



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA

IAA reference: IAA21/09329

Date and time of decision: 22 July 2021 13:54:00

V Price, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka of Tamil ethnicity. He lodged an application for a protection visa with the Department on 2 June 2017.
2. On 9 June 2021, a delegate of the Minister of the Department refused to grant the visa to the applicant finding that he did not face a real chance or risk of harm in Sri Lanka.

### Information before the IAA

3. I have had regard to the material given to the Immigration Assessment Authority (IAA) by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

### Applicant's claims for protection

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5. The applicant's claims as set out in the written statement accompanying his protection visa application can be summarised as follows:
  - In 1996 he travelled to India by boat and stayed there as a refugee. At that time young men in the north of Sri Lanka were suspected of the LTTE involvement and were arrested and killed by the Sri Lankan forces.
  - In 2003 he returned to Sri Lanka as there was a peace agreement. The applicant was in [Village 1] at that time where he was recruited by the LTTE and undertook weapons training. His LTTE name was [Alias].
  - In 2003 the sea-Tiger leader asked the applicant to help with the border force. This duty was called Kadalorakkaval (beachside patrol) and formed part of the LTTE intelligence unit. This work was irregular, and whenever called upon, he guarded the shores.
  - In 2005 the war started again. He feared becoming involved and left Jaffna, moving to [Village 2] in [Town], where he then went into hiding for some time. He was approached by an LTTE intelligence unit officer in 2006 and asked why he was not assisting the LTTE. He returned to the LTTE and was assigned mine clearance work.
  - The LTTE intelligence unit asked him to return to India and accommodate LTTE members. He was given instructions for how to undertake this task. The applicant returned to India in December 2007 but, no longer wanting any association with the LTTE, he did not undertake the task they requested. He resided in the camp in Tamil Nadu until he came to Australia.
6. He elaborated on these claims during his protection visa interview and stated that his sister and one of his brothers were members of the LTTE. His sister was killed, and his brother now lives in Australia.
7. The applicant states that he faces harm on return to Sri Lanka due to his past affiliation with the LTTE. Many people in his area are aware he was a member of the LTTE and that he had undertaken weapons training. He fears that he will be identified, arrested and tortured for this reason. Although not expressly raised by the applicant, the delegate considered that

claims to fear harm due to his illegal departure from Sri Lanka and as a returned failed asylum seeker from Australia arose on the material.

## **Refugee assessment**

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8. 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**

9. 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.
10. The applicant states he was born in [Village 1] in Jaffna in the Northern Province of Sri Lanka. This is supported by his birth registration and identity card, and I accept this evidence. He resided in various areas throughout the Northern Province including Mullaitivu and Kilinochchi during his residence in Sri Lanka. The applicant also resided in Tamil Nadu in India during two periods: 1996 to 2003; and 2007 to 2013 (when he came to Australia). His wife and two children continue to reside in India. However, having viewed the applicant's most recent refugee card issued by Indian authorities, I am satisfied that he does not have a current right to enter and reside in that country and nor is there any suggestion that he is a citizen of India. I accept that the applicant is of Tamil ethnicity and is a national of Sri Lanka. I find Sri Lanka is his receiving country.
11. The evidence is that the applicant's mother and several of his siblings continue to reside in Sri Lanka and given his past residence in the Northern Province of the country, I find it is highly likely that he would return to this area.
12. The applicant claimed that he and several of his siblings were members of the Liberation Tigers of Tamil Elam (LTTE). At the height of its influence in Sri Lanka the LTTE controlled and administered 76 per cent of the Northern and Eastern provinces and as a result all persons living in those areas, and at the outer fringes of the areas under their control, necessarily had

contact with the LTTE and its civilian administration in their daily lives.<sup>1</sup> The LTTE included military, intelligence and administration branches, and relied on both voluntary and forced recruitment.<sup>2</sup> During the conflict Tamils in the North and East were monitored, harassed, arrested or detained by security forces (including those with LTTE connections) and information supports that security forces imputed LTTE support based on ethnicity.<sup>3</sup> At that time, Tamils were disproportionately detained under the Prevention of Terrorism Act (PTA) compared to other ethnic groups.<sup>4</sup>

13. The applicant participated in several interviews with the Department after he arrived in Australia during which time he gave different evidence regarding his association with the LTTE ranging from no personal association (though his sister was a member) to being forced to participate in some weapons training but not being a member.<sup>5</sup> He did not raise claims to be a member of the LTTE until making his protection visa application. I have considered whether this different evidence and the delay in raising these matters indicates that the applicant's claimed involvement with the LTTE is not credible. However, I give weight to the applicant's oral evidence at the protection visa that these matters were not raised earlier due to fear it would lead to issues with the Australian authorities. I also give some weight to the fact that his oral evidence was detailed, presented in a manner indicative of lived experience, and that it was largely consistent with the independent information set out above. I do not consider his failure to raise this matter earlier to be adverse.
14. I accept the applicant and his family resided in an LTTE controlled area in the Northern Province of Sri Lanka in the years during the conflict. I accept this sister and brother were members of the LTTE and that his sister was subsequently killed. I accept that the applicant moved to India in about 1996, because his mother feared he would also join the LTTE and would be harmed either by the LTTE or the Sri Lankan authorities. I also accept that, missing his family, he returned to Sri Lanka in about 2003, whereupon he participated in mandatory weapons training and undertook guard duties with the sea-tigers border force when needed. I accept that the applicant then voluntarily became an official member of the LTTE in about 2006 and undertook mine clearing work. I accept his evidence that he was given training by the leader in intelligence methods, but that he never undertook any intelligence work, and nor was he ever a combatant or a high-ranking member of the LTTE. I accept that fearing for the safety of his family and the increasing intensity of the conflict, he then left Sri Lanka and returned to India in December 2007. I accept that the LTTE asked him to accommodate members of their movement in India but that he did not do so, and he had no further involvement with the LTTE after that point. He did not return to Sri Lanka after 2007, but travelled to Australia in 2013.
15. I note the applicant's evidence at interview that a photograph depicting him in an LTTE uniform appears on a file held by the authorities. I am not satisfied as to this aspect of the applicant's claim. It is unclear from his evidence how he would be aware that the authorities had this information, and moreover, if they were aware he was a member of the LTTE then, on country information above regarding the treatment of Tamils with actual or suspected

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<sup>1</sup> United Nations High Commissioner for Refugees (UNHCR), 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka', 21 December 2012, UNB0183EA8 (UNHCR 2012 Report); and DFAT 2019 Report; UNHCR, 'Background Paper on Refugees and Asylum Seekers From Sri Lanka', 1 April 1999, CIS12484 (UNHCR 2009 Report).

<sup>2</sup> UNHCR 2012 Report; DFAT 2019 Report; and UNHCR 2009 Report.

<sup>3</sup> DFAT 2019 Report.

<sup>4</sup> UNHCR 2012 Report; DFAT 2019 Report; and UNHCR 2009 Report.

<sup>5</sup> Enhanced Screening Interview held on 28 June 2013; and Irregular Maritime Arrival and Induction Interview (arrival interview) held on 14 July 2013 and 18 July 2013; Biodata Interview

LTTE affiliation, I consider he would have been arrested and detained at that time. The applicant's evidence at interview was that he did not have any adverse attention from the authorities between 2003 and 2007. He did not leave Sri Lanka due to fear of arrest, but due to the increasing intensity of the conflict and as he wanted to protect his family. As such, I am not satisfied the authorities were aware of his LTTE membership on his departure from Sri Lanka in 2007.

16. I accept that the applicant is Tamil male who previously resided in the Northern Province of Sri Lanka and that he has resided in Australia since 2013. I accept that on return to Sri Lanka he will be identified as returned failed asylum seeker, his residence in Australia will become known, and his illegal departure will be identified. I have considered whether the applicant faces a real chance of harm on return to Sri Lanka on the basis of his accepted profile and circumstances.
17. Independent information before me indicates that the situation in Sri Lanka has changed since the applicant's departure and overall, the conditions for Tamils have significantly improved.<sup>6</sup> The Tamil community continue to report discrimination in employment, particularly in relation to government jobs, however, the Australian Department of Foreign Affairs and Trade (DFAT) has assessed that this is due to disrupted education because of the conflict and language constraints, not the result of an official policy of discrimination.<sup>7</sup> The United Kingdom Home Office (UKHO) noted in 2020 that, while the war has destroyed factories and other livelihoods, there are increasing job opportunities in the North.<sup>8</sup> DFAT indicates that monolingual Tamil speakers can have some difficulty communicating with authorities due to the small number of Tamil speakers in the police and military, but there are government incentives to improve this situation and Tamil is recognised as an official language of Sri Lanka.<sup>9</sup> Overall, DFAT now assesses that Sri Lankans of all backgrounds, including Tamils, face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment and housing and I give weight to this information.
18. DFAT and the UKHO refer to reports that Sinhalese from the South have resettled in the North with government assistance and concerns have been noted regarding the construction of Buddhist statues and temples in areas traditionally belonging to members of the Tamil, Hindu community.<sup>10</sup> Nonetheless DFAT states that Hindus are able to practise their faith freely. Further, the inclusion of Tamils in political dialogue has increased since 2015 with numerous Tamil political parties and DFAT has advised that Tamils do not receive unwarranted attention due to their political involvement, and there are no barriers to Tamil political participation.<sup>11</sup>
19. DFAT and the UKHO advised that monitoring in the North and East increased in the wake of the Easter Sunday bombings in 2019 with the reinstatement of checkpoints.<sup>12</sup> However, these have since been removed and UKHO has reported that there is a prevailing feeling of

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<sup>6</sup>Australian Department of Foreign Affairs and Trade (DFAT), 'Country Information Report Sri Lanka', 4 November 2019, 20191104135244 (DFAT 2019 Report); United Kingdom Home Office (UKHO), 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928 (UKHO January 2020 Report); and UKHO, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 20200527172009 (UKHO May 2020 Report).

<sup>7</sup> DFAT 2019 Report.

<sup>8</sup> UKHO January 2020 Report; and UKHO May 2020 Report.

<sup>9</sup> DFAT 2019 Report.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid; UKHO January 2020 Report; and UKHO May 2020 Report.

increased personal freedom.<sup>13</sup> DFAT also assessed in late 2019 that the monitoring and harassment of Tamils in day-to-day life has significantly decreased.<sup>14</sup> The authorities monitor public gatherings and protests in the North, and practice targeted surveillance and questioning of individuals and groups, however, this is directed at those associated with politically sensitive issues (missing persons, land release and memorial events) rather than the Tamil community in general.<sup>15</sup> Monitoring that does occur is subtle, involving indirect questioning and telephone calls and physical violence against those being monitored is not common.<sup>16</sup> Both the UKHO and DFAT advise that 'white-van' abductions have not occurred in recent years.<sup>17</sup> DFAT also assesses that while gangs, including the Aava gang, are active in the Northern Province, they pose low threat of violence to the local community, and that former paramilitary groups aligned with the government during the war, have disarmed and present a low threat of violence and intimidation to members of the Tamil community.<sup>18</sup>

20. Tamils were disproportionately detained under the PTA in the past.<sup>19</sup> This legislation was suspended between 2016 and April 2019, but it remains legally in force and was used, alongside the Emergency Regulations to detain persons allegedly involved in the 2019 Easter Sunday terrorist attacks.<sup>20</sup> The Emergency Regulations have lapsed and most Tamils detained under the PTA have been released.<sup>21</sup> Of those individuals who have been detained under the PTA, they were allegedly involved in an assassination plot and the Easter Sunday attacks.<sup>22</sup> I conclude that the information does not support that the PTA been recently employed against members of the Tamil community in general and nor does it indicate that a real chance of arbitrary detention arises to members of the Tamil community in general or against all individuals with an actual or imputed association with the LTTE, and I am not satisfied this is the case.
21. The UKHO recently advised that Tamils are not specifically targeted and do not suffer persecution just for being Tamil.<sup>23</sup> The government and military in Sri Lanka continue to be fearful of an uprising, and they monitor activities in the Tamil diaspora.<sup>24</sup> However, both DFAT and the UKHO advise that the authorities are interested in prominent activists, prominent LTTE sympathisers who have actively supported or funded the LTTE and those with links to banned organisations. The information does not support, and I am not satisfied that, individuals face chance or risk of harm on the basis they have resided or sought asylum in a Western country.

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<sup>13</sup> UKHO January 2020 Report; and UKHO May 2020 Report.

<sup>14</sup> DFAT 2019 Report.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> DFAT 2019 Report; UKHO January 2020 Report; and UKHO May 2020 Report.

<sup>18</sup> DAFT 2019 Report.

<sup>19</sup> Ibid; UKHO January 2020 Report; and UKHO May 2020 Report.

<sup>20</sup> DFAT 2019 Report; Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', OHCHR, 18 February 2020, 20200221140652 (OCHRC 2020 Report); The Sunday Reader, 'Police arrest 2289 over Easter Sunday terror attacks – Police Spokesman SP Ruwan Gunasekara', 3 June 2019, 20190711142139; Daily News, 'Over 2,280 suspected arrested since Easter Sunday terror attacks', 5 June 2019, 20190710120316; Daily News, 'Brother of Suicide Bomber Arrested', 10 May 2019, 20190510123043; The Island, 'Govt urged to review 'security reforms' as 60 suspects taken in under PTA', 25 April 2019, 20190508133730; Ceylon Today, 'Official list of detainees under PTA', 30 July 2017, CXC90406612037; and Tamil Guardian, 'Jaffna uni students and canteen owner release on bail', 17 May 2019, 20190710121032.

<sup>21</sup> DFAT 2019 Report.

<sup>22</sup> Ibid.

<sup>23</sup> UKHO January 2020 Report; and UKHO May 2020 Report.

<sup>24</sup> UKHO January 2020 Report; UKHO May 2020 Report; and DFAT 2019 Report.

22. Sri Lankan authorities continue to monitor former LTTE members and supporters on 'stop' and 'watch' lists.<sup>25</sup> Watch lists contain the names of individuals of interest including for suspected separatist or criminal activities; those on the 'stop list' are persons have an extant court order, have an outstanding arrest warrant or order to impound their passport.<sup>26</sup> DFAT advises that former LTTE leadership and those who held senior positions in the LTTE military wing and civilian administration are at the highest risk of monitoring, arrest, detention or prosecution on return to Sri Lanka.<sup>27</sup> Former combatants, those employed in administrative or other roles, or those who provided a high level of non-military support to during the war are considered to be low-profile members and DFAT states that such persons who came to the attention of the authorities may be detained and sent to rehabilitation centres.<sup>28</sup> However, DFAT also advises they are not aware of rehabilitation being imposed on any former LTTE members who have returned from Australia.
23. For those that are sent to rehabilitation, both high and low profile former members would be monitored following their release; as would close family members of high profile former LTTE members.<sup>29</sup> DFAT has been unable to verify that a family connection to former LTTE members has led to people being arrested and detained. DFAT assesses that low-profile former members of the LTTE face a low to moderate risk of societal discrimination, with some employers reluctant to hire former LTTE members due to fear it would invite scrutiny of the authorities and military.<sup>30</sup> Overall, DFAT states that Tamils with previous links to the LTTE are able to lead their lives without concern for their security.
24. DFAT has acknowledged concerns by human rights commentators, including the International Truth and Justice Project, Amnesty International and Freedom From Torture, about the ongoing risk of mistreatment, including torture, by the security forces in Sri Lanka.<sup>31</sup> I have had regard to information from the United States Department of State report before me regarding these matters.<sup>32</sup> DFAT also had regard to the 2016 report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and assessed that torture may carried out by police in regular criminal investigations, though it was noted that this risk increases when individuals were perceived to pose a threat to national security. DFAT states that if an individual was detained by the authorities, there was a moderate risk of mistreatment and that such mistreatment may amount to torture. However, having considered the reports from the various human rights organisations, DFAT assessed that the incidents of torture have decreased, they are not state sponsored, and that overall Sri Lankans (including Tamils) face a low risk of mistreatment that can amount to torture.<sup>33</sup> Overall, I note that the DFAT report is distinct from Australian Government policy with respect to Sri Lanka and is prepared from on-the-ground knowledge and discussions with a range of sources in Sri Lanka as well as reports from numerous international organisations, and I give weight to the assessment contained therein.
25. There has been a recent change of government in Sri Lanka with Gotabaya Rajapaksa appointed as President and his brother and former President, Mahinda Rajapaksa, appointed

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<sup>25</sup> UKHO January 2020 Report; UKHO May 2020 Report.; and DFAT 2019 Report.

<sup>26</sup> DFAT 2019 Report.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> United States State Department (USDOS), 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412 (USDOS 2021 Report).

<sup>33</sup> Ibid.

the Prime Minister.<sup>34</sup> Gotabaya and Mahinda Rajapaksa have been implicated in alleged war crimes and human rights abuses during the civil conflict, including against Tamils.<sup>35</sup> Concerns have been raised by various international commentators that the new Government has reversed or announced its intention to abandon many key legislative achievements and policy commitments of the preceding government, including promises on post-war reconciliation, accountability, and inclusive governance made to the UN Human Rights Council and to the EU and it has also rolled back police investigations into a series of high-profile political killings and disappearances during the Mahinda Rajapaksa administration.<sup>36</sup> I acknowledge these concerns and the past war-time allegations against the President and Prime Minister, but I consider that any suggestion that they are currently targeting or will target members of the Tamil community in the foreseeable future, including those with actual past low-level LTTE affiliation, is speculative and at present the information before me does not support that the change in government gives rise to a real chance of harm to Tamils, to low-level former members of the LTTE, and/or to individuals with the applicant's particular profile.<sup>37</sup>

26. On the information before me I find there has been an improvement in the situation for Tamils in Sri Lanka. Tamil is an official language in Sri Lanka, Tamils have greater participation in politics, a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment and housing, and Tamil Hindus can freely practice their faith. The information does not support that all Tamils or individuals with an actual or imputed association to the LTTE are being detained under the PTA, 'white van' abductions are not common, paramilitary groups pose a low threat of harm to Tamils, and the prevalence of monitoring of Tamils, even in former LTTE controlled areas, has reduced such that only those with certain profiles, would now attract monitoring. The information before me does not indicate that Tamils face a real chance of harm in Sri Lanka solely due to their Tamil ethnicity/race. Nor does the information indicate that being of Tamil ethnicity, being a young Tamil male, and/or being from an area that was previously controlled by the LTTE, imputes LTTE membership or support or any political opinion adverse to the government, and I am not satisfied that it does. I am not satisfied that the applicant faces a real chance of harm for these reasons on return to Sri Lanka now or in the reasonably foreseeable future.

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<sup>34</sup> OHCHR 2020 Report; UKHO January 2020 Report; UKHO May 2020 Report; DFAT 2019 Report; International Crisis Group (ICG), 'A Dangerous Sea Change in Sri Lanka', 29 January 2020, 20200615164541 (ICG 2020 Report); and USDOS 2021 Report.

<sup>35</sup> DFAT 2019 Report; UKHO January and 2020 Report; UKHO May 2020 Report; USDOS 2021 Report; ICG 2020 Report; and Sri Lanka's new president has a worrying past', Economist, The, 23 November 2019, 20191122115223.

<sup>36</sup> See for eg: ICG, 2020 Report; Sri Lanka Campaign for Peace and Justice, 'Abandoned Promises? Preserving Human Rights and Pursuing Accountability in Gota's Sri Lanka', February 2020, 20200330123213 (Abandoned Promises 2020 Report); Human Rights Watch (HRW), 'World Report 2021. Events of 2020', 13 January 2021, 20210114072851 (HRW 2021 Report); and Diplomatic Courier, 'Sleeping Tigers: How the Scars of Sri Lanka's Civil War Still Linger', 28 February 2020, 20200302120323; , OHCHR, 'Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the Office of the High Commissioner for Human Rights '27 January 2021, 20210203162131 (OHCHR 2021 Report); and Freedom House, 'Freedom in the World 2021 - Sri Lanka', 3 March 2021, 20210304102827 (FH 2021 Report).

<sup>37</sup> ICG 2020 Report; OHCHR 2020 Report; UKHO January 2020 Report; UKHO May 2020 Report; DFAT 2019; Abandoned Promises 2020 Report Diplomatic Courier, 'Sleeping Tigers: How the Scars of Sri Lanka's Civil War Still Linger', 28 February 2020, 20200302120323; United Nations Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association', 5 May 2020, 20200622112923; INFORM Human Rights Documentation Centre, 'Repression of Dissent in Sri Lanka: 1 st - 31st May 2020', 29 June 2020, 20200702160949; HRW 2021 Report; USDOS 2021 Report; Tamil Guardian, 'Tamil youth hospitalised following Sri Lankan army assault in Mannar', 25 August 2020, 20200828165229; Tamil Guardian, 'Sri Lankan police arrest ten Tamils in Jaffna', 11 August 2020, 20200812105606; , Tamil Guardian, 'Falsely arrested and tortured disabled Tamil man submits complaint at Human Rights Commission', 3 June 2020, 20200604080654; and Foreign Policy, 'Rajapaksa Rule'14 August 2020, 20200817165533; OHCHR 2021 Report; and FH 2021 Report.



27. I have accepted that the applicant was a member of the LTTE in the past but have found that I am not satisfied that the authorities were aware of this at the time of his 2007 departure from Sri Lanka. Even taking into account his evidence that people in the village knew of his LTTE participation, given the passage of time since these events occurred (14 years), I consider the chance that his LTTE membership would be discovered on his return is so remote so as not to be real and am not satisfied he faces a real chance of harm for this reason on return. However, even if the authorities did learn of his LTTE participation, having regard to the nature of his role and the information above, I am satisfied that his activities would bring him within the category of 'low-level' former member. Noting information above that DFAT are not aware that any former LTTE members from Australia have been sent to rehabilitation, and that generally Tamils with previous links to the LTTE are able to lead their lives without concern for their security. I consider the chance that the applicant will be sent for rehabilitation, or that he will otherwise be arrested, detained, prosecuted, or monitored, to be remote.
28. The applicant has not engaged in any political activities in support of the LTTE, for Tamil separatism, or against the government during his time in Australia, despite having the opportunity to participate in such activities. This leads me to conclude that he is not interested in engaging in any such activities in the future including in relation to politically sensitive issues, and I am not satisfied that he will do so on return to Sri Lanka. Several of the applicant's siblings were former members of the LTTE, but having regard to DFAT advise set out above, I am not satisfied that he would now be of interest to the authorities for this reason. I am not satisfied that he faces a real chance of any harm on return to Sri Lanka now or in the reasonably foreseeable future for his participation with the LTTE or the membership of his brother and sister with the LTTE.
29. The evidence before me is that the applicant had [Number] years of education to [level] in Sri Lanka, he speaks Tamil, has attained skills working in a variety of roles in Australia, and he states some of his family, including his mother and several siblings, continue to reside in Sri Lanka. Noting these matters and having regard to the applicant's profile and the independent information above, I am not satisfied that he faces a real chance of societal discrimination, that he will be unable to find accommodation or employment or that he will be unable to access basic services on return to Sri Lanka.
30. I accept that on arrival in Sri Lanka the applicant's travel documents and identity information will be checked against immigration databases, intelligence databases and records of outstanding criminal matters.<sup>38</sup> I accept he will be interviewed and that further enquires may be undertaken and that he may be questioned about the reasons he left the country and that this process can take several hours due to the administrative processes, interview lengths, and staffing constraints at the airport.<sup>39</sup> However, having regard to his profile and circumstances, I am not satisfied this will result in a real chance of harm to the applicant. The applicant will be processed in a group, and individuals in that group cannot exit the airport until all returnees have been processed. DFAT has advised that all returnees are treated according to these standard procedures irrespective of their ethnicity and religion and considers that returnees are not subject to mistreatment during processing at the airport. DFAT advises that some returnees have been charged with immigration offences (people smugglers) or with outstanding criminal convictions, but I am not satisfied this will apply in the applicant's circumstances.

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<sup>38</sup> DFAT 2019 Report; UKHO January 2020 Report; and UKHO May 2020 Report. 40 DFAT 2019 Report.

<sup>39</sup> DFAT 2019 Report.

31. Having regard to the independent information above and to the totality of the applicant's profile discussed above, I am not satisfied he will be on a 'stop' or 'watch' list, that he will be considered a threat to national security, or that he will otherwise be found to have an adverse profile of any kind on return. I am not satisfied the processing of itself amounts to serious harm of the kind contemplated by the Act, and having regard to the applicant's profile and the independent information before me, I am not satisfied that he faces a real chance of harm in the returnee processing phase at the airport.
32. DFAT advises that persons in breach of the Immigrants and Emigrants Act (I&E Act) are questioned at the airport, subject to enquires and that they will be arrested and charged with an offence.<sup>40</sup> After investigations are completed, police transport the individual to the closest Magistrate's Court, where responsibility for the individual shifts to the prison services. In general, prisons in Sri Lanka do not meet international standards but this is due to overcrowding, poor sanitary conditions and a lack of resources rather than any intentional conduct on the part of the authorities.<sup>41</sup> Where a magistrate is unavailable a returnee may be held for several days in an airport holding cell. However, as noted above, returnees are not subject to mistreatment at the airport and are treated the same irrespective of their background. DFAT advises that passengers on a people smuggling venture are generally issued with a fine, which can be paid by instalments, rather than a custodial sentence. If they plead guilty to a charge, they are fined and are free to go. If they plead not guilty, they are generally granted bail on personal surety or a family member may be required to act as guarantor. Bail conditions are discretionary and may involve monthly reporting to police at the returnee's expense. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture.<sup>42</sup>
33. I accept that the applicant will be subject to questioning and possible short-term detention while awaiting appearance before a magistrate. DFAT advises that they are not aware of mistreatment of returnees during this process. On this information, and considering his accepted profile and the independent information above, I find he would not face a real chance of serious harm during any questioning or during any brief period of detention, and even having regard to information above regarding poor prison conditions, in my view this does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment or otherwise amount to serious harm of the kind contemplated by the Act. Moreover, the information also indicates that the conditions may face in detention do not
34. Moreover, the information also indicates that the conditions may face in detention do not arise from any intentional conduct on the part of the authorities to harm him for a s.5J(1)(a) reason. I am also not satisfied that the poor prison conditions he faces is for the essential and significant reason of a s.5J(1)(a) reason, as such s.5J(4)(a) is also not satisfied.
35. The applicant was a passenger on a people smuggling vessel and has not claimed to have been involved in organising or facilitating people smuggling. In these circumstances, I find that he will not be subject to any custodial sentence but that he will be fined for his illegal departure, which does not amount to serious harm. Having regard to his personal circumstances and profile, I accept he will be issued a fine and then released, or if he pleads not guilty, he will be released either on his own personal surety, or a family member, may be required to act as a guarantor. I am not satisfied on the evidence before me that his family

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<sup>40</sup> DFAT 2019 Report.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

will not be available to act as guarantor if required, and nor having regard to all of his circumstances, am I satisfied that the applicant will not be able to pay any fine issued to him. I am not satisfied that the applicant faces a real chance of serious harm for his illegal departure if he returns to Sri Lanka now or in the reasonably foreseeable future.

36. In any event, I also find that the evidence from DFAT is that all persons who depart Sri Lanka illegally are subject to the terms of the I&E Act on return to the country. The law is therefore not discriminatory on its terms and or in its application. For these reasons, I find that this is a law of general application. Case law confirms that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. As noted above, the information before me does not support that the law is selectively enforced or that it is applied in a discriminatory manner. Accordingly, even having regard to the applicant's profile, I find that the investigation, prosecution and punishment for his illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
37. DFAT advised that some returnees have been the subject of monitoring on return, specifically visits to their homes and telephone calls by the CID.<sup>43</sup> However, Tamils who have returned from Australia have advised DFAT that they had no protection concerns and had not been harassed or monitored by the authorities, and DFAT states that most returnees, including failed asylum seekers, are not monitored on an ongoing basis and are not aware that they are being treated in a way that endangers their safety and security. The information does not support that returnees to Sri Lanka face harm on the basis they have resided in a Western country. Where monitoring does occur, DFAT assessed that this may contribute to a sense of mistrust within communities and notes that financial reintegration assistance provided to returnees may lead to some social stigma. DFAT also states that some returnees may face financial difficulties on reintegrating into their communities. However, even taking these matters into account, overall DFAT states that returnees face a low risk of societal discrimination.
38. In this case, having regard to his profile and the above information, I am not satisfied that the applicant will be monitored on return. However, even if he is, on his profile and circumstances, and having regard to the independent information cited above, I am not satisfied that any such visits/monitoring rises to the level of serious harm, having regard to the non-exhaustive list set out in s.5J(5) of the Act. I am not satisfied that he faces a real risk of being arbitrarily arrested and detained under the provisions of the PTA on return to Sri Lanka in the future. On his profile and the independent information above, I am also not satisfied that he faces a real chance of societal discrimination and am not satisfied that he will be unable to access basic services or find accommodation and employment on return to Sri Lanka.
39. On the totality of all the evidence before me, including the independent information and the applicant's particular profile and circumstances, I am not satisfied that he faces a real chance of harm, serious harm or persecution on return to Sri Lanka now or in the reasonably foreseeable future for any the reasons he has claimed. His fear of persecution is not well-founded.

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<sup>43</sup> Ibid.

*Refugee: conclusion*

40. 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).

**Refugee: conclusion**

41. 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**

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42. 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**

43. 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.
44. 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.
45. I have set out above my findings in relation to the applicant's profile and circumstances. I have described above the process the applicant will face on arrival in Sri Lanka as a returnee and have found that I am not satisfied he will be on a 'stop' or 'watch list', that he will be found to be a threat to national security, or that he will otherwise be found to have an adverse profile of any kind on return, including due to the release of his information on the Department's website. Having regard to the independent information set out above and the applicant's accepted profile, I am not satisfied that he faces a real risk of significant harm in the returnee processing phase for the purpose of s.36(2)(aa) of the Act.
46. I have accepted that he will be charged with an offence under the I&E Act and that he will be subject to questioning and possible short-term detention while awaiting appearance before a magistrate. Considering his accepted profile and circumstances, and having regard to the independent information cited above, I am not satisfied the applicant faces a real risk of significant harm during any questioning or during any brief period of detention, and even having regard to the poor conditions, in my view this does not rise to significant harm as defined: he does not face the death penalty; an arbitrary deprivation of life or torture. Further, I am not satisfied that there is an intention to inflict severe pain or suffering, pain or

suffering that is cruel or inhuman, or that it amounts to degrading treatment or punishment intended to cause extreme humiliation. In these circumstances, the poor prison conditions to which the applicant may be subject do not of themselves constitute significant harm as defined under ss.36(2A) and 5 of the Act. I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention.

47. On the independent information and the applicant's profile and circumstances, I accept that he will be fined for his illegal departure, which does not of itself amount to significant harm as defined. I find he will then be released, or if he pleads not guilty, he will be released either on his own personal surety, or a family member, may be required to act as a guarantor. I am not satisfied on the evidence before me that his family will not be available to do so if required, and nor am I satisfied that the applicant will not be able to pay any fine issued to him. I am not satisfied that his illegal departure from Sri Lanka gives rise to a real risk of significant harm for the purpose of s.36(2)(aa) of the Act.
48. Having regard to his profile and the above information, I am not satisfied that the applicant will be monitored on return. However, even if he is, I am not satisfied that any such visits/monitoring will amount to significant harm. On the independent information set out above and the applicant's profile, I am not satisfied that he faces a real risk of being arbitrarily arrested and detained under the provisions of the PTA on return to Sri Lanka in the future. The applicant had [Number] years of education to [level] in Sri Lanka, he speaks Tamil, has attained skills working in several jobs in Australia, and he states some of his family, including his mother and several siblings, continue to reside in Sri Lanka. On the independent information above, and his profile, I am not satisfied that he faces a real chance of societal discrimination. I am also not satisfied that he will be unable to find accommodation and employment or that he will not be able to access basic services. I am not satisfied that these matters give rise to a real risk of significant harm for the purpose of ss.36(2)(aa) and 36(2A) of the Act.
49. On the totality of the evidence, including the independent information and the applicant's profile and circumstances, I am not satisfied that he faces a real risk of significant harm for the purpose of ss.36(2)(aa) of the Act for any reason associated with his illegal departure or his asylum application and long-term residence in Australia.
50. I have otherwise found above that the applicant does not have a real chance of harm on return to Sri Lanka for the reasons he has claimed which are set out and discussed above. I note that 'real chance' and 'real risk' involve the same standard.<sup>44</sup> I similarly find having regard to the evidence, independent information and his particular profile discussed above, that these matters do not give rise to a real risk of significant harm to the applicant for the purpose of ss.36(2)(aa) and 36(2A) of the Act.
51. On the totality of all the evidence before me, including the independent information and the applicant's particular profile and circumstances, taken individually and cumulatively, I am not satisfied 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 that he will suffer significant harm for the purpose of ss.36(2)(aa) of the Act.

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<sup>44</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

**Complementary protection: conclusion**

52. 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**

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

## Applicable law

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### **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.