



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08890

Date and time of decision: 22 March 2021 14:19:00
K Allen, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu from [Town 1], Batticaloa in the Eastern Province of Sri Lanka. On 4 May 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 17 February 2021, a delegate of the Minister for Immigration made a decision to refuse the grant of the SHEV on the basis that the applicant is not owed protection.

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 18 March 2021 the applicant provided a statement to the IAA which contains submissions about the delegate's decision and new information. The applicant has made a number of statements about the law and the Sri Lankan authorities and their treatment of illegal departees and failed Tamil asylum seekers who have spent time abroad. He has also included statements about the current government in Sri Lanka and conditions in Sri Lanka including about paramilitary groups, abductions, prison conditions and human rights. These comments appear to have been provided in response to the delegate's findings about illegal departees and failed asylum seekers and the current political and security situation in Sri Lanka. As these matters were addressed by the delegate in the primary decision, I am satisfied that these statements amount to submissions and not new information and I have had regard to that information in making this decision.
5. The applicant has stated that he is Hindu which is a minority religious group in Sri Lanka and that Hindus face severe discrimination due to growing Buddhist extremism in Sri Lanka. The information that the applicant is Hindu was already before the delegate. He has not previously asserted any fear of harm on the basis of his religion in spite of opportunities to do so, including being asked directly at interview if he had any other fears. To the extent he now appears to be asserting a fear on this basis, I am not satisfied that this information could not have been provided to the delegate at the primary stage. The country information before the delegate does refer to Hindus being a minority religious group in Sri Lanka and that there has been some conflict as a result of Buddhist extremism in Sri Lanka. The information does not refer to Hindus facing severe discrimination due to growing Buddhist extremism nor did the applicant previously raise this. He has not presented any information in support of this assertion. I am not satisfied that this is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. Overall, having regard to these factors and the fact that statement is little more than an assertion on the applicant's part, I am not satisfied that there are exceptional circumstances to justify considering the new information.
6. The applicant has stated that if he returns to Sri Lanka he would be perceived as a wealthy Tamil and would be targeted, abducted and extorted. He does not provide any further details such as who would do this to him. He has not provided any independent information in support of this claim. As with the religious claim above, the applicant has not previously asserted any fear of harm on this basis in spite of opportunities to do so. I am not satisfied that this information could not have been provided to the delegate at the primary stage or that it is

credible personal information, which was not previously known and, had it been known, may have affected the consideration of his claims. I am also not satisfied that there are exceptional circumstances to justify considering the new information.

7. The applicant has made a new claim that since arriving in Australia from Sri Lanka he used to attend Tamil nationalist activities, including Black July and Mullivaikal events, to show his solidarity and sympathy. He fears that he will be harmed on this basis including being charged under the *Prevention of Terrorism Act* (PTA) because of his actual and imputed political opinion and because of his membership of a particular social group of Sri Lankan Tamils living abroad involved in nationalist activities. The applicant has been in Australia since 2012. His SHEV interview was not held until February 2021. The applicant has never made this claim or claimed that he has ever been politically active. If he has been doing this since arriving in Australia, I am not satisfied that this information could not have been provided to the delegate at the primary stage, particularly given the opportunities afforded to the applicant at interview to provide information. The applicant did not claim to ever have been politically active in the past or that he planned to be politically active on his return to Sri Lanka. He did not claim he ever had any association with the LTTE or separatist movements. The applicant has not provided any detail about when these events were held, who organised them, how often he attended or why he began attending, leading to concerns about the credibility of this new claim. He provided no other evidence to corroborate these matters. I am not satisfied that this is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. Having regard to all these factors, I am not satisfied that there are exceptional circumstances to justify considering the new information.
8. The applicant provided new information that the military demolished a monument at Jaffna University and that this is evidence that the government perceived that Tamils are a threat to them. He provided an article "Razing of war monument in Jaffna an act of oppression: SL Tamils continue to condemn act", *The News Minute*, 12 January 2021. The information pre-dates the delegate's decision by a number of weeks. I am not satisfied that it could not have been provided to the delegate before the decision was made. The article does contain some personal information about officials at the University, although I am not convinced that it may have affected consideration of the applicant's claims. It concerns the destruction of a Tamil monument and although the views expressed are that it was seen as an act of oppression, the article does not explain why the military is blamed for the destruction and notes that the Vice Chancellor was appointed to remove the monument. It also states that the Vice Chancellor has promised to reconstruct the monument. I do not consider that the article corroborates that the government perceives that Tamils are a threat to them. The delegate did have regard to other recent information from reputable sources about the Sri Lankan government. I am not satisfied that there are exceptional circumstances to justify considering this new information.
9. The applicant claims that President Rajapaksa said he would show his real face against anyone that holds an opinion against the new government and in support of this claim he provided new information from a news article, "Nasadena Issues Chilling Warning to Opposition: 'I Killed Prabhakaran Like A Dog – I Can Become That Person'", *Colombo Telegraph*, 10 January 2021. This article pre-dates the delegate's decision. The applicant was given opportunity to provide information in support of his claims at the primary stage and I am not satisfied that this information could not have been provided to the delegate before the decision was made. The article reports on comments allegedly made by the Sri Lankan President in response to a speech by an opposition MP. The reporting appears to indicate that both parties made scathing comments to each other in a dispute about government policy and claims of illegal activity. The article does identify individuals (Ministers) and to that extent may be regarded as credible personal information but does not appear to support that Tamils in the position of the

applicant are targeted by the current government. Accordingly, I am not satisfied that the article contains credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. Additionally, I have other recent information before me from credible country information sources about the current Sri Lankan government. In light of these matters I am not satisfied that there are exceptional circumstances to justify considering the new information.

10. The applicant provided new information from a news article, "Sri Lankan government 'officials complicit in trafficking'", 27 June 2020 which appears to be from the Tamil Guardian, although it is unsourced. The article contains commentary on the US State Department, Trafficking in Persons report noting that Sri Lankan government continues in its failure to meet the minimum standards for the elimination of trafficking but is "making significant efforts to do so". This article pre-dates the delegate's decision by some months. The applicant was given opportunity to provide information in support his claims and I am not satisfied that this information could not have been provided to the delegate before the decision was made. The article identifies a government Minister but otherwise is general country information. The article is about people involved in people trafficking and does not appear to relate to the applicant's circumstances or support the applicant's claims about the President. I am not satisfied that the article contains credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. Given these factors, including the apparent lack of relevance to the applicant's claims, I am not satisfied that there are exceptional circumstances to justify considering the new information.
11. The applicant provided new information from the Department of Foreign Affairs and Trade (DFAT) "DFAT Country Report 2015 – Sri Lanka" in support of his claim of fear of harm on return to Sri Lanka. This pre-dates the delegate's decision but was not before the delegate as the delegate had regard to the 2019 DFAT report which updates the 2015 report. As noted above the applicant was given the opportunity to provide information in support his claims. The information referred to is general country information and is now quite dated. The delegate had before them much more recent information about the matters referred to by the applicant, as do I. I am not satisfied that this information could not have been provided to the delegate or that it is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. I am also not satisfied that there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows:
 - He was born in [year] in [Town 1], [location], Batticaloa to a Tamil Hindu family. His father, [siblings], [and relatives] continue to live in the family home. His mother died in 2005 and a brother and sister in law were killed in the 2004 tsunami.
 - He was educated to grade [level] and then from 1991 he worked in the family [business] which he left in 2000 as he was not suited to the work.
 - From 2000 to 2012, he worked in Colombo for [Company 1], a Tamil-owned [company]. His responsibilities included [assisting] Tamil [customers] and helping them [with specified tasks]. The Tamil [customers] only preferred to [deal with] Tamil-owned [businesses], rather than Sinhalese-owned [businesses] so he only [referred them to] Tamil-owned [businesses].

- In May 2012, he was approached by four or five Sinhalese people who threatened to kill him unless he [referred] Tamil [customers to] Sinhalese-owned [businesses].
 - On 15 July 2012, four of the same Sinhalese people abducted him in a van and took him to an unknown location, where he was tortured and detained for approximately one to two hours. They also threatened him at gunpoint, demanding that he [refer] Tamil [customers to] Sinhalese-owned [businesses]. He said he would do it in order to prevent further harm.
 - After his release, he returned to Batticaloa because he was afraid to return to the shop in Colombo. His work colleague later informed him that some people were looking for him at the shop and that he told them where the applicant was.
 - One day, he received a telephone call from the same Sinhalese man who previously attacked him. He recognised the man's voice and the man threatened him and demanded that he [refer] Tamil [customers to] Sinhalese-owned [businesses]. He received another telephone call a few days later where the person was making similar threats.
 - After this incident, he was afraid these people would come to Batticaloa and harm him so he decided to depart Sri Lanka illegally by boat in or around November 2012.
 - Since his arrival in Australia, his work colleague in Colombo informed him some Sinhalese people were looking for him.
 - His work colleague is still employed at [Company 1] and his colleague was beaten on two occasions by the same Sinhalese people because they wanted information regarding the applicant's whereabouts.
 - He fears that if he returns to Sri Lanka the same Sinhalese people would still be able to find him, regardless of whether he relocates to a different area of Sri Lanka.
 - He fears that if he returns to Sri Lanka, it would be difficult for him to find employment because of his limited education and employment skills.
13. Although the following claims were not expressly made by the applicant, the delegate also considered whether the applicant would face harm on his return to Sri Lanka on the basis of his Tamil ethnicity and/or as a failed Tamil asylum seeker who departed Sri Lanka illegally.

Factual findings

Identity

14. The applicant provided a plausible and consistent account of his identity throughout his interactions with the Department. He was interviewed in Tamil about his family, education and employment and was able to provide a compelling account of his life in Batticaloa and Colombo. In support of his claimed identity the applicant provided a translation of his Sri Lankan birth certificate, a copy of the biodata page of his Sri Lankan passport and his National Identity Card. I accept that the applicant's identity, family, education and employment in Sri Lanka are as claimed. I accept that his family remain living in the family home in Batticaloa where they work in the family [trade]. I am satisfied that the applicant is a Sri Lankan national and that Sri Lanka is the receiving country for the purpose of the application. There is no information before me to suggest that the applicant has a right to enter and reside in any country other than Sri Lanka and I am satisfied he does not.

Employment and problems at [Company 1]

15. The applicant provided a consistent and credible account of his decision to move to Colombo to work for [Company 1] and his duties at the company where he [served] Tamil [customers]. According to documents obtained by the delegate, [Company 1] is a company that continues to operate in Colombo. In his SHEV interview the applicant explained that he was not an owner of the company but an employee and that he worked in the office with another employee. I accept that the applicant was employed by [Company 1] in Colombo.
16. The applicant claims that in May 2012, he was approached by four or five Sinhalese people who threatened to kill him unless he [referred] Tamil [customers to] Sinhalese-owned [businesses]. On 15 July 2012, four of the same Sinhalese people abducted him in a van and took him to an unknown location, where he was tortured and detained for approximately one to two hours. They also threatened him at gunpoint, demanding that he [refer] Tamil [customers to] Sinhalese-owned [businesses]. He said he would do it in order to prevent further harm. The applicant claims that he then returned to Batticaloa because he was afraid to return to the shop in Colombo. His work colleague later informed him that some people were looking for him at the shop and that he told them where the applicant was. The applicant claims that one day, he received a telephone call from the same Sinhalese man who previously attacked him. He recognised the man's voice and the man threatened him and demanded that he [refer] Tamil [customers to] Sinhalese-owned [businesses]. He received another telephone call a few days later where the person was making similar threats. After this incident, he was afraid these people would come to Batticaloa and harm him so he decided to depart Sri Lanka illegally by boat in or around November 2012.
17. At the SHEV interview the applicant was asked why he left Sri Lanka. He reiterated the claim made in his SHEV application. He stated that the Sinhalese wanted him to [refer] Tamils [to their businesses] but Tamils did not want to [use] Sinhalese [businesses] so they kidnapped, threatened and injured him. He confirmed that there were no other reasons he left. The delegate noted that the applicant had a passport and enquired as to why he did not depart legally if he felt he needed to leave the country. He responded that his family told him that boats were leaving.
18. The delegate asked the applicant for more detail about who threatened him and exactly what happened to him. The applicant responded that four unknown men threatened him over the phone two or three times and then kidnapped him once and cut his hand. In response he agreed to do [referrals] for them. The delegate asked the applicant about the other employee who worked with him. The applicant made a new claim that he was threatened and the same thing happened and that he was beaten up about a year ago because of the applicant. The applicant claimed that the same people attacked his colleague. He was unable to explain how he knew that they were the same people noting that he said that he did not know who they are. When asked about his colleague he stated that he still works for [Company 1].
19. The delegate put to the applicant that he did not own the business and he had no senior role in the business and the Sinhalese people do not appear to have harmed anyone in the business from 2012 until 2020. The delegate asked him why he would continue to face harm if he returned in 2021. The applicant did not provide any convincing explanation for this noting only that if he goes back it will create problems. The delegate put to the applicant that it is many years since he left the job and Sri Lanka; he does not know his attackers and whether they still run a [business]; and he would no longer be perceived to be discriminating against Sinhalese as he is no longer [working in that industry]. He was offered the time to respond as to why he

would still fear harm from those people on his return to Sri Lanka. The applicant responded immediately that Australia is a good country and that he would like to stay.

20. I accept as plausible that during the war in Sri Lanka and in the immediate post war period, Tamil people did not feel comfortable [using] Sinhalese owned [businesses] and preferred to support Tamil businesses. I also accept as plausible that Sinhalese people would prefer not to [use] Tamil [businesses] and, accordingly they did not generally use the service of [Company 1]. I accept as plausible that the employees of [Company 1] had a dispute with Sinhalese [business] owners because their actions appeared discriminatory and were depriving the Sinhalese [companies] of business. However, I do not accept the applicant's account of the ongoing harm he faced as a result of this dispute with the Sinhalese men. I have a number of concerns about the applicant's account of the events from May 2012 onwards and consider that these concerns when considered cumulatively lead me to conclude that he applicant's claims are both illogical and implausible and did not happen.
21. The applicant has not identified his claimed attackers. He claims they never identified themselves and that they were unknown to him but he knew that he was targeted by the same people over a period of some nine years. The applicant worked for twelve years in the [business] in Colombo with a role of [coordinating with other businesses]. I do not accept that the applicant would not be aware of the rival [companies] or that he would not know people who ran Sinhalese [businesses], particularly if those people knew him well enough to target him with threats. It must be assumed that if the applicant were to [refer Tamils to a Sinhalese business] that he would at least know the name of the [company] that he should be [referring them to]. Further if there was a dispute with a rival Sinhalese [company], I have concerns that the applicant was the only person targeted and not his colleague or in fact the business owner. When this was put to the applicant at interview, he made the new claim that his colleague was threatened and beaten about a year ago. He did not satisfactorily explain why the Sinhalese men would wait for nine years to target someone else in the business nor did he explain how his colleague could remain working in the business if he faced similar harm to that claimed by the applicant.
22. I consider that the applicant's account of his attack at interview was vague and unsupported. He has provided varying dates for the attack, stating both that it occurred in May and July 2012. He provided limited detail about the claimed attack except to say they kidnapped, threatened and injured him. He did not claim to have reported the matter to his employer or the police but rather he made the decision to abandon his employment and accommodation in Colombo and immediately return to Batticaloa. If the applicant was released because he undertook to [make referrals] as claimed, I do not accept as plausible that these same unknown men would follow him to Batticaloa to threaten him, particularly as he was no longer employed by the business. I do not accept as plausible that the applicant would take the decision to flee the country by boat when he could have reported the matter to the authorities or left legally by air to avoid the claimed harm. Further, I do not accept as plausible that the applicant's former colleague would be threatened by the same people in 2020, some eight years after the events because they wanted to target the applicant. Accordingly, I do not accept as plausible that the same people would maintain an interest in the applicant nine years later in 2021. The applicant has provided no satisfactory explanation as to why the threats would continue on his return. I consider that the applicant has embellished the dispute over the [business] in order to further his claims for protection. In particular I do not accept that the applicant was kidnapped and injured in 2012 as claimed or that his colleague was beaten in 2020 or that he was sought out after he returned to Batticaloa or that he has been sought out since his arrival in Australia.

Illegal departure/Failed Tamil asylum seeker

23. I accept that the applicant departed Sri Lanka unlawfully by boat and sought asylum in Australia. I accept that this would be apparent to the authorities on his return due to the manner of his return, including on temporary travel documents.

Refugee assessment

24. 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

25. 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.
26. I have accepted that the applicant was in a dispute with some Sinhalese people because he was not [referring] Tamil people [to] Sinhalese-owned [businesses], thus he was perceived as depriving a Sinhalese owned company of business. I have not accepted that the Sinhalese people were interested in the applicant beyond his role as a [Occupation 1] with [Company 1]. As the applicant is no longer employed at [Company 1] and has not been employed by them or lived in Sri Lanka since 2012, I am satisfied that he does not face a real chance of any harm from these people on his return to Sri Lanka.
27. I accept that the applicant is Tamil and that his family home is in Batticaloa, an area which was impacted by the civil war. The applicant did not make any claims in his SHEV application or interview that he faced harm in the past in Sri Lanka because of his ethnicity or place or origin or that his family was impacted by the war or associated with the LTTE. I consider that if the applicant returns to Sri Lanka he will return, at least initially, to live with his family with whom he maintains a connection. He has not indicated otherwise. In his submissions to the IAA the applicant has stated that the Sri Lankan authorities continue to have suspicion that Sri Lankan Tamils living abroad continue to promote the ideologies of the LTTE and Tamil nationalism and that due to that perception he would become a target on his return to Sri Lanka. He claims that

there have been no constructive changes to the political and security situation in Sri Lanka and that in particular the Rajapaksa government contains officials involved in the killing of Tamils.

28. I have had regard to recent country information about the treatment of Tamils from the Eastern Province of Sri Lanka and the treatment of Tamils by the current Rajapaksa government. DFAT reports¹ that Tamils are the largest ethnic minority in Sri Lanka. According to the most recent national census, held in 2012, ethnic Sinhalese comprise 74.9 per cent of Sri Lanka's total population. Tamils constitute 15.3 per cent of the population, followed by Muslims at 9.3 per cent. The Sinhalese and Tamil languages enjoy official status, with Tamil used mostly in the north and east. DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing.
29. DFAT reports that during the war many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during. While LTTE members and supporters were almost all Tamil, security forces also imputed LTTE support based on ethnicity, and emergency regulations were, at times, applied in a discriminatory manner. Towards the end of the war, government security forces arrested and detained a large number of LTTE members. Most were sent to government-run rehabilitation centres. A smaller number were prosecuted through Sri Lanka's court system. Security forces also questioned or monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment. Although not officially mandated, in many areas the military took a visible and active role in civilian life. The applicant has not claimed that he was ever impacted by these measures targeting Tamils when he lived in Sri Lanka including during and in the aftermath of the war. He has also indicated that he was able to travel freely including between Batticaloa and Colombo and Colombo and India and did not come to the attention of the authorities.
30. DFAT reports that while the LTTE was comprehensively defeated, Sri Lankan authorities remain sensitive to its potential re-emergence. According to expert testimony provided to a 2013 hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. DFAT understands these databases remain active. 'Stop' lists include names of those individuals that have an extant court names of those individuals that the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities. The UK Home Office reported in June 2017 that the 'watch list' comprised minor offenders and former LTTE cadres. DFAT assesses those on a watch list are likely to be monitored. The applicant has not claimed that he or any members of his family were associated with the LTTE. He does not claim to have ever been wanted for or suspected of separatist or criminal activities. He does not claim to have been a minor offender or former LTTE cadre.
31. The applicant has submitted to the IAA that he fears he will be perceived as being an LTTE supporter or sympathiser holding a political opinion against the Sri Lankan government for reasons including his ethnicity. He has submitted to the IAA that human rights issues including torture are perpetrated by government forces and he expressed fear that on his return to Sri Lanka he will be detained and harmed under the PTA. DFAT reports that several local and international organisations have alleged torture by Sri Lankan military, intelligence and police forces, mostly from the period immediately following the war and involving people with imputed links to the LTTE. The 2015 OISL report found that 'victims of war-related torture perpetrated by Government forces... were generally Tamil, often arrested and detained in

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

Government controlled areas... under the PTA and the Emergency Regulations'. The OISL documented 'particularly brutal use of torture by the Sri Lankan security forces' in the immediate post-war period, following the LTTE's surrender. Local sources told DFAT that the police routinely mistreat suspects during criminal investigations, including as a way of extracting confessions. Sources also told DFAT that mistreatment was common in prisons. Mistreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture. According to sources, mistreatment in prison, where it occurs, does not discriminate on ethnicity. While there are some reports of mistreatment of people in detention in certain circumstances, DFAT assesses that Sri Lankans face a low risk of torture overall. I do not accept that the applicant is wanted for any outstanding criminal activity or that he is suspected of working with the LTTE and that he is at risk of detention and torture.

32. DFAT reports that The PTA remains legally in force. It was effectively suspended between 2016 and April 2019, following the government's commitment to repeal and replace the PTA under HRC Resolution 30/1 (2015). However, the PTA has been used – along with the now-lapsed Emergency Regulations – to detain persons allegedly involved in the 2019 Easter Sunday terrorist attacks. DFAT is unable to verify how many individuals have been detained under the PTA since 21 April 2019. The PTA appears to have been used recently to detain Muslims suspected of involvement in terrorism. It does not appear to have been used recently to target Tamils in the applicant's circumstances. Reporting indicates that it was used to detain a Tamil man in 2018 who was a suspect in the murders of two policemen. The applicant does not claim to have ever been involved in criminal activity of that nature.
33. DFAT reports that members of the Tamil community claim that authorities continue to monitor public gatherings and protests in the north and east, and practise targeted surveillance and questioning of individuals and groups. Security forces are most likely to monitor people associated with politically-sensitive issues related to the war, including missing persons, land release and memorial events. In the east, local informants within the community (including neighbours and business owners) reportedly undertake monitoring on behalf of the authorities. Intelligence agencies also monitor links to foreign groups, including some in the Tamil diaspora. I do not accept that the applicant has ever been involved in any politically sensitive issues. The applicant has not claimed that his family remaining in the east have been targeted by these monitoring and surveillance measures.
34. The applicant has submitted to the IAA that there are no constructive changes to the security situation in Sri Lanka. The report of the UN's OISL, covering the period 2002 to 2011, found frequent occurrences of extrajudicial killings, disappearances and kidnappings for ransom during the war, particularly in the north and east. The report largely attributed these to government forces, the LTTE and paramilitary groups, although some related to business or personal disputes. DFAT assesses that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, has significantly reduced since the end of the war.
35. DFAT reports that the security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the civil war in May 2009. The Sri Lankan Government exercises effective control over the entire country, including Tamil-populated areas. Security has been heightened across Sri Lanka following the Easter Sunday terrorist attacks of 21 April 2019, including through the establishment of roadblocks and security checkpoints. The 2019 Easter Sunday terrorist attacks, carried out by local Islamic extremists inspired by ISIL, targeted three luxury hotels in Colombo (Western Province) and three Christian churches in Colombo, Negombo (Western Province) and Batticaloa (Eastern Province). The Sri Lankan Government says it has killed or apprehended all of those directly involved in the Easter Sunday attacks and

diminished the capability of the NTJ and the JMI to carry out future mass-casualty attacks. The government no longer restricts travel to the north and east. It removed security checkpoints on major roads in 2015, although some were re-established following the 2019 Easter Sunday terrorist attacks. DFAT understands that some security checkpoints re-established in the north since 21 April 2019 have since been removed. Accordingly, the applicant should face no barrier to returning to Batticaloa.

36. The applicant has submitted to the IAA that the Tamil Makkal Viduthalai Pulikal (TMVP, formerly the Karuna Group) is a dangerous paramilitary group operating in Sri Lanka. He has not claimed that he has ever been impacted personally by this group. DFAT reports that former Tamil paramilitary groups who were accused of violence during the war, like the TMVP and the Eelam People's Democratic Party (EPDP), remain active, but have disarmed and are now engaged in politics. At the time of reporting DFAT assessed that, the TMVP and the EPDP present a low threat of violence and intimidation to members of the Tamil community. There evidence before me does not indicate that situation has changed.
37. The applicant has submitted to the IAA that there are no constructive changes in the political situation in Sri Lanka and that army officials involved in killing Tamils are returned and have been given high level responsibilities. The US Department of State and the UK Home Office report² that President Gotabaya Rajapaksa (brother of Mahinda Rajapaksa, president from 2005 to 2015) came into power in November 2019. Whilst initially stating he would be a leader for those who voted for him as well as those who didn't, he later went on to express his disappointment at not having gained the support he expected from the minority groups. There has been speculation about the treatment of some groups with some reports suggesting that there are fears of a crackdown among those who have been critical of the Rajapaksa family in the past and some minority groups have expressed fears that they may face repression. The UK Home Office quoted a number of reports from the BBC, the New York Times and the International Crisis Group expressing that minority groups were worried about the return of the Rajapaksa brothers. The reports also indicate that the Rajapaksas have consolidated power in the family thus making it difficult to support investigations into the Rajapaksas and their allies. The BBC also reported that in February 2020 several news agencies reported that the new government had dropped the singing of the national anthem in Tamil during the Sri Lankan Independence Day celebrations. This was a move away from the previous government who sang the national anthem in both Tamil and Sinhalese to promote ethnic harmony.
38. I accept that the Rajapaksa government is still associated with the Sri Lankan military in the eyes of many Tamils. I also accept that their election, appointment to power of their peers and their winding back of reconciliation commitments have also been causes of concern and that many commentators, in particular human rights organisations, have written about these concerns, speculating on what this might mean for Tamils. I note however, that this government has now been in power since November 2019, over sixteen months, and the evidence does not support that Tamils have been targeted or harmed in that time or that there is any intention to do so. The applicant is not a criminal or former LTTE cadre that might come to the notice of the authorities and he was not wanted by the authorities prior to leaving Sri Lanka. His family continue to live in their home area unharmed. The applicant is not politically active or involved in politically sensitive activity. He has not ever sought office or held a role in public life. Given the stability in Sri Lanka since 2015, and the fact that in spite of concerns about measures taken by the new government to consolidate power in the Rajapaksa government, the evidence before me does not indicate that Tamils with the applicant's profile

² UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418.

have not been targeted for persecution. I am not satisfied that the applicant will face a real change of any harm from the new government or anyone else in Sri Lanka on the basis of his overall profile, including his previous business dispute, his ethnicity and/or place of origin for the reasons outlined above and below.

39. The applicant submitted to the IAA that he will face harm on his return to Sri Lanka on the basis of the penalties he will face as a result of his illegal departure and being a failed Tamil asylum seeker. DFAT reports that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. The government has consistently said that refugees are welcome to return to Sri Lanka and, in August 2016, released a 'National Policy on Durable Solutions for Conflict-Affected Displacement'. During a visit to Australia in February 2017, Prime Minister Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka.
40. DFAT reports that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. I am satisfied that the applicant does not hold one of these profiles of interest. The verification process often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. The UK Home Office³ reports that the Chief Immigration Office where questioning takes place is situated opposite the immigration arrival desks. These open onto the arrivals' hall, with an area to wait outside. Toilets are nearby and there is access to food, water and a prayer room. Whilst the fact-finding team were there, interviews were taking place and the door to the offices were open. The fact-finding team were informed, and observed, that there are no holding cells.
41. The information before me does not indicate that the applicant will come to any particular harm or face mistreatment during the return process for any reason including his ethnicity, background, experiences or time spent in Australia. While returnees might be at the airport for several hours while these procedures take place and due to being processed en masse, DFAT understands detainees are not subject to mistreatment during processing at the airport and I am satisfied that the delays are not excessive. I am not satisfied that the applicant will come to any particular attention of the authorities as a result of this investigative process or that he will be harmed as a result of that process. I am not satisfied that he has any profile of interest to the Sri Lankan authorities beyond having departed the country illegally.
42. DFAT reports that where an illegal departure is suspected, returnees can be charged under the *Immigrants and Emigrants Act* (I&EA). At the earliest available opportunity police transport the individual to the closest Magistrates' Court. The Court then makes a determination as to the next steps for each individual. Should a magistrate not be available – for example, on a public holiday – those charged may be held at the airport for up to two days. Bail is normally granted to fare-paying passengers of a people smuggling venture. Bail conditions are discretionary and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country. The Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no fare-paying passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally.

³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

(as distinct from facilitators or organisers). A guilty plea will attract a fine, which can be paid in instalments, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. The Sri Lankan Government claims no returnee from Australia to Sri Lanka has been charged under the PTA. The evidence before me does not support that this situation has changed since the change of government in November 2019.

43. There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face a real chance of a custodial sentence. As noted above, the applicant may be held for up to two days at the airport whilst waiting to be brought before a magistrate but there are no holding cells at the airport. He may incur legal and transport costs travelling to and from court and he may spend many years on bail which can involve monthly reporting to police at the returnee's expense. On the evidence before me, I am not satisfied that the delay at the airport, the imposition of any fine, possible surety or guarantee and associated costs and reporting requirements would constitute serious harm for the applicant, noting that the applicant has family in Sri Lanka and fines can be paid by instalment. I am also satisfied that the provisions and penalties of the I&EA are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process or penalty the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act.
44. The applicant claims that if he returns to Sri Lanka, it would be difficult for him to find employment because of his limited education and employment skills. DFAT has assessed that refugees and failed asylum seekers do face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey and subsequent court costs, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation. The Sri Lankan government is known to cooperate with the United Nations High Commissioner for Refugees and other humanitarian organisations in providing assistance for returning refugees⁴. It is reported that the International Organisation for Migration is active in Sri Lanka and provides eligible returnees with livelihood assistance and makes regular visits to monitor the welfare of returnees. There are reports that some refugees and failed asylum seekers faced social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.
45. As noted above, DFAT understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. I am satisfied that the applicant does not fit this profile. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security.

⁴ US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418.

46. The applicant has advised that he has worked in the family business in Batticaloa and then successfully relocated to Colombo where he found work in [a specified] industry. I am satisfied that the applicant has demonstrated an ability to be resourceful and resilient and has been able to successfully relocate both within Sri Lanka and overseas and subsist independently of his family members. I am satisfied that if he is returned to Sri Lanka, he would be able to apply the same or similar skills to re-settle and find work in a country where he is already familiar with the language and culture and where he has previous work experience and a home to go to. Therefore, I am satisfied that the applicant would not face serious harm in the form of an inability to subsist in Sri Lanka on his return. I do not accept that any challenges that the applicant may face in terms getting established, finding employment, or any social stigma he may experience as a returning asylum seeker from Australia, if it does occur, amounts to serious harm.
47. Overall, I accept that serious mistreatment of some Tamils with certain links is an ongoing issue in Sri Lanka and that the change of government in 2019 has created concerns within the Tamil and international community. However, the weight of the evidence indicates that harm against Tamils has significantly reduced since the immediate post war period, and that the chance of such treatment for being a Tamil or a Tamil male with the background, profile and type of experiences that the applicant has had are remote. Given the improved situation in the country, including the lack of reported harm against Tamils by the Rajapaksa government, the length of time since the cessation of the conflict and the applicant's overall profile, I am not satisfied the applicant faces a real chance of any harm on his return in the reasonably foreseeable future for any of the reasons or combination of reasons set out above. Further I am not satisfied that the applicant faces a real chance of harm as a result of his departure from Sri Lanka or that he would face a real chance of serious harm as a result of seeking asylum and spending time in Australia or any combination or accumulation of those factors.
48. I am not satisfied that the applicant has a well-founded fear of persecution.

Refugee: conclusion

49. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

50. 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

51. 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.
52. 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.
53. I have accepted that on his return to Sri Lanka, the applicant may be held for up to two days at the airport whilst waiting to be brought before a magistrate. He may incur legal and transport costs travelling to and from court and he may spend many years on bail which can involve monthly reporting to police at his expense. I have also accepted that, on his return to Sri Lanka, the applicant may face challenges as a returning asylum seeker including in re-establishing himself and finding work and facing some social stigma. I am not satisfied that these difficulties and treatment would amount to significant harm as defined. I am not satisfied that it would amount to the arbitrary deprivation of life or the death penalty. I am also not satisfied that it would amount to being subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as defined in the Act. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka there is a real risk, he will suffer significant harm.
54. In relation to the remainder of the applicant’s claims, I have found that there is not a real chance that the applicant will face any harm on his return to Sri Lanka. Real chance and real risk involve the same standard⁵. On the same factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm on any of the remaining grounds he has raised or on those grounds cumulatively, including significant harm, should he be returned to Sri Lanka.

Complementary protection: conclusion

55. 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.

⁵ *MIAC v SZQRB* (2013) 210 FCR 505

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.