



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08698

Date and time of decision: 27 October 2020 13:41:00
S Kamandi, 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 national of Sri Lanka and of Tamil ethnicity. He arrived in Australia in April 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV) on 13 June 2017.
2. On 25 August 2020, a delegate of the Minister for Immigration (the delegate) made a decision refusing to grant the visa on the basis that the applicant was not a person in respect of whom Australia owed protection obligations. The delegate was not satisfied that the applicant would face a real chance of serious harm or a real risk of significant harm for reasons of his ethnicity, any perceived links with the Liberation Tigers of Tamil Eelam (LTTE), as a Tamil from a previously LTTE controlled area or as a returned asylum seeker from Australia.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 15 October 2020, the IAA received an email from the applicant's representative attaching a submission, the applicant's NSW driver's licence, a copy and the English translation of a complaint to the Human rights Commission in Sri Lanka made in 2007, and three country information reports.
5. The applicant's driver's licence is said to have been provided for the purposes of confirmation of his residence in NSW. Apart from confirming the applicant's identity and current residential address, which is not an issue in this review, the licence does not provide any further information and I do not consider it as relevant in assessing the applicant's claims.
6. The copy and the English translation of the complaint to the Human rights commission in Sri Lanka made in 2007 and the United Kingdom Home Office reports of March 2017 (fact finding mission conducted between 11 and 23 of July 2016) and June 2017 provided to the IAA were also before the delegate and referenced in the delegate's decision. I do not consider these documents to be new information and have had regard to in undertaking this review. In addition, the IAA is also provided with a copy of the 2018 Human Rights Council report titled "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism", parts of which is also referenced and extracted in the applicant's submission to the IAA. This specific report was not before the delegate and is new information. The report pre-dates the delegate's decision by over two years and is general country information, not personal information in the relevant sense. I also note that the delegate had before him a report of the same title produced by the Human Rights Council dated in December 2018. The July 2018 report and the December 2018 report contain broadly the same information which relates to the special rapporteur's visit to Sri Lanka from 10 to 14 July 2017 and includes his observations, including observations extracted in the submission to the IAA about concerns regarding the surveillance of Tamils, alleged human rights violations under the Prevention of Terrorism Act (PTA) and the stigmatisation of the Tamil community. Given this I do not consider that the earlier July 2018 report adds anything further to the information that was before the delegate and I do not consider that there are any exceptional circumstances to justify consider it. I am not satisfied that either of the requirements under s.473DD(a) or (b) of the Act are met.

7. In part the submission refers to the applicant's claims made before the delegate and includes extracts from case law and the refugee guidelines. I do not consider those aspects of the submission to be new information and have had regard to in undertaking this review. The submission also includes information which appears to have been extracted from and based on information obtained from country information/new reports. This information includes the following:
- After Gotabaya Rajapaksa became the president of Sri Lanka in November 2019, he "appointed military officials for civil administration and handed over implementing police powers establishing new army camps in the North and East of Sri Lanka let to a grave deteriorating political, security and human rights situation which augments the applicant's claim for grant of a protection visa". In making this statement, the submission includes a footnote described as "The Gazette dated 2019.11.22 by section 12 of the Public Security Ordinance (Chapter 40)", a copy of which has not been provided to the IAA.
 - On 26 February 2020, the Sri Lankan prime minister, Mahinda Rajapaksa, "said Sri Lanka is withdrawing from the UNHCR Resolution 30/1 of 2015 and will not abide by this resolution anymore that class for accountability for alleged excesses carried out by Sri Lankan forces and reparations for victims". Further it is noted that the Sri Lanka's foreign minister informed the UNHCR that "Sri Lanka has decided to withdraw from the co-sponsoring of UNHCR resolution 40/1 on promoting accountability, reconciliation and human rights". Neither the source from which this information has been extracted from nor a copy of the documents from which this information has been obtained has been provided to the IAA.
 - On 22 April 2019, Ben Emmerson QC, the former UN Special Rapporteur in an interview with the CBC Radio said "the biggest problem they have in Sri Lanka is discrimination against national minorities, particularly the Tamil community, who are primarily Hindu, and the Muslim community. And the biggest social problem is disenfranchisement of these minorities and continuing persecution by public officials from the majority Sinhalese Buddhist community". The submission footnotes a hyperlink of what appears to be an article or transcript of the said interview, a copy of which is not provided to the IAA.
8. The above information is included under the heading of "exceptional circumstances to justify considering the new information" within the submission and appears to be identified as new information. However, the manner in which this information has been provided to the IAA is not in compliance with the Practice Direction for Applicants, Representatives and Authorised Recipients (the Practice Direction) issued by the President of the AAT, a copy of which was set to the applicant with the letter acknowledging the referral of his case to the IAA. The Practice Direction requires that when referencing or providing new information such as country information reports or media articles, the applicant must attach a copy of the document and identify the source and date of the document. It also explicitly indicates that hyperlinks to publicly available documents are not acceptable. In this case the applicant's migration agent has not identified the sources or dates of all of the documents it appears to have extracted the information from and only referenced hyperlinks for two sources, both of which do not appear to be functional. Considering that the applicant was provided with a copy of the Practice Direction, have had the benefit of assistance from his migration agent and given the extent of the deficiencies/non-compliance with the requirements of the Practice Direction, I do not accept the new information (s.473FB(5)). Even if I were to accept the new information, I am not satisfied that either limb of s.473DD are met. The information appears to relate to events taken place prior to the delegate's decision made on 25 August 2020. Apart from stating that

the information was not available, which I do not agree with, no other explanation has been provided as to why the information could not have been presented to delegate, given that the applicant was represented at the time and his former representative did raise claims relating to situation of Tamils in Sri Lanka and the impact of the outcome of the recent presidential election on the Tamil community. Nor has been explained (or is apparent) why the information, which may be best described as general country information, should be considered as credible personal information. In addition, given that the applicant's representative at the time provided the delegate with submission and country information regarding the recent presidential election, the appointment of figures accused of war crimes and human rights violation within the new government's administration and the fear and anxiety that the outcome of the presidential election is claimed to have caused amongst the Tamil community, it is not apparent to me that the new information adds anything further to what was already before the delegate. I am not satisfied that either of the requirements under s.473DD(a) or (b) of the Act are met.

Applicant's claims for protection

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

- The applicant was born in [City 1], eastern province, Sri Lanka. He is of Tamil ethnicity and Hindu religion.
- The applicant's parents separated and from a young age he resided with a relative (maternal grandmother's sister) in [City 2]. His [sisters] grew up in a hostel and his brother was conscripted by the LTTE in 2003. He had contact with his sisters, but his brother's whereabouts is unknown to him.
- When his maternal grandmother's son, J, got married, the applicant started residing with him and his wife and refers to J as his uncle.
- J's brother-in-law P owned [a] business located at his place of residence. J owned a lorry which he used as part of P's [business] and he was paid a commission.
- P had to frequently pay money to persons who they believed were members of the Sri Lankan authorities and the army. When P refused to pay money to the authorities, he was falsely accused of LTTE links and was arrested/abducted [in] April 2007 and detained [in] jail. The applicant became aware of this through his uncle J.
- After P went into hiding, J started having problems with the authorities. When the applicant was 14 or 15 years of age, he recalls Sri Lankan authorities coming to his uncle J's home and physically assaulting J. J's lorry was confiscated on one occasion. J feared being sent [to] jail and as a result fled Sri Lanka by boat (illegally) for [Country 1].
- The Criminal Investigation Department (CID) frequently came in search of J. The applicant was targeted by the CID and he was beaten on three occasions. The CID's intention was to somehow force J to return. The CID officers told that the applicant they would abduct him, causing the applicant to fear for his safety and depart Sri Lanka.
- A smuggler arranged the applicant's departure from Sri Lanka. He went to [Country 1] and remained there for two months before departing [Country 1] by boat and arriving in Australia in April 2013.
- Since arrival in Australia, the applicant has attended two Martyrs day celebrations and fears harm at the hands of the authorities.

- The applicant fears harm for reasons of being an unmarried young Tamil male, originating from an LTTE controlled area, being targeted due to his uncle J's profile with the authorities, his brother's LTTE involvement and departing Sri Lanka illegally and seeking asylum in Australia.
- Following the recent presidential election in November 2019, Gotabaya Rajapaksa (the former defence minister under his brother Mahinda Rajapaksa's presidency) came to power and the applicant fears that the Rajapaksa government will resume persecution of Tamils.

Refugee assessment

10. 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

11. 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.
12. The applicant has consistently claimed that he was born in [City 1] in the eastern province of Sri Lanka and is of Tamil ethnicity and Hindu religion. The delegate was provided with copies and English translations of the applicant's Sri Lankan birth certificate and National Identity Card. I accept that the applicant is a national of Sri Lanka and of Tamil ethnicity and that Sri Lanka is the receiving country for the purposes of this review. I also accept that the applicant is of Hindu religion, but he has not made any claims to fear harm on the basis of his religion.
13. The applicant has consistently claimed, and I accept, that his parents separated when he was young and that he resided and grew up with his maternal grandmother's sister's family (J's family who he calls his uncle). He has also been consistent about his [sisters] growing up in a hostel in [City 2] and that he had some contact with them while growing up. At the SHEV interview, the applicant indicated that his sisters remain in [City 2] and that he is in contact with them. At the SHEV interview the applicant confirmed that he married his wife, a Tamil

from Colombo, in Australia. He has not made any claims to fear harm on the basis of his marriage or his relationship with his wife if returned to Sri Lanka.

14. In his SHEV statement, the applicant indicates that he had a biological brother who he did not disclose during his arrival interview. He claimed that his brother was conscripted by the LTTE sometime in 2003 and that his brother's whereabouts is unknown to him. The applicant provided the delegate with a copy of a birth certificate claiming to be his brother's birth certificate. At the SHEV interview the applicant was asked why he did not declare having a brother earlier. The applicant stated that as his brother was a member of the LTTE, a terrorist organisation, and that he did not declare having a brother because he assumed that disclosing this information would cause problems for him. In response to the delegate's questions, the applicant stated that his brother did not reside with him; his uncle informed him about his brother's forcible conscription when the applicant was about [age] or [age] years old and he could not recall how old his brother was at the time of his conscription. When asked why he decided to disclose this information now, the applicant stated that on the "information sheet" it said that he had to tell the truth at the interview. When reminded that he would have also been informed to tell the truth during his arrival interview, the applicant responded that he was only [age] or [age] years old at the time of his arrival interview. He did not have clarity about what to say and has now realised that he should tell the truth.
15. In relation to his brother's claimed birth certificate, the delegate observed that it was issued in 2014 and asked who obtained the birth certificate and why. The applicant stated that his mother obtained the birth certificate and that he was unsure why, but it may have been to confirm "the visa or something". The delegate observed that in 2014 his brother would not have been seen for over ten year and asked again what caused his mother to apply for his brother's birth certificate. The applicant said that he did not know and did not ask. When asked why he requested his brother's birth certificate, the applicant referred to his non-disclosure of having a brother and that now that he has provided that information, he wanted the birth certificate to confirm that he had a brother. The delegate put to the applicant that his parent's dates of birth was not the same in his and his brother's birth certificates. The applicant stated that he did not know how this occurred. When asked that given that his mother applied for the birth certificate wouldn't she had noticed that her date birth was incorrect, the applicant explained that the information would not have been given by his mother but obtained from his brother's place of birth.
16. At the SHEV interview the applicant confirmed that he had not heard from his brother and was unaware of his whereabouts. When asked if his sisters, who have remained in [City 2], had any trouble with the authorities due to their brother's LTTE involvement, the applicant stated that his sisters do not disclose that they have a brother. When the delegate put him that the Sri Lankan authorities would know that his sisters have a brother, the applicant stated that the situation is different for females, his sisters were living in hostel and that women are not affected this way. When reminded that he also did not reside with his brother in Sri Lanka and what would have been the difference between his and his sister's circumstances, the applicant stated that only males joined the LTTE and as a result the authorities would come to the conclusion that he also was a member of the LTTE. The applicant was informed that it is well-known that the LTTE had a lot of female members.
17. I have serious doubts about the veracity of the applicant's claim that he has an older brother who was forcibly recruited by the LTTE sometime in 2003. As observed by the delegate, at the commencement of his arrival interview held in July 2013, the applicant was informed of his obligation to give true and accurate answers to questions asked and that if his evidence in future interviews happen to be different from information provided at the time, that would

raise doubts about the reliability of his evidence. He was also informed that the information he provided would not be disclosed to the authorities in Sri Lanka. The applicant, who was [age] years old at the time, confirmed that he understood this information. He provided detail about his family members in Sri Lanka, his family members with whom he travelled on the boat to Australia and responded to a number of questions regarding why he left Sri Lanka and could not return. I am not convinced that his age, lack of clarity as to what information he needed to provide at the time, or his fears that disclosing information about his brother's involvement with a terrorist organisation caused him not to declare having a brother. Even in accepting that he may not have felt comfortable disclosing his brother's conscription, I find it difficult to accept that he would not have just disclosed the fact that he had a brother without referring to his brother having been forcibly conscripted. In addition, like the delegate, I also have concerns about the applicant's evidence as to why his mother obtained his brother's birth certificate in 2014, over a decade after he was forcibly conscripted by the LTTE with his family having no knowledge of his whereabouts. Given that the applicant requested his brother's birth certificate for the purposes of his SHEV application, I have difficulty in accepting his evidence that he did not ask his mother why she applied for his birth certificate in 2014, particularly given that he claims that his brother's whereabouts was unknown to his family for a significant period of time. In addition, even in accepting that the applicant has a brother based on the birth certificate, the birth certificate does not corroborate his claim that his brother was conscripted by the LTTE in 2003.

18. For the reasons set out above, I do not accept the applicant's claim that he has a brother who was conscripted by the LTTE in 2003. Even if I were to accept this claim, the applicant's evidence does not suggest that he ever encountered any problems or issues as a result of his brother's conscription while in Sri Lanka. I note the applicant's evidence that he resided in the eastern province with J's family from a young age and that he went to school, completing year 12 in 2012, and only had issues with the authorities after J departed the country for [Country 1] in 2009. The applicant claims that he did not disclose that he had a brother to anyone in Sri Lanka and there is no suggestion that he had ever been asked about or connected to his brother or the LTTE at any time while living in Sri Lanka. The applicant's evidence also does not indicate that his sisters who have remained in [City 2] or his mother who has returned to Sri Lanka from [Country 3] in the recent years, have encountered any issues with the authorities for any reason, including in relation to the applicant or his brother. I do not accept the applicant's suggestion that his sisters have not encountered any issues because they are women and that because only males joined the LTTE, particularly given that this is not supported by the country information regarding the LTTE's membership. Further his assertion that he would be attributed with an LTTE profile if returned to Sri Lanka is undermined by lack of any evidence that he has ever been attributed with such profile while residing in Sri Lanka. This is particularly so given that the applicant was residing in the eastern province during and in the aftermath of the civil, a period during which the country information cited below indicates that security forces imputed LTTE support based on individuals' Tamil ethnicity.
19. In his SHEV statement, the applicant states that his uncle J worked with his brother-in-law P who had [a] business. The applicant claims that he came to know from J that P was frequently asked for money by the Sri Lankan authorities and that in 2007, P was abducted/arrested for refusing to pay money, falsely accused of having LTTE links and was detained [in] jail. He states that he understood that after P "went into hiding" his uncle J started having problems with the authorities. The applicant claims that the authorities came to J's house on several occasions, physically assaulted J in front of the applicant who was about [age] or [age] years old at the time, and that on one occasion they confiscated J's lorry that was part of P's [business]. He states that because J feared that he would also be detained [in] Jail, in 2009 he fled Sri Lanka illegally and went to [Country 1]. After J's departure, the CID frequently came in search of him

and the applicant who was living at J's house was targeted and beaten on three occasions. The applicant claims that sometime towards the end of 2012, he was beaten by the CID with the intention to somehow force J to return as he was wanted by the authorities. The applicant states that because he was fearful of being harmed by the CID on account of his uncle J and J's links to P, he decided to depart the country.

20. At the SHEV interview the applicant confirmed the delegate's understanding that P escaped Sri Lanka because he was suspected of having LTTE links and that following P's departure, J was accused of being an LTTE sympathiser. When asked why the authorities came to the applicant's house and beat him up, the applicant stated that they wanted information about J and questioned him. The delegate observed that J departed Sri Lanka in 2009. The delegate asked the applicant why the authorities came searching for J in 2012, three years after his departure, and what the CID said to him. The applicant stated that he did not know anything, it was J who was accused of supporting the LTTE and that his brother was taken by the LTTE when he was [age] years old and that the applicant was also around that age at the time. I note that earlier during the interview, the applicant stated that he was unaware of how old his brother was when he was conscripted, this is despite having his brother's birth certificate. The delegate noted that the war had ended in 2009 and it was not plausible that he would have been accused of being conscripted by the LTTE. The delegate referred to the applicant's evidence in his SHEV statement that he was told that the CID would abduct him. The applicant simply stated that the CID wanted information about J and wanted to bring J back to Sri Lanka through him.
21. The delegate in noting that both J and P came to Australia, asked what had happened to P since. The applicant stated that he came to Australia with J and did not know what had happened to P. The delegate informed the applicant that P came to Australia and then voluntarily returned to Sri Lanka in 2015 and asked if he had been informed about this by his uncle J. The applicant stated that he did not have much contact with J, did not engage in deep conversations with him, and did not even invite J to his wedding last year. The delegate referred to the applicant's evidence that he was brought up by J's family, that he departed [Country 1] with family, including J and his family members, and his claim that J's association with P caused the applicant to depart his country, and asked for confirmation that despite these circumstances he was saying that he did not discuss such issues with his uncle J. The applicant stated that since arriving in Australia his focus in life had changed and he was not in much contact with J. The applicant was asked that given that he has now become aware that P has voluntarily returned to Sri Lanka in 2015, whether he still feared returning to Sri Lanka. The applicant stated that he did not know what has happened to P and that because of his connections with his older brother the authorities would be after him. I note that neither the delegate nor the IAA have been provided with any evidence regarding P's circumstances since his departure from Australia in 2015.
22. The applicant has consistently claimed that his uncle J worked with his brother-in-law P in Sri Lanka and I accept that to be the case. Country information reports¹ before me indicates that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and detained by the security forces during the civil war. As LTTE supporters and members were almost all Tamils, the security forces imputed LTTE support based on ethnicity. The authorities possessed extensive powers to arbitrarily detain and arrest people under the emergency regulations and Prevention of Terrorism Act (PTA) and more Tamils were detained than other ethnic groups. Given the reporting of harassment and intimidation of Tamils by the authorities

¹ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'Sri Lanka - Country Information Report', 24 January 2017, CISED50AD105; US Department of State 'Country Reports on Human Rights Practices for 2017 - Sri Lanka', 20 April 2018, OGD95BE927333.

during the civil war which ended in 2009, I am also willing to accept that P may have been harassed for refusing to pay money to the authorities and possibly falsely accused of having links with the LTTE and detained. Although the applicant's evidence does not include information about how long P was detained, when and why he was released from [jail] or when he went into hiding, I note that the applicant has provided a copy of a complaint made to the Human Rights Commission in Sri Lanka which appears to indicate that P's wife reported him as missing in 2007. I accept that given J's association with P, after P's departure from Sri Lanka which appears to have occurred during the war, J may have been approached by the authorities and, as a Tamil and due to his association with P, he may have been accused of having sympathised with the LTTE. I accept that J departed Sri Lanka in 2009 and that the applicant remained residing in J's house and I note his evidence that he continued with his schooling and completed year 12 in 2012. While I am willing to accept that following J's departure in 2009, the authorities may have come looking for J soon after his departure and may have questioned the applicant given he was residing in J's house, I do not consider it plausible that the authorities would have continued to search for J for a period of three years and targeted the applicant as a way of getting J back into the country. Country information indicates that the longstanding civil war in Sri Lanka ended with the defeat of the LTTE by the Sri Lankan army in May 2009. It is reported that a large number of LTTE members were arrested and detained and the majority were sent to government-run rehabilitation centres.² Given that in 2012, three years had passed since J's departure and most LTTE members and supporters had been arrested and sent to rehabilitation camps, I do not accept that the authorities continued to search for J and wanted him to return to Sri Lanka. In addition, the applicant's evidence does not suggest that either P or J were in fact involved with the LTTE, but that P was falsely accused, and J was only accused of being sympathiser due to his association with P. On the applicant's evidence, I am not satisfied that the applicant was beaten by the CID with the intention of forcing J to return to the country or that the applicant was targeted or told by the CID that he would be abducted. The applicant's evidence does not suggest that he was ever accused of having any association or connection with the LTTE due to his relationship with J or otherwise.

23. During his arrival interview held just over two months after his arrival in Australia in April 2013, the applicant gave evidence that he obtained his passport about five months prior to his departure from Sri Lanka and that he departed the country using his passport and entered [Country 1] lawfully. He stated that he stayed in [Country 1] for about two months after which his uncle J arranged for them to depart [Country 1] illegally by boat. In his SHEV application, the applicant claims that he departed Sri Lanka for [Country 1] illegally. He states that he did not know if his passport or visa to [Country 1], arranged by the smuggler, were legal, but that his passport had his photo and it was his understanding that his departure from Sri Lanka was not lawful. He has also indicated that he did not have his passport with him because it was taken from him by the smuggler before he boarded the boat in [Country 1] to come to Australia. At the SHEV interview, the applicant stated that he obtained his passport through the smuggler with the help of his aunty. When asked why he did not apply for his passport, the applicant stated that he had problems regarding his uncle and if he had applied for his passport, he would not have been able to get a visa to [Country 1]. When the delegate sought to clarify that what the applicant was saying was that he flew out of an international airport from Sri Lanka into an international airport in [Country 1] with a fake visa and passport, the applicant stated that at that time he did not know that they were fake. When asked how he knew that they were fake now, the applicant stated that he talked to his aunty who told him about it. When asked about what had happened to the passport, the applicant, contrary to his evidence in his SHEV application, stated that on his way to Australia he dropped the passport in the water. At the

² DFAT, 'DFAT Country Information Report Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, 'Sri Lanka - Country Information Report', 24 January 2017, CISED50AD105

conclusion of the SHEV interview, the delegate put to the applicant that he had given conflicting evidence regarding how he obtained his passport. In referring to the applicant's evidence during his arrival interview that he obtained his passport five months prior to his departure from the passport office and his evidence at the SHEV interview that he travelled to [Country 1] using a bogus passport and visa, the delegate suggested that he had come up with departing Sri Lanka on fake passport after realising that if he had been issued a passport and departed Sri Lanka legally, that would indicate that he was not of any interest to the authorities. The applicant and his representative were given an opportunity to respond to the delegate's concerns at the SHEV interview and in writing after the interview. I note that neither the applicant nor his representative provided any submissions or explanation in this regard. I am not satisfied that he departed Sri Lanka on a fake passport or visa. I prefer his evidence given shortly after his arrival in Australia that he obtained his passport from the passport office about five months prior to his departure from Sri Lanka in 2012 and that he departed the country using his own passport on a valid visa to [Country 1]. As put to him by the delegate at the SHEV interview, I consider that he has changed his evidence regarding how he departed Sri Lanka to enhance his claimed adverse profile with the Sri Lankan authorities.

24. Given my findings set out above, I am not satisfied that the applicant had any adverse profile with the authorities or was of any interest to the authorities, for any of the claimed reasons or otherwise, at the time of his departure from Sri Lanka in 2012.
25. Country information³ before me indicates that the security and situation for Tamils in Sri Lanka has improved significantly since the applicant's departure in 2012. Government initiatives, particularly after 2015, have markedly improved the lives of Tamils in Sri Lanka. These include the recognition of both Sinhala and Tamil as the official languages of the country; the lifting of restrictions on travel to the north and east of the country; the freeing of civilian land from military control; the release of some individuals detained under the PTA; the government's public commitment to reducing military involvement in civilian activities; and the establishment of the Office of Missing persons in February 2018. Such measures have resulted in a decrease in the number of Tamils held in detention, reduced incidents of extrajudicial killing, disappearances, abductions, extortion and kidnapping for ransom and resulted in the effective suspension of the PTA, which was used to target those suspected of involvement with the LTTE. It is noted that the PTA was only used sporadically during the period between 2016 and 2019 and in response to the Easter bombings in 2019.
26. In relation to Tamils, the country information indicates that they are the second largest ethnic group in Sri Lanka. They have a substantial level of political influence and their inclusion in political dialogue has increased since 2015. Tamil political parties are numerous, with the largest coalition of parties under the umbrella of the Tamil National Alliance (TNA). Due to government initiatives post-war and in particular in the period after 2015, the situation for Tamils in Sri Lanka has improved significantly, in that Tamils do not face unwarranted attention from authorities due to their political involvement or in their day-to-day activities. Restrictions

³ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, 'DFAT Country Information Report Sri Lanka', 23 May 2018, CIS7B839411064; Danish Immigration Services, "Human Rights and Security Issues concerning Tamils in Sri Lanka, Report from Danish Immigration Service's fact-finding mission to Colombo, Sri Lanka, 19 June to 3 July 2010", October 2010, CIS19345; Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), 'Sri Lanka: COI Compilation' 31 December 2016, CIS38A80123251; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: Treatment of Tamils and People who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", Version 4.0", March 2017, CISED50AD3780; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', 15 June 2017, OGD6E7028826; US Department of State 'Country Reports on Human Rights Practices for 2017 - Sri Lanka', 20 April 2018, OGD95BE927333; International Truth and Justice Project, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; International Truth & Justice Project, "Unstopped: 2016/17 Torture in Sri Lanka" 14 July 2017, CISED50AD4849.

on public Tamil commemoration have relaxed and Tamils have been free to hold public ceremonies marking heroes' day since 2016. Further, there are no official laws or policies that discriminate on the basis of ethnicity, including in relation to education, employment or housing. It is also noted that there is no official discrimination on the basis of ethnicity in public sector employment, but rather the limited Tamil appointments are as a result of a number of factors, including disrupted education because of the conflict, and language constraints. However, although the LTTE has not held any military or political power since the end of the war in 2009, the country information indicates that the Sri Lankan government remains sensitive to the potential re-emergence of the LTTE throughout the country, and as a result surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. DFAT understands that close relatives of high profile former LTTE members who are wanted by the authorities may be subjected to monitoring. Tamil men accused of links to the LTTE have reported abductions and torture at the hands of the security forces, although it is reported that the focus of the Sri Lankan government has changed since the end of the war with an objective of identifying Tamil activists in the diaspora who are working for Tamil separatism to destabilise the government or the State. Those most at risk of detention and mistreatment are those who are, or are perceived to be a threat to the integrity of Sri Lanka as a single state, have a significant role in relation to post-conflict Tamil separatism and those former LTTE members who had leadership roles, or are suspected of having committed terrorist or serious criminal acts during the conflict or have provided weapons or explosives to the LTTE. The weight of the information indicates that a person being of Tamil ethnicity would not in itself warrant international protection, neither would a person with a past membership or connection with the LTTE, unless they have or are perceived to have had a significant role in it, or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state. There are reports that ex-combatants and their family members may face discrimination both within the community and from government officials but reports of arrest and detention of former LTTE family members cannot be verified.

27. the SHEV interview the applicant's representative referred to the recent presidential elections in Sri Lanka. In a post-interview submission it is argued that the election of Gotabaya Rajapaksa and the appointment of officials engaged in alleged war crimes to combat COVID-19 is likely to instil fear in the minds of the Tamil, particularly those living in the majority Tamil areas. The submission includes extracts from reports confirming the election of Gotabaya Rajapaksa late last year and extracts from the 2019 DFAT report and DFAT advice on traveling to Sri Lanka. The delegate was provided with numerous news articles published in various news outlets such as the Guardian, TamilNet, the Diplomat, the Tamil Guardian and Aljazeera. The information presented in news reports indicate that the Rajapaksa government appointed officials that were alleged to have committed war crimes during the conflict; that since the outbreak of COVID-19, the government has introduced measures such as the establishment of quarantine facilities for returned travellers from overseas, implementation of curfews on people's movement and restrictions on large gatherings that have impacted holding events such as Remembrance Day; that complaints have been made by Tamils in the northern province on the basis that their family members have been detained on allegations of attempting to regroup the LTTE; and that there have been disputes between the navy and Tamil communities in the north about land release and ownership. Some news reports have also reported on the president's endorsement of amending the constitution to reduce power of political minority political parties on the basis that political agendas based on race destabilise the political and justice system.

28. DFAT⁴ reports that Mahinda Rajapaksa was the president of Sri Lanka from 2005 until he was defeated in 2015. It is also noted that grave human rights violations, including possible war crimes and crimes against humanity, were likely committed by the government of Sri Lanka and the LTTE during the civil conflict, which significantly impacted the Tamil population. On 16 November 2019, Gotabaya Rajapaksa, Mahinda Rajapaksa's brother who was also the defence secretary under his ten year presidency, won a decisive victory in Sri Lanka's Presidential election.⁵ Gotabaya Rajapaksa's return to power was premised on the notion that Sri Lanka needed a strong man to take on terrorism and bring back security after the Easter bombings in April 2019.⁶ Human rights defenders, journalists and trade unions activities have expressed concern about the president's appointment of individuals previously accused of corruption or alleged to have committed war crimes and that his strategy is to increase militarisation which would impact the minorities.
29. Given their past experiences, I accept the applicant's submission that the Tamil community are concerned and anxious about the election of President Rajapaksa in late 2019. However, overall, the information presented by the applicant, in my view, does not support a conclusion that the current government of Sri Lanka have an agenda to dismantle the former President's initiatives to restore security and unite the citizens of Sri Lanka. While the news reports presented by the applicant notes the president's endorsement of amending the constitution, the appointment of officials who are alleged to have committed human rights violations during the longstanding civil war, that there are still disputes regarding land ownership and that the government has made arrests and detained Tamil on allegations of attempts to re-emerge the LTTE, the information does not indicate that any amendments to the constitution or measures put in place to curb the spread of the COVID-19 virus have been put in place to target or persecute the Tamil community, or that young Tamils with profiles like the applicant are being targeted. Given the defeat of the LTTE in 2009 (more than ten years ago) and the significant security improvement in the country in more recent years, I also consider that the situation in Sri Lanka to be markedly different from when the Rajapaksas were last in power. Based on the information before me, I am not satisfied that the situation for Tamils has deteriorated or that the current government have an anti-Tamil agenda that indicates there is a real chance of persecution of Tamils. I also note that the applicant's evidence does not suggest that his family members, including his sisters who are currently residing in the [City 2] have reported any anti-Tamil sentiment or that they have encountered any issues following the recent political change in Sri Lanka.
30. In his SHEV statement the applicant indicates that he attended two Martyrs day celebrations in Australia and fears that if his photographs or details are known to the authorities, he could attract adverse attention. At the SHEV interview, the applicant confirmed that he attended events in Australia. He referred to having attended events on 18 May being the last day of the war and when a lot of Tamils died. He confirmed that the reason he went was not to show support for the LTTE but to pay his respects for Tamils people who died during the war. He also stated that such events are banned in Sri Lanka. In response to the delegate's observation that since May 2015 the Sri Lankan government has allowed such gatherings in the north and east of the country to commemorate those who were killed during the war, the applicant stated

⁴ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, 'DFAT Country Information Report Sri Lanka', 23 May 2018, CIS7B839411064; DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

⁵ International Truth and Justice Project, Journalists for Democracy in Sri Lanka, "SRI LANKA: AND THE CRACKDOWN BEGINS", January 2020, 20200114142534.

⁶ International Truth and Justice Project, Journalists for Democracy in Sri Lanka, "SRI LANKA: AND THE CRACKDOWN BEGINS", January 2020, 20200114142534.

that he read on the internet that last year university students in the northern province were assaulted by the authorities during these events.

31. The delegate was provided with a news article published in TamilNet on 18 May 2020, which indicates that Tamil political parties were blocked from marking Mu'l'livaaykkaal Remembrance Day in Jaffna. An interim order from a [City 1] Magistrate was obtained on the basis that earlier events were not compliant with COVID-19 restrictions and that such gathering could disturb COVID-19 measures. The applicant did not provide the delegate with any further independent evidence to corroborate his understanding that such events are otherwise banned in Sri Lanka or that people in the north were assaulted last year for reasons of attending such events. In addition, the applicant has not provided any evidence to the delegate or the IAA that the authorities in Sri Lanka have become aware of his attendance at two Martyrs day events in Australia.
32. As indicated by the delegate and supported by the country information cited above, while the Sri Lankan authorities are sensitive to re-emergence of the LTTE and have shifted their focus to identifying Tamil activists in the diaspora who are working for Tamil separatism to destabilise the government, the information indicates that restrictions on public Tamil commemoration have relaxed and Tamils have been free to hold public ceremonies marking heroes' day since 2016. I accept that due to COVID-19 restrictions, bans may have been placed for large gatherings as reported in the TamilNet news report, however, there is no suggestion that such bans are because people attending such events are perceived to support re-emergence of the LTTE or engage in Tamil separatism activities. Other than attending two commemoration day events, the applicant's evidence does not suggest that he has undertaken any activities in Australia that would be of concern to the Sri Lankan authorities and I consider the chances of him attracting any adverse attention as a result to be no more than remote.
33. The weight of the country information before me, supports that being of Tamil ethnicity in itself, or being a young Tamil male from a former LTTE controlled area or Tamils with past connections with the LTTE does not warrant international protection, unless the person had or is perceived to have had a significant role in the LTTE, which I note is not the case for the applicant. The applicant was not a member nor had any involvement or interactions with the LTTE during the war. I do not accept the applicant's claim that he has a brother who was conscripted by the LTTE or that he was targeted by the CID due to his association with his uncle J. I have also found that the applicant was not of any adverse interest to the authorities at the time of his departure from Sri Lanka, and do not consider that his attendance at two events in Australia would cause him any issues with the Sri Lankan authorities.
34. While I do not accept he departed Sri Lanka illegally, I accept the applicant's evidence that he is no longer in possession of his passport. DFAT⁷ indicates that Sri Lankans without passports can re-enter the country on temporary travel documents, also known as an Emergency Passport or a Non-Machine-Readable Passport, issued by diplomatic and consular missions and valid for re-entry to Sri Lanka. Given that the applicant is no longer in possession of his passport he may be returning to Sri Lanka on temporary travel documents.
35. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act), under which it is an offence to depart the country other than via an approved port of departure. I have not accepted that the applicant departed Sri Lanka illegally as such find that he will not be charged under the I&E Act. According to DFAT, returnees, including voluntary and involuntary returnees on charter flights from Australia, are questioned on arrival. For returnees

⁷ DFAT, 'DFAT Country Information Report Sri Lanka', 23 May 2018, CIS7B839411064.

travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. The process often involves interviewing, contacting hometown police, neighbours or family members and checking criminal or court records. DFAT reports that no one is subjected to mistreatment during this process and that all returnees are subjected to these standard procedures irrespective of their ethnicity.⁸ Given my findings about the applicant's lack of any profile with the authorities at time of his departure in 2012, his ability to depart the country using his own passport and lack of any evidence that he been charged with any crimes or offences, I find that the investigative process at the airport will very likely identify him as a person of no interest to the authorities and consider the chances of him encountering any issues or problems to be no more than remote.

36. In relation to the applicant facing any harm for reasons of returning as a returned asylum seeker, DFAT⁹ notes that during 2008 and 2015, over 1,500 failed asylum seekers returned from Australia to Sri Lanka, with majority of Tamil ethnicity. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis or are treated in such a way that endangers their safety or security. It is noted that returnees may face financial difficulties reintegrating into their communities or may face challenges in securing employment or reliable housing on return. Societal discrimination is not considered a major concern and DFAT assesses that returnees face a low risk of societal discrimination on return to their communities. In this case, the applicant's mother and sisters have remained in [City 2]. Given the applicant's family's location and his past residence in the area, I consider it very likely that he would return to [City 2] in the eastern province. The applicant completed year 12 and although he has not worked in Sri Lanka, he has undertaken employment in Australia. The applicant has not claimed that he would be facing any challenges or problems in securing employment or reliable housing. On the evidence before me, I am not satisfied that there is a real chance the applicant would face challenges in terms of employment or housing on return to Sri Lanka and consider any societal discrimination that he may face not to amount to serious harm.
37. In considering the applicant's circumstances in the context of the country information cited above I am not satisfied that there is a real chance that the applicant would face persecution in the reasonably foreseeable future for any of the claimed reasons, including his Tamil ethnicity, as a young Tamil male from a former LTTE controlled area, due to his association with his uncle J, his attendance of two Martyrs day events in Australia or as a returned asylum seeker from Australia.
38. The applicant does not have a well-founded fear of persecution within the meaning of s.5(J) of the Act.

Refugee: conclusion

39. 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).

⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 23 May 2018, CIS7B839411064.

⁹ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

Complementary protection assessment

40. 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

41. 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.
42. 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.
43. I accept that on return to Sri Lanka the applicant will very likely be subjected to an investigation process on arrival. Given his profile, I am not satisfied that there is a real risk he would be identified as a person of interest or otherwise be harmed during this process. In considering the country information about difficulties that a person returning to Sri Lanka may face on return, I also accept that the applicant may face some low-level societal discrimination within his community as a returning asylum seeker. However, I do not consider that such treatment and difficulties that the applicant may face involves significant harm. I am not satisfied that, there is an intention to inflict pain or suffering that can reasonably be regarded as cruel and inhuman in nature, severe pain or suffering or an intention to cause extreme humiliation such as to meet the definitions of torture or cruel or inhumane treatment or punishment or degrading treatment or punishment. I am also not satisfied that the applicant will face a real risk of being arbitrarily deprived of his life or be subject to the death penalty or tortured. I am not satisfied that the applicant faces a real risk of significant harm as defined.
44. I have found above that there is otherwise no real chance of the applicant facing any harm. The Federal Court¹⁰ has held that 'real risk' imposes the same standards as the 'real chance' test. Having regard to my findings and reasoning above I am also satisfied that the applicant does not face a real risk of significant harm.
45. I am not satisfied that there is a real risk that the applicant will suffer significant harm in Sri Lanka.

¹⁰ MIAC v SZQRB (2013) 210 FCR 505.

Complementary protection: conclusion

46. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
 - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
 - (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.