



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08689

Date and time of decision: 19 October 2020 10:34:00
J Jennings, 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 Tamil from the Northern Province, Sri Lanka. On 3 May 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 22 May 2019. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.
3. On 2 July 2019 the IAA affirmed the decision not to grant the applicant a protection visa. [In] August 2020 the Federal Circuit Court of Australia quashed the decision of the IAA and directed the IAA to determine the matter according to law.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The IAA received emails from the applicant on 1 July 2019 and 21 and 22 September 2020 attaching copies of two documents; these are a Sri Lankan police message form and English language translation. This is not new information; the applicant provided copies of these same documents to the delegate.
6. The delegate's decision refers to a Department of Foreign Affairs and Trade (DFAT) report published on 23 May 2018, and a UK Home Office report published on 15 June 2017. These reports have since been updated. On 1 October 2020 the DFAT Country Information Report Sri Lanka (4 November 2019), the UK Home Office "Report of a Home Office fact-finding mission to Sri Lanka" (20 January 2020) and the Al Jazeera article "Mahinda Rajapaksa sworn in as Sri Lanka's PM after record victory" were provided to the applicant for consideration and comment highlighting potentially adverse information which may form part of my decision. No response has been received from the applicant.
7. The DFAT and UK Home Office reports update those before the delegate, which are now more than two years old. They have been prepared specifically for the purpose of assisting in the determination of protection status and are relevant to the applicant's claimed risk profile. The Al Jazeera article provides updated information on presidential and parliamentary elections in 2019 and 2020 and the change of government as a result. In all the circumstances I am satisfied there are exceptional circumstances to justify considering the new country information reports and article.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil born in Kilinochchi, Northern Province, Sri Lanka.
 - Kilinochchi was an LTTE controlled area and from around 2008 young Tamil men were expected to join and support the LTTE. Some were forcibly recruited.

- The applicant's father remarried when the applicant was young and the applicant and his family lived in the family home of his [grandmother].
- Because the applicant's father had left the family his older brother was viewed by the LTTE as the male family head and he was not required to join the LTTE or fight.
- The applicant wanted to avoid fighting and arrangements were made for him to work at an LTTE camp at [Location 1]. He went there in 2008 and stayed about six months doing various manual tasks. One of the senior LTTE members said he would arrange for the applicant to be trained to fight. To avoid this the applicant returned to the family home and stayed in hiding there.
- In January 2009 civil war fighting in the area escalated and the applicant and his family passed into government controlled territory. At army checkpoints civilians were asked about any LTTE activity and the applicant and his family underwent questioning and their documents were checked.
- They were taken into a camp for displaced persons in [City 1]. In the camps people identified as being linked to the LTTE were arrested. The applicant's older brother showed the authorities the letter he had from the LTTE which exempted him from fighting.
- They remained in camps until moving to [a location within] [City 1] in 2009. When it was safe to do so the applicant and his family returned to Kilinochchi in 2011.
- In June 2011 the applicant travelled to [Country 1] to work; he returned to Sri Lanka in November 2011.
- Two [uncles] were members of the LTTE. One of his uncles was a high profile LTTE member and was in charge of a base. This uncle has died.
- The applicant's other uncle was detained in Colombo in 2005 and held until 2010. He was mistreated while detained. When he was released in 2010 he came to live with his mother, the applicant's grandmother, in Kilinochchi. The applicant and his uncle had a close relationship.
- His uncle was required to report regularly to the authorities and on an occasion in 2011 when he reported he was detained again and held until 2012. He returned to the family home in Kilinochchi. He is now very sick.
- After the release of his uncle in 2012 the Criminal Investigation Department (CID) started to come to the house to ask the applicant about his uncle. They did not question his brother as his brother is a sick person and has [a medical condition].
- The authorities also asked the applicant about his own activities. The applicant was told to report to CID offices but did not do so and the CID then began to stop him on the street.
- People in the village knew about the applicant's activities and the applicant suspected the CID had a file on him. The CID showed him a paper from the LTTE excusing his brother's service and said this was proof he must have been involved with the LTTE as he was the second son. He was told he would be imprisoned if he did not admit being part of the LTTE and was hit when he denied involvement.
- The applicant was concerned for his safety and from July 2012 he left the family home and worked at various places before going to Colombo in September 2012 from where he departed Sri Lanka by boat.
- After his departure the CID visited the family home in 2012/2013 and asked about his whereabouts. His mother denied knowing his whereabouts and the CID threatened her and to take the applicant's younger brother.

- The applicant has provided a Sri Lanka Police Message Form and English language translation. The form is dated [in] July 2017 and is addressed to the [Police] Station from the Terrorist Investigation Division (TID) Colombo and requests a message be sent to the applicant to attend an upcoming enquiry.
- The applicant has attended Heroes' Day events in Australia. He was in the front at these events and his photograph was taken.
- The applicant fears that on return to Sri Lanka he will be harmed by the authorities.

Factual findings

9. The applicant has consistently claimed to be a Tamil from the Northern Province in Sri Lanka. The applicant has provided documents in support of his claimed identity and residence in the Northern Province. I accept the applicant's identity and nationality as stated and that Sri Lanka is the receiving country for the purpose of this review.
10. I accept that his older brother was exempted from fighting with the LTTE. Over the protracted civil war the LTTE has had several policies around recruitment and made various concessions to the otherwise generally standard rule of recruiting the eldest male and I find the applicant's account of this claim to be plausible in the light of the country information and his family circumstances.¹
11. I accept that the applicant wanted to avoid fighting with the LTTE and that he took steps to do so around 2008. Although the applicant would only have been [age] years of age at this time recruitment of teenagers and even younger children was common and I accept he was concerned he may be recruited as a fighter.² It is the applicant's claim his grandparents knew someone connected to the LTTE base at [Location 1] and that he was taken there to work as a volunteer undertaking manual work. The applicant could not name this person when asked at the protection visa interview however I take into account his young age at the time and his explanation that he referred to this person only by a term of respect rather than by name and that he could not remember the person's name. I find this explanation to be plausible.
12. I note the delegate's concern as to the plausibility that "the applicant's mother would spare her eldest son from being recruited by the LTTE and voluntarily allow her younger son to assist the movement" but I take into account the applicant's explanation that he was taken to volunteer at [Location 1] in order to avoid having to fight, and in that context I consider his account to be plausible. I also note that when it was suggested he be trained to fight the family took steps to hide him at home which is consistent with the desire to avoid him being required to fight.
13. I do however have some concerns as to the claim he was at [Location 1] from May to September/October 2008 (Question 81 protection visa application) in the light of other information he has provided as to his education. At Question 85 of the protection visa application the information the applicant gave for his education was that he attended [a named] School from [specified year] to [year] until [grade]. This would be consistent with his claim to have been present in [Location 1] for a period in 2008. But at the Arrival Entry interview

¹ Human Rights Watch (HRW), "Trapped and Mistreated: LTTE Abuses Against Civilians in the Vanni", December 2008, CISLIB16832; UN High Commissioner for Refugees, (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

² UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

conducted on 17 October 2012 he stated that he was at school until 2008 or 2009, which may conflict with the claim he was in [Location 1] from May 2008. However I again note his young age at the time of these events and that he seemingly does not have the benefit of school certificates that may assist him to provide accurate dates of his school attendance.

14. The UNHCR report from 2012 outlines the links many Tamils in the north had with the LTTE and that many provided material support to the organisation in various ways. In this regard the applicant's account of having provided material support to the LTTE is plausible. I accept this claim. I accept the applicant provided volunteer labour to the LTTE at [Location 1] for five to six in months in 2008.
15. However I am concerned that aspects of his account regarding leaving [Location 1] and hiding at home seem to be implausible. I do not accept that after a senior LTTE officer identified the applicant as ready for fighting training he would have been simply able to leave the [Location 1] camp and return home and remain there in hiding. In other evidence the applicant spoke of the LTTE not allowing him to travel to Colombo to visit his uncle in prison as the LTTE was concerned about losing young Tamils from the area and in the light of this and country information already noted that reports the strict control the LTTE kept over the population, particularly in the last months of the civil war, it is difficult to accept his account of his departure from [Location 1] and subsequent hiding.
16. However it remains that I have accepted he provided volunteer labour to the LTTE at [Location 1] for five to six in months in 2008 and his means of leaving the LTTE are not pertinent to my assessment as to whether he would experience harm on this basis of this profile. The LTTE no longer exist³ and as I have found below any claims related to avoiding recruitment as a fighter would not give rise to a real chance of harm.
17. I accept that in response to the escalated fighting the applicant and his family crossed into government controlled territory in January 2009 and were admitted into a displaced persons camp.
18. It is plausible that as Tamils living in the LTTE controlled north two of the applicant's uncles were LTTE members and noting the number of deaths during the civil war it is plausible one of his uncles has died.⁴
19. The claim that his other uncle was imprisoned during the war from 2005, noting this was during a period of peace before the ceasefire broke down in 2006,⁵ for five years and then again in 2011/2012 suggests a high profile LTTE association; the applicant's account is that his uncle transported weapons. The applicant has not indicated if his uncle was prosecuted for any security offences, but I note his young age at the time and his indication at the protection visa interview that his grandmother did not encourage him to talk about his uncle's activities.
20. I accept the applicant's claim that two uncles were LTTE members, one died, and one was imprisoned from 2005 to 2010 and then again in 2011/2012.
21. It is the applicant's claim he was close to the second uncle both before and after he returned from imprisonment. The applicant would have been [age] years of age when his uncle first

³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁵ ibid

went to prison in 2005. I note he claimed his uncle returned to his grandmother's home in Kilinochchi when he was released in 2010, but according to the address history given in the protection visa application the applicant was still residing in [the location within] [City 1] until 2011 and then left for [Country 1] in June 2011. I accept that the applicant was close to this uncle but note this association would have been limited by the short time the applicant was present in Kilinochchi.

22. Overall I accept the applicant had an association with the LTTE through the familial links to his uncles and his own volunteer work at [Location 1] in 2008. Although I have noted some concerns as to aspects of his account these can in part be explained by his young age at the time.
23. However, while I have accepted the claims addressed above, I have significant concerns as to the veracity of the later claimed attention from the CID.
24. The applicant referred to security checks when crossing into government controlled territory in 2009 and in the displaced persons' camp and he stated those people suspected of LTTE links of concern were arrested in the camps and removed. This is consistent with country information.⁶ He indicated he did not disclose his LTTE activities, but I note he stated his brother showed authorities the LTTE letter exempting him from fighting for the LTTE. It is the applicant's claims that in 2012 the CID told him this letter was proof he must have been involved as he was the second son, but seemingly they took no action in this regard when first shown the letter in the camp. The country information is that at the end of the civil war and when Tamils crossed into government controlled areas from LTTE areas they were subject to stringent security checking and those of concern were taken into rehabilitation or prosecuted for security offences.⁷ Yet the applicant was not so identified at this time, despite his claim his brother showed the authorities the LTTE letter. It is difficult to accept the authorities were aware of this letter when the applicant was in the camp but did not act to detain him in rehabilitation, yet they referred to this same letter in 2012 as pointing to the applicant having LTTE links of concern.
25. It is also significant that at the time he was admitted to the camp and subject to the security checking his uncle had already in prison since 2005 and from the applicant's evidence this was for transporting weapons for the LTTE. He also described his other uncle as being a high profile LTTE member and a leader of a base. Yet despite these familial LTTE links there is no indication he was of adverse interest to the authorities at this time.
26. Noting these links and his own activities did not result in adverse attention at this time it is difficult to accept the CID began to question and harass the applicant from 2012. The indications are that rather than having concerns about the applicant as a security concern while he in the displaced persons' camp he was able to be released to live in the community and was assisted to return to living in the community by having his National Identity Card issued to him while in the camp. He was released to live and work in the community. There is no indication

⁶ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345; Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

⁷ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

that he was subject to any monitoring or reporting requirements which would indicate he was of any concern to the authorities.

27. Similarly he was able to travel to Colombo in 2011 to obtain a passport, despite Colombo being subject to stringent security measures and checkpoints checking Tamils before allowing them to enter the city.⁸ That the applicant was issued a passport in 2011 indicates the authorities did not have any concerns as to him leaving the country.
28. The applicant's freedom to live in the community and travel overseas indicates at this time he was not of concern to the authorities and is difficult to reconcile with the claims of the CID interest from 2012.
29. The applicant indicates the CID began to question him after his uncle was released from prison in 2012. I find it difficult to accept it would be of utility for the CID utility to ask about his uncle's activities some seven years after he was first imprisoned, particularly noting the applicant was only [age] years of age when his uncle was imprisoned in 2005, even accepting that the two were close and were always together. There is no indication his uncle became involved in any activities during his period of release in 2010/2011 that would cause renewed interest and point to a need to question the applicant in 2012. Furthermore if the uncle was involved in any activities of ongoing interest or the authorities remained interested in his past activities there is no indication they questioned other family members, including his mother or grandmother who would have been adults at the time he was transporting LTTE weapons and therefore likely to be more aware of his activities. I do not accept the applicant's account they did not question his brother, who is older, about their uncle because of his illness; reports of the military treatment of the Tamil population at this time was often one of brutality and I do not accept as plausible they would not question his brother because of his [medical condition] or other illness.⁹
30. I have further concerns as the plausibility of the applicant's account of the CID interest. He claims he was told to attend their offices for questioning but did not do so, after which they stopped him on the street. He stated he believed they had a file on him and that his role with the LTTE was known by villagers. If such was the case and his LTTE role was of concern to the authorities in 2012 it is difficult to reconcile his account he was not detained for questioning at this time; wide sweeping Emergency Powers were in place at this time that allowed the authorities to detain people for questioning on mere suspicion and noting particularly he stated he did not cooperate with the request to attend their offices for questioning it is difficult to accept he was not so detained for questioning.¹⁰
31. I also have concerns regarding his account of the questioning and accusations made. He stated the CID told him to admit his LTTE involvement or he would be imprisoned, yet although he continued to deny LTTE involvement he was not imprisoned. I again note the Emergency Powers in place at this time and that these allowed the authorities to detain a suspect for periods of up to three months on the basis of suspicion. Yet the applicant was not so detained;

⁸ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

⁹ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286; International Truth and Justice Project, "Sri Lanka's Special Task Force", 23 April 2018, CIS7B83941895

¹⁰ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

he was allowed to remain living and working in the community, indicating he was not of adverse interest to the authorities.

32. Overall the applicant has failed to satisfy me he was of interest to the CID and questioned by them either about his uncle or his own activities. Considering he was only [age] when his uncle was first imprisoned I do not accept the authorities would have questioned him seven years later about his uncle. If there was some concern about his uncle's activities after he returned to Kilinochchi on his first release it seems more plausible that the authorities would have questioned the applicant at that time and not waited until after the uncle's second release in 2012. I am also concerned there is no indication the authorities questioned other family members about the uncle. With regard to the claimed interest in his own activities if the authorities had some concern about these I do not accept they waited until 2012 to investigate these, noting his evidence is that his LTTE role was known to local villages and that the authorities used networks of informers to obtain information¹¹ and furthermore that his account is they were aware of his brother's LTTE exemption letter as early as 2009.
33. I do not accept the applicant was questioned by the CID in 2012 or that he left the family home in July 2012 to avoid the CID. I do not accept he was of interest to the authorities when he departed Sri Lanka in 2012.
34. It follows that I do not accept the authorities visited his mother and made enquiries as to his whereabouts and threatened her and threatened to take his younger brother.
35. I accept that the applicant departed Sri Lanka illegally in 2012.
36. I accept that the applicant has attended Tamil commemoration events in Australia.
37. I have had regard to the police message form provided by the applicant. Noting my finding that the applicant was not of interest to the authorities when he departed Sri Lanka I find it difficult to accept the CID would have an interest in the applicant in 2017. This is some eight years after the end of the war and five years after the claimed interest in 2012. I have considered the possibility that this may relate to more recent events and I note the country information that indicates the authorities have made enquiries with family members about their relatives attending diaspora events in the UK.¹² In these cases the family in Sri Lanka were shown photographs of their relatives at events, but there is no indication this has occurred in the applicant's case. Furthermore in the event of such interest from the authorities in diaspora activities overseas it is evident the authorities are aware the person is overseas and it would therefore be illogical for them to issue a request for that person to attend for an interview in Sri Lanka.
38. I do not accept the authorities had any interest in the applicant in 2017 and I am not satisfied this is a genuinely issued police document.

¹¹ International Truth and Justice Project, "A Still Unfinished War: Sri Lanka's Survivors of torture and sexual violence 2009-2015", July 2015, CIS38A801275; International Truth and Justice Project, "Sri Lanka's Special Task Force", 23 April 2018, CIS7B83941895

¹² International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

Refugee assessment

39. 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

40. 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.
41. The applicant has not claimed to fear harm on the basis of his Hindu religion and I am not satisfied that the country information before me indicates he would face harm on this basis or that he would be unable to practise his religion.¹³ I note tensions between militant Buddhists and minority religious groups, particularly with Muslims and Christians and the incidents of attacks but overall the information does not support a finding the applicant would experience harm as a Hindu.
42. In regard to the applicant’s concern as to possible forced recruitment by the LTTE and his method of leaving the [Location 1] camp I have already noted the LTTE no longer exists and I find that any concerns he had in the past as to being recruited by them and therefore any claims related to avoiding recruitment as a fighter and leaving [Location 1] would not give rise to a real chance of harm.
43. I have accepted that the applicant provided volunteer support to the LTTE in 2008 and has familial links to the LTTE through his two uncles. However I have not accepted that he was of adverse interest to the authorities on this basis, or otherwise, when he departed Sri Lanka in 2012 and I am not satisfied he would be should he return to Sri Lanka now or in the reasonably foreseeable future. The country information from the UK Home Office advises that in “post-

¹³ US Department of State, “International Religious Freedom Report for 2017 - Sri Lanka”, 29 May 2018, OGD95BE927541; US Commission on International Religious Freedom, “US Commission on International Religious Freedom Annual Report 2015 - Sri Lanka”, 30 April 2015, CISEC96CF1705; Amnesty International, “Amnesty International Report 2017/18 – Sri Lanka”, 22 February 2018, NGED867A612; World Watch Monitor, “Sri Lanka: over 20 attacks on Christians this year”, 13 June 2017, CX9040668947; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064

conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government".¹⁴

44. I have accepted that the applicant attended Heroes' Day events in Australia, but I am not satisfied this would be of concern to the authorities in Sri Lanka. The UK Home Office report acknowledges reporting from the International Truth & Justice Project (ITJP) that indicates the Sri Lankan authorities may monitor diaspora activities. But in the same report the UK Home Office cited findings in the Upper Tribunal that the Sri Lankan authorities use sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora and acknowledge that many "Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war". The Upper Tribunal commented that the "government's present objective is to identify Tamil activists in the Diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state ... its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka."¹⁵
45. The recent UK Home Office report notes monitoring of the Tamil diaspora including taking photographs at events, and the comments from a representative of a northern province community stating that activists were probably monitored and he had heard reports of members of the diaspora facing intimidation on return but that this was not the case for everyone and was more likely to be prominent activists. The same report comments that the government meets regularly with the diaspora, the Global Tamil Forum, and members of UK and US Tamil groups, including Global Tamil Forum members, have been able to come and go within Sri Lanka and to travel to the north to cover war hero events and have not faced problems. This is supported by comments from the International Organization for Migration that "persons involved in protests abroad are of no interest ... although if links are found to banned organisations then it may increase the risk on return".¹⁶
46. From the applicant's account he has attended November Heroes' Day annually in Australia, was at the front of the event and was photographed. But I am not satisfied that simply attending such events, even being at the front, would be of concern to the authorities. There is no indication the applicant has joined or follows any of the proscribed Tamil diaspora groups that are of concern to the Sri Lankan authorities. He described his attendance at these events in Australia as being to remember those who fought for Tamil rights. There is no indication he has been or wishes to be outspoken on Tamil separatism.
47. I accept that the applicant may have been concerned as to his safety when he left Sri Lanka in 2012 noting the long detention of his uncle and the mistreatment he endured in prison and that the country information reports stringent security measures in place in the aftermath of the civil war. I also note the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka released in 2012 provided guidance on the profiles of people at risk of harm and likely to be in need of protection. According to those guidelines senior LTTE members, fighters, people involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE or fundraising and their family members of LTTE members may be at risk on return to Sri Lanka¹⁷. However in the passage of time since the UNHCR Guidelines were released the security situation in Sri Lanka has eased.

¹⁴ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGG6E7028826

¹⁵ ibid

¹⁶ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

¹⁷ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

As noted above the UK Home Office reported that the Sri Lankan government's concern has changed since the civil war ended and is now focussed on Tamil separatist activists. The UK Home Office reported the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism, journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a "stop" list of those against whom there is an extant court order or arrest warrant.¹⁸

48. I have had regard to reports of ongoing harassment of Tamils in Sri Lanka.
49. The US Department of State report cited reporting from the International Truth and Justice Project and the Associated Press of allegations of abductions and torture carried out by the security sector during 2017 and that most victims were Tamil men accused by security forces of having links to the LTTE.¹⁹ The International Truth and Justice Project report, "Unstopped: 2016/2017 Torture in Sri Lanka", identified three cases of torture in 2017 and DFAT noted that an Associated Press investigation, published in November 2017, claimed 52 incidents of torture.²⁰ The International Truth and Justice Project report "Sri Lanka's Special Task Force" cited one case dating from 2017 being the death of a Tamil boy chased by police, although it is important to acknowledge this report was specific to the role of the Special Task Force and not a reflection of the security agencies overall. The only reference to incidents in 2018 in the same report was anti-Muslim violence in March.²¹ DFAT has also noted the International Truth and Justice Project cited 76 alleged cases of torture between 2015 and 2017 involving individuals suspected of LTTE involvement and that in September 2019 the International Truth and Justice Project identified alleged torturers in the TID of the Sri Lanka Police based on the testimony of 73 individuals, both Tamil and Sinhalese, who claimed to have experienced torture between 2008 and 2017. Other reporting cited by DFAT is the Freedom From Torture report released in February 2019 which documented alleged cases of torture of Tamils in the period 2015 to 2017 to extract information or confessions about alleged LTTE or anti-government activities.²²
50. In its fact finding mission to Sri Lanka conducted in September and October 2019 the UK Home Office spoke with a range of agencies and informed sources about conditions and the security situation in Sri Lanka, particularly for Tamils, including UNHCR, the International Organization for Migration, the Human Rights Commission of Sri Lanka and journalists, human right activists and non-government organisations, in addition to official Sri Lankan sources. I also take into account that the UK Home Office report includes information from politicians from the Northern Province and from the Tamil National Alliance. In regard to the treatment of Tamils the report comments that "most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil" and one of the sources cited is the Tamil National Alliance. The report noted that since the end of the civil war the focus of the Sri Lankan government has changed and most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being Tamil but that "certain Tamils may be subject to closer scrutiny" indicating that these would be political activists and journalists.²³

¹⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGD6E7028826; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

¹⁹ US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333

²⁰ International Truth and Justice Project report, "Unstopped: 2016/2017 Torture in Sri Lanka", 14 July 2017, CISED850AD4849; DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²¹ International Truth and Justice Project, "Sri Lanka's Special Task Force", 23 April 2018, CIS7B83941895

²² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

51. Reporting from the UK Home Office indicates that being of Tamil ethnicity in itself or being from a former LTTE controlled area would not warrant international protection and that generally a person who evidences past membership or connection to the LTTE would not be regarded as a concern unless they have or are perceived to have had a significant role in the LTTE or to have been active in post-conflict Tamil separatism. The country information does not support a finding that the applicant would be of adverse interest or harmed for reason of his volunteer support to the LTTE or familial LTTE links. I note the information in the UK Home Office report indicating some LTTE members may be questioned about their activities on return to Sri Lanka but I take into account that the applicant was not an LTTE member, nor was he so questioned when he returned from [Country 1] in 2011 and I do not accept that he would be so on return now or in the reasonably foreseeable future. Nor do I accept his attendance at Heroes' Day events in Australia would be of concern or should he be involved in similar activities in Sri Lanka should he return there.
52. Reporting shows that there continue to be reports of abuse by the authorities of Tamils based on actual or suspected links to the LTTE, however DFAT is unable to verify allegations of torture since 2016 and local sources told DFAT they were not aware of recent cases of former LTTE members being subjected to torture.²⁴ Reporting shows recent incidents of ongoing interference in the free press and harassment of civil rights activists but the indications are that Tamils are not subject to the same abuse and mistreatment that was prevalent during the civil war and during the repressive Rajapaksa government in the aftermath of the conflict. The Sirisena government, elected in 2015, took steps to curb the excesses of military power exercised under the previous Rajapaksa government.²⁵
53. In November 2019 Gotabaya Rajapaksa was elected as President of Sri Lanka and his brother, previous President Mahinda Rajapaksa was sworn in as Prime Minister after his party secured a landslide victory in parliamentary elections that cemented his family's hold on power.²⁶ I accept there is credible reporting of the brutality of the government of past President Mahinda Rajapaksa in which human rights abuses were committed both during the civil war and in the immediate aftermath and that many agencies and the general Tamil community have expressed concern as to the return of the Rajapaksas to power.²⁷
54. I note there may be concern about the incoming Rajapaksa government in the light of the past but Gotabaya and Mahinda Rajapaksa are returning to government in a very different environment from that in place between 2005 and 2015. The change of government in 2015 provided Sri Lanka a chance to break from the repressive policies of the past and the cloud of suspicion of Tamils imbued by the long running civil war. It is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the war. President Rajapaksa was elected during the civil war on a hard-line Sinhala nationalist ticket and his administration adopted aggressive military tactics and a tougher political line with the aim of ending the protracted civil war through the resumption of conflict and the annihilation of the LTTE. His brother, Gotabaya, was Defence Secretary in his government and was charged with the military defeat of the LTTE.²⁸ It was in this

²⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²⁵ *ibid*

²⁶ Al Jazeera, "Mahinda Rajapaksa sworn in as Sri Lanka's PM after record victory", 9 August 2020

²⁷ Al Jazeera, "Mahinda Rajapaksa sworn in as Sri Lanka's PM after record victory", 9 August 2020; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

²⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

environment that the excesses of human rights abuse were committed and continued to be committed in the aftermath of the war in attempts to quash any resurgence of the LTTE.

55. There is no information before me to indicate that President Rajapaksa or his political supporters, including those who successfully contested the February 2018 local government elections under the Rajapaksa sponsored Sri Lanka Podujana Peramuna party (SLPP), intend to introduce repressive policies that would impinge on the Tamil population in general or Tamils with a profile similar to that of the applicant, or that such has been the result since the SLPP's success at the local elections and ongoing political influence.²⁹
56. Considered overall I am not satisfied there is a real chance the applicant would be harmed in Sri Lanka for reasons of his religion, Tamil race, his familial links to the LTTE or his own activities supporting the LTTE in [Location 1] and attending Tamil commemorative events in Australia. Nor am I satisfied that his past residence in an LTTE controlled area or him being a young Tamil male would give rise to a real chance of harm. Nor am I satisfied he would be harmed should he choose to attend Heroes' Day or similar Tamil commemorative events as he has done in Australia.
57. I accept that should the applicant return to Sri Lanka it would be as a failed asylum seeker but on the evidence before me I am not satisfied that the applicant's status as such would bring him to adverse attention on return to Sri Lanka. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of concern to the authorities³⁰, but I have not accepted that the applicant was so imputed or that he would be now or in the foreseeable future as a returning asylum seeker. I am not satisfied that the applicant would face any harm as a returning failed Tamil asylum seeker.
58. I accept that the applicant departed from Sri Lanka illegally as a passenger on a boat when he came to Australia and I accept that because of his illegal departure he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return.
59. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT advises that at the earliest possibility after investigations are complete police transport persons charged under the I&E Act to the closest Magistrate's court. Persons can remain in police custody at the Criminal Investigation Department office at the airport for up to 24 hours after arrival and in cases where a magistrate is not available, such as a weekend or public holiday, may be detained at an airport holding cell for two days. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.³¹
60. The penalties under the I&E Act for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,633). In

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

³⁰ Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Freedom From Torture, 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881; Country of Origin Information Section (COIS), 'Situation Update: Sri Lanka Tamil Returnees', 5 September 2017, CRF00C22F109

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

practice, penalties are applied to such persons on a discretionary basis and are almost always a fine and the Sri Lankan Attorney-General's Department advises no fare-paying passenger on a people smuggling venture has been given a custodial sentence. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis.³²

61. DFAT advises that the Attorney-General's Department has directed that passengers of people smuggling ventures be charged under the I&E Act and appear in court. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis and may include reporting to police at the returnee's expense.³³
62. Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The frequency of court appearance depends on the Magistrate and DFAT understands that most persons charged under the I&E Act appear in court every three to six months. Cases are only progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.³⁴
63. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. Even having regard to general detention conditions, I do not consider that a brief period in detention would amount to serious harm for the applicant for the purposes of s.5J of the Act. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm.
64. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. That law is not discriminatory on its terms, and the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution, punishment or detention of the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
65. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka on any of the bases claimed.

Refugee: conclusion

66. 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).

³² ibid

³³ ibid

³⁴ ibid

Complementary protection assessment

67. 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

68. 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.
69. 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.
70. I accept that the applicant will be identified on return as a person who departed illegally and that he will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I accept that the applicant may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources.³⁵ I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm.
71. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test,³⁶ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

72. 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).

³⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

³⁶ *MIAC v SZQRB* (2013) 210 FCR 505

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.