people are targeted for harm in Sri Lanka.²⁷ Legal submissions refer to four articles purportedly about the dangers faced by ‘homeless people in Sri Lanka’ and ‘homeless Tamils in Sri Lanka’. I have reviewed those articles. The Sunday Times article only offers general comment on the prevalence of homelessness in Sri Lanka and does not mention any dangers faced by homeless people. The La Croix International article discusses the lack of legal rights afforded to persons experiencing homelessness in Sri Lanka. The World Scientific News article makes various vague observations, such as “without a resident [sic] makes people prime targets of antisocial elements and other social related problems”, but offers no further elaboration upon the targeting of homeless people and whether it occurs for reasons of their homelessness. The Seattle Globalist article is from 2013 and refers to the 2010 murders of 10 homeless people in Colombo that went unsolved. These articles indicate, and I accept, that persons

²⁷ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244.

experiencing homelessness in Sri Lanka endure various hardships and insecurities deriving from their lack of accommodation. However the limited evidence before me do not support a finding that homeless people are targeted for harm for reasons of their homelessness in Sri Lanka or that they would be in the foreseeable future. Nor am I satisfied there this is a real chance that this applicant would be targeted for harm for reasons of his homelessness should be become homeless in the foreseeable future.

39. DFAT assesses that while there has been some improvement in the availability and quality of mental health services in Sri Lanka they remain inadequate overall, particularly in war-affected areas, where demand is greatest.²⁸ There is very little information before me in respect of the applicant's mental health needs in the foreseeable future. Even assuming he may seek to access mental health support services in Sri Lanka, there is nothing before me to suggest the applicant will be discriminatorily refused mental health treatment or support services on any basis.
40. The applicant's claimed fear of an increased risk of infection because of Sri Lanka's tropical weather does not involve systematic or discriminatory conduct by any person. Any potential chance of harm owing to the tropical climate is not harm feared for the essential and significant reason of any of the matters specified in s.5J(1)(a). In any event, the only material provided in support of this claim is the applicant's assertions and there is no relevant medical evidence regarding the applicant's predisposition to infection or how this may be impacted by Sri Lanka's climate. Even assuming he may require medical attention in Sri Lanka for infection, there is nothing before me to suggest the applicant will be discriminatorily refused treatment on any basis.
41. The applicant, a Tamil Hindu who originates from an area of Sri Lanka's East that was formerly under LTTE control, would return to Sri Lanka after an extended period of residency in Australia and after having requested asylum here. I am not satisfied the applicant faces a real chance of any harm for reasons of his ethnicity, religion, origins from a formerly LTTE controlled area, because he requested asylum abroad, due to his extended presence in Australia, because of the Easter 2019 bombings, due to Gotabaya Rajapaksa's election, due to Buddhists expanding their presence into traditionally Hindu areas.
42. I accept that he may face a fine and associated legal expenses due to his unlawful departure from Sri Lanka. I do not consider that any questioning, short period of remand, the imposition of fines, or the potential costs associated with the further court appearances if would constitute serious harm in the present case even when considering the applicant's vulnerability. Information before me indicates and I accept they are applied in a non-discriminatory manner and do not involve systematic and discriminatory conduct.
43. I am not satisfied he faces a real chance of being systematically or discriminatorily denied disability support or mental health support services or any other necessary medical treatment on any basis, including for a reason specified in s.5J(1)(a). I accept as a returning asylum seeker with a brain injury the applicant may experience some stigma, however based on information before me I am not satisfied this treatment would amount to serious harm. As a returnee with a brain injury and no support network I accept there is a real chance the applicant will suffer serious harm in the form of significant economic hardship that will threaten his capacity to subsist. However I find that a s.5J(1)(a) reason would not be the essential and significant reason or reasons for that harm, as this hardship arises for the essential and significant reason of the inadequate support available to persons living with a disability in Sri Lanka. As s.5J(4)(a) is not met, I am not satisfied that the applicant has a well-founded fear of persecution for reasons

²⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

related to the severe economic hardship that I accept he will likely experience as a result of his brain injury. I accept he may experience homelessness as a result of this hardship, but the material before me does not support a conclusion he faces a real chance of being harmed for that reason and I am not satisfied he does.

44. The applicant's fear of persecution is not well founded.

Refugee: conclusion

45. 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

46. 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

47. 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.

48. 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.

49. For reasons set out above I am not satisfied this has applicant a real chance of any harm for reasons of his ethnicity, religion, origins from a formerly LTTE controlled area, because he requested asylum abroad, due to his extended presence in Australia, because of the Easter 2019 bombings, due to Gotabaya Rajapaksa's election, due to Buddhists expanding their presence into traditionally Hindu areas. The real risk test imparts the same standard as the real chance test,²⁹ and as such I am satisfied he also does not have a real risk of experiencing significant harm for any of these reasons.

50. I accept the applicant may face questioning, a short period of remand, the imposition of fines, and the potential associated legal expenses due to his unlawful departure from Sri Lanka. DFAT reports it is not aware of returnees being mistreated during returnee processing.³⁰ I do not consider that any procedures or penalties relating to his unlawful departure attract a real risk of

²⁹ *MIAC v SZQRB* [2013] FCAFC 33.

³⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

any treatment amounting to significant harm as defined, even when considering this applicant's vulnerability.

51. I accept that the applicant may face some stigma as a returnee and a person with a disability. Overall, DFAT assesses that societal discrimination is not a major concern for returnees, including failed asylum seekers.³¹ Similarly reports referred to above, while noting persons with a disability may face substantial stigma, do not elaborate on the nature and prevalence of this discrimination, or the types of disabilities which are prone to attracting such attention. On the material before me I am not satisfied there is a real risk of this applicant experiencing treatment amounting to significant harm as relevantly defined because of disability related stigma. I am not satisfied any such stigma attracts a real risk of applicant being intentionally subjected to severe pain or suffering; pain or suffering that is cruel or inhuman, or that is intended to causes unreasonable extreme humiliation, or otherwise being subjected to treatment constituting significant harm.
52. There is a real risk of this applicant will suffer significant economic hardship that will threaten his capacity to subsist owing to inadequate welfare for disability people and his inability to secure appropriate employment. The resultant harm would not be due to an intentional act or omission upon the applicant by anyone. It would not constitute significant harm including in the torture, cruel or inhuman treatment of punishment, or degrading treatment or punishment. Similarly any resultant harm arising from a lack of adequate medical or mental health support would also not constitute serious harm as it would not be harm intentionally inflicted by an act or omission. Cruel or inhuman treatment or punishment and degrading treatment or punishment cover acts or omissions which, when carried out, would violate Article 7 of the International Covenant on Civil and Political Rights (ICCPR). General socio-economic conditions and the absence or inadequacy of medical treatment does not generally amount to a violation of Article 7 and will therefore not satisfy the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment.³²

Complementary protection: conclusion

53. 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.

³¹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244.

³² REFUGEE AND HUMANITARIAN Complementary Protection Guidelines

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.