



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09817

Date and time of decision: 1 November 2021 17:04:00  
S MacKenzie, 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 Tamil from the Northern Province, Sri Lanka. He arrived in Australia [in] November 2012 as an unauthorised maritime arrival. On 29 November 2016 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV) claiming to fear harm in Sri Lanka.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 14 June 2017, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.
3. On 24 August 2017 the IAA affirmed the decision not to grant the referred applicant a protection visa. [In] July 2021, the Federal Circuit Court of Australia (now Federal Circuit and Family Court of Australia) remitted the matter to the IAA for reconsideration.

### Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 11 September 2021, the IAA received an email from the applicant. Attached to the email is a letter from the Parish Priest of [a named] Church, dated 5 September 2021. The email also contains text in a language other than English.
6. The letter from the Parish Priest was not before the delegate and primarily refers to claims and evidence of the applicant before the Minister. However, the letter also refers to claims and evidence not before the Minister, specifically, that the applicant had known the Priest since 2009 and lived with him in [Town 1] for a period of six months due to the troubles he faced in Sri Lanka. It is new information. While I acknowledge the letter post-dates the delegate's decision, no explanation is provided as to why this information was not provided to the Minister prior to the decision. I am not satisfied the new information in the letter could not have been provided to the Minister before the delegate made his decision. Turning to whether I consider the new information credible, I note applicant gave no indication throughout the SHEV process that he lived in [Town 1] or with a Parish Priest for any period. This leads me to doubt the credibility of the new information. However, consistent with the applicant's earlier evidence, the Priest states that the applicant was targeted and arrested on multiple occasions and it was for this reason he came to live with him. Although I have some concerns, I am satisfied the new information is personal information that, on its face, is capable of being believed. The information appears to be provided to the IAA as evidence of the applicant's claim that he came to the adverse attention of the Sri Lankan authorities between 2008 and 2012, which is relevant to the issues for determination. In all the circumstances, I am satisfied there are exceptional circumstances to justify considering this information.
7. On 16 September 2021, the applicant advised the IAA by telephone that the text in his email on 11 September 2021 was a statement written in Tamil. He said he would take steps to provide an English translation of the statement within the coming days. However, nothing was subsequently provided.

8. I have obtained new information, primarily information on the treatment of Sri Lankans of Tamil ethnicity, and citizens who have departed Sri Lanka illegally and sought asylum abroad.<sup>1</sup> Given the time that has elapsed since the delegate made his decision, and that the new information is from credible and authoritative sources relevant to the issues for determination, I am satisfied that there are exceptional circumstances to justify considering it.
9. On 22 October 2021, the IAA provided the applicant a copy of the new information and invited his response. As noted in the correspondence sent, the information indicates that the situation in Sri Lanka has improved significantly since the end of the civil war, and that persons with a profile similar to his do not face a real chance of serious harm or a real risk of significant harm. The IAA also advised the applicant that any information already provided to the IAA in a language other than English, that he wanted considered, must be accompanied by an English translation. As outlined in the invitation sent, the applicant was advised that if the IAA did not receive a response by 29 October 2021 it may make a decision on the review without taking any further action to get the information. Three days have now passed since that deadline and there has been no response or contact by the applicant to indicate that a response will be provided in the foreseeable future.
10. There is no information before me to indicate how the applicant's Tamil statement contained within the email on 11 September 2021 is relevant to his claims or this review. The applicant has not provided an English translation of the statement as he indicated that he would, and there is no indication as to when or if a translation will be provided. If the Tamil statement is new information, I find that the Practice Direction for Applicants, Representatives and Authorised Recipients (IAA Practice Direction)<sup>2</sup> has not been complied with and under s.473FB(5) I have decided to not accept this information. The applicant was put on notice both orally and in writing that information provided in a language other than English required a translation for it to be considered. I have not considered the statement.
11. In all the circumstances, I consider it is reasonable to proceed to make a decision without waiting further time for the applicant to respond to the invitation sent on 22 October 2021 and/or to provide an English translation of his statement dated 11 September 2021.

### **Applicant's claims for protection**

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12. The applicant's claims can be summarised as follows:
  - He is a Tamil from the Northern Province;
  - Between 2008 and 2012, he was harassed, monitored, and mistreated by the Sri Lankan Army (SLA);
  - In October 2012, he departed Sri Lanka by illegal boat;
  - While in Australia, his family have been harassed and interrogated by the SLA as to his whereabouts;

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<sup>1</sup> US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>2</sup> The IAA Practice Direction states that all documents that are not in English should be translated into English by a translator with a 'Translator' level accreditation from the National Accreditation Authority for Translators and Interpreters. Both the documents and the translations should be provided. Documents not in English which are not accompanied by a translation may not be accepted.

- If returned to Sri Lanka, he fears harm on account of:
  - his profile as a young Tamil
  - his prior place of residence
  - his illegal departure from Sri Lanka.

## Refugee assessment

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13. 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

14. 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.

### *Identity*

15. The applicant claims to be a Tamil from the Northern Province. He has provided some evidence of his identity, including a copy of his Sri Lankan birth certificate and national identity card. On the basis of his evidence, I find that Sri Lanka is the receiving country, and I accept that the applicant is a Tamil male from this part of Sri Lanka.

### *Events in Sri Lanka*

16. The applicant’s written claims and evidence about events in Sri Lanka was initially set out in a statutory declaration dated 26 November 2016 (SHEV statement). He claimed that he lived in a High Security Zone (HSZ) near a number of army camps and was repeatedly harassed and/or mistreated by the SLA between 2008 and 2012. His experiences as outlined in his SHEV statement can be summarised as follows:
- from 2008, he was frequently stopped, questioned, harassed and assaulted by SLA patrols. He was on several occasions required to report to a SLA camp at a set time;

- in early 2009, he was detained for over six hours and badly beaten with a wooden baton and his private parts attacked. He wasn't told the reason for his detention/mistreatment.
  - when he reported to the SLA camps he was shouted at and asked things like how many people he knew in the LTTE (Liberation Tigers of Tamil Eelam);
  - in April 2012, he was celebrating Tamil New Year with friends when they were rounded up and taken to a military base for two hours. He was slapped and pushed and told because he lived in a HSZ he should not have been out at midnight;
  - the harassment continued almost daily and by September 2012 he was very weak and unable to work on his family's farm;
  - in October 2012, under instruction from his uncle, he departed Sri Lanka (illegally) by boat;
  - the SLA still patrol the area and harass and interrogate his father and siblings as to his whereabouts.
17. The applicant gave oral evidence about events in Sri Lanka in an interview with the delegate on 10 April 2017 (SHEV interview). Overall, I consider he gave a fairly credible account of his experiences in Sri Lanka, which was broadly consistent with his written claims. However, there were some minor inconsistencies. For example, he claimed in his SHEV statement that when harmed by the SLA in early 2009 he was badly bruised all over his body. However, in the SHEV interview, he advised the delegate that he never had bruising from such encounters because the SLA would harm him in a way that caused pain but left no physical evidence. Further, his oral account of the circumstances that led him to come to the adverse attention of the SLA during the New Year celebrations in 2012 differed to his written evidence. However, I consider not much turns on these minor discrepancies. In the SHEV interview, the applicant advised the delegate that:
- he only came to the adverse attention of the SLA;
  - he was not individually targeted, everyone in his village was harassed and mistreated in this way;
  - the SLA used threatening and degrading language but never gave a reason for the harassment and/or mistreatment they inflicted on the people;
  - they were never specifically accused of anything and he does not know the reason why he faced this harassment/mistreatment from the SLA. However, the SLA's questioning indicated they were suspicious of anyone that supported or had a connection to the LTTE;
  - the authorities infrequently asked his family about his whereabouts, with the last time six to twelve months prior.
18. The country information before me from DFAT<sup>3</sup>, the US Department of State<sup>4</sup>, and the UK Home<sup>5</sup> Office confirms that:

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<sup>3</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>4</sup> US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8

- the LTTE launched an armed insurgency against the Sinhalese dominated Sri Lankan government in 1983, surrendering in 2009;
- during the war, the military created HSZ's, which were buffer zones around military bases and other high-value targets, including on the Jaffna Peninsula;
- LTTE support during the conflict was at times imputed on the basis of ethnicity;
- many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the conflict and in its aftermath;
- there are credible reports of human rights abuses during the conflict and in its aftermath;
- since the end of the conflict, the Sri Lankan authorities have taken steps to guard against the LTTE's re-emergence.

19. When I consider the applicant's evidence in its entirety, including the country information, I accept he, like other Tamils in his village (and in the north and east of Sri Lanka), faced harassment, monitoring and mistreatment from the SLA during the conflict and in its aftermath. I accept he came to the adverse attention of the SLA between 2008 and 2012 as claimed. While the applicant's evidence was that he did not know why he was a person of adverse interest to the SLA during this period, there is sufficient country information before me to indicate that LTTE support was at times imputed on the basis of ethnicity and that the authorities feared a LTTE re-emergence. I note the applicant's evidence that indicated the SLA were suspicious he may have had a connection to the LTTE. As noted by the Parish Priest in his letter dated 5 September 2021, many youngsters were arrested and targeted 'on suspicion' in the aftermath of the war. I find the applicant, like other Tamils in the north of Sri Lanka, was harassed, monitored and mistreated by the SLA on the basis of his Tamil ethnicity and imputed LTTE links based on his ethnicity. I am prepared to accept the applicant lived with the Parish Priest, which the evidence to the IAA suggests he did to avoid harm. As noted above, the information before me indicates that since the end of the war the Sri Lankan authorities have remained sensitive to a re-emergence of the LTTE and for this reason I am prepared to accept the authorities may have infrequently asked the applicant's family about his whereabouts as recently as 2016.

#### *Return to Sri Lanka*

20. As noted earlier, country information indicates that during the conflict LTTE support was at times imputed on the basis of Tamil ethnicity. However, the information also indicates that the overall situation for Tamils in Sri Lanka has improved considerably since that time.
21. Sri Lankan government and NGO sources reportedly advised a 2019 UK Home Office fact-finding mission that former cadres would only be of interest if there was a pending criminal case against them, and that mere membership of the LTTE would not make someone of interest.<sup>5</sup> DFAT assessed in 2019 that 'high-profile' individuals with links to the LTTE would continue to be of interest to the Sri Lankan authorities, and indicated that aside from the LTTE leadership, former members who have committed terrorist or serious criminal acts during the conflict, or who provided weapons or explosives to the LTTE, may be considered high-profile. DFAT also assessed that even former 'low-profile' LTTE members who have since come to the attention of the Sri Lankan authorities would still be detained and may be sent to

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<sup>5</sup> UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism", 28 August 2014, OG180885B28

<sup>6</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

a rehabilitation centre. DFAT described low profile former LTTE members to include former combatants, those employed in administrative or other roles, and those who may have provided a high level of non-military support to the LTTE during the war.<sup>7</sup> DFAT reported that Tamils, including those with imputed links to the LTTE, are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links, and that under the previous government even Tamils with links to the LTTE were generally able to lead their lives without concerns for their security as a result of past LTTE associations.<sup>8</sup> In its 2020 Sri Lankan Human Rights Report, the United States Department of State reported that Tamils, especially in the north and east, reported that security forces regularly monitored and harassed former or suspected former LTTE members.<sup>9</sup>

22. I note the IAA invitation to the applicant of 22 October 2021 invited his response to the recent country information that indicated that Tamils, including those with imputed LTTE connections, did not face harm in Sri Lanka. As already noted, no response was received.
23. In the applicant's circumstances, I am not satisfied he is, or would be perceived as, a former high or low level LTTE member. While I have accepted he came to the adverse attention of the Sri Lankan authorities due to his ethnicity during the war and in its aftermath, I am not satisfied he undertook activities that amount to being part of the LTTE leadership, committing terrorist or serious criminal acts during the conflict, or providing weapons or explosives to the LTTE. Nor am I satisfied he is perceived by the Sri Lankan authorities to have done so. While I accept the applicant was previously questioned by the SLA to determine whether he supported the LTTE or had another connection to the group, I am not satisfied he was (or was perceived to be) a LTTE member who was former combatant, employed in any role, or that he provided high level non-military support to the LTTE during the war. While I have accepted he had interactions with the Sri Lankan authorities during the conflict and in its aftermath, even when considered cumulatively, the country information before me does not support a claim that persons with a profile like the applicant are of adverse interest to the Sri Lankan government authorities on the basis of LTTE links.
24. Several sources told a 2019 UK Home Office fact-finding mission that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil, but they do suffer discrimination along with other minorities.<sup>10</sup> As noted above, DFAT assessed in 2019 that Tamils are no longer considered vulnerable to mistreatment by virtue of their ethnicity (including those with imputed links to the LTTE). DFAT also assessed that all Sri Lankans face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment, and housing. DFAT defines 'low risk' as meaning it is aware of incidents but has insufficient evidence to conclude they form a pattern. DFAT assessed that some Tamils report discrimination in employment, particularly in relation to government jobs. DFAT also assessed that there is no official discrimination on the basis of ethnicity in public sector employment, rather the limited Tamil appointments are a consequence of factors such as disrupted education due to conflict and language constraints. DFAT further reported that Tamils have a substantial level of political influence and their inclusion in political dialogue increased since the previous change of government in 2015. DFAT assessed that, while monitoring of Tamils in day-to-day life has decreased significantly under the previous Sirisena government, surveillance of Tamils in the north and east continued,

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<sup>7</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>8</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>9</sup> US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

<sup>10</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

particularly those associated with politically sensitive issues. Physical violence against those being monitored is not common.<sup>11</sup>

25. DFAT also reported that the government no longer restricts travel to the north and east of the country, removing security checkpoints on major roads in 2015, and that military involvement in civilian life has decreased. DFAT indicate that in the Northern Province the military occupy some land and remain involved in some aspects of civilian life, particularly the economy. DFAT also report there was a heightened security posture in the north following the April 2019 Easter Sunday attacks which has subsequently eased.<sup>12</sup> Reporting does not indicate that Tamils are at risk of harm based on their prior place of residence.<sup>13</sup>
26. Country information reports that in November 2019, Gotabaya Rajapaksa, who served as defence secretary during the final phase of Sri Lanka's civil war, won Sri Lanka's presidential election. Later, his brother and former President, Mahinda, was appointed Prime Minister.<sup>14</sup> In 2019, prior to the election, DFAT reported that local sources, both Tamil and non-Tamil, expressed concern that the human rights improvements achieved since 2015, including in relation to freedom of expression, could be reversed if Mahinda Rajapaksa, or an individual close to him, returned to power.<sup>15</sup> I consider the situation in Sri Lanka is significantly different from when the Rajapaksas were previously in power (Mahinda as President and Gotabaya as Defence Secretary). The country information from DFAT and other sources indicates that Sri Lanka is no longer in the midst or aftermath of a civil war, the LTTE has been eradicated, and while the authorities remain sensitive to its potential re-emergence there is no indication of such a resurgence or the emergence of a similar group. When I consider this in conjunction with reporting from DFAT and other sources which consistently indicates significant reforms and improvements for Tamils in recent years, I consider it speculative to conclude that the election of Gotabaya Rajapaksa and/or his brother as Prime Minister will lead to a reversal of reforms or a deterioration of conditions for Tamils in Sri Lanka and/or increase the risk for people in Sri Lanka with profiles like the applicant. On the evidence, I am not satisfied that the 2019 change of government changes or undermines the assessments in the other country information before me.
27. In its 2020 Sri Lankan Human Rights Report, the United States Department of State reported that Tamils, especially in the north and east, reported that security forces regularly monitored and harassed members of their community, especially activists and journalists. Tamil journalists reported that military officers had requested copies of photographs, lists of attendees at events, and names of sources for articles. They also reported that the military requested journalists refrain from reporting on sensitive events, such as Tamil war commemorations or land occupation protests. The report also states that Tamils maintained that they suffered long-standing, systematic discrimination in university education, government employment, housing, health services, language laws, and procedures for naturalization of noncitizens.<sup>16</sup> As noted above, DFAT have previously attributed some of

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<sup>11</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>12</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>13</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

<sup>14</sup> US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

<sup>15</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

<sup>16</sup> US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412



these complaints as a consequence of disrupted education because of the conflict as well as language constraints, rather than because of an official policy of discrimination.

28. Overall, the weight of the country information before me does not support that being Tamil or being Tamil from a certain part of Sri Lanka in itself gives rise to a real chance of persecution, or that persons with a profile like the applicant's face any real chance of adverse attention from the state on this basis. Nor am I satisfied that the political developments in Sri Lanka over the past 23 months indicate that Tamils, like the applicant, will face a real chance of harm on return to Sri Lanka now, or in the reasonably foreseeable future. While I acknowledge there have been reports of mistreatment of Tamils, particularly in the north of Sri Lanka and against those suspected of links to the LTTE and other politically sensitive issues, the weight of the country information before me, including from DFAT, indicates that Tamils are not being systematically targeted and subjected to serious harm because of their race. I am not satisfied the applicant faces a real chance of harm in Sri Lanka due to his ethnicity as a Tamil, his prior place of residence in the north and/or in a HSZ, as a young Tamil from the north, or any combination of these factors now, or in the reasonably foreseeable future. Nor am I satisfied the applicant's chance of facing harm is elevated due to past events in Sri Lanka or that he faces a real chance of being imputed with LTTE links arising from his ethnicity or other relevant profile now, or in the reasonably foreseeable future. Considering the information as a whole, while I accept that the applicant as a Tamil may experience a level of official or societal discrimination, I am not satisfied that any such treatment he may face would constitute serious harm.
29. In his SHEV statement, the applicant said he will be detained if returned to Sri Lanka because he departed the country illegally. He said will be arrested and likely charged. The delegate considered whether the applicant faced harm in Sri Lanka as 'a Tamil who left Sri Lanka irregularly and returned as a failed asylum seeker'.
30. I accept that if the applicant returned to Sri Lanka he would do so as a failed asylum seeker returned from Australia. I also accept that as he departed Sri Lanka in an irregular manner he would be identified by the Sri Lankan authorities as someone who departed Sri Lanka illegally. I note the IAA invitation to the applicant of 22 October 2021 invited his response to the recent country information that indicated that returning asylum seekers, including those who departed Sri Lanka illegally, are unlikely to face mistreatment in Sri Lanka. As already noted, no response was received.
31. Having regard to the country information before me, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities by virtue of him being a Tamil returnee or returnee asylum seeker. The International Organisation for Migration (IOM) noted in October 2019 that claiming asylum abroad is not an offence in Sri Lanka and as such when someone returns who has been absent for a number of years, they would not be questioned about this and there were no media reports of returnees being interrogated on such grounds. IOM indicate that the police would only be interested in returnees if there were outstanding criminal offences. Other sources advised a 2019 UK Home Office fact-finding mission that they were not aware of ordinary Tamil returnees being targeted or facing difficulty on return from abroad.<sup>17</sup> DFAT assess that all returnees are subject to the same standard procedures on return, regardless of ethnicity, and are not subjected to mistreatment during processing at the airport.<sup>18</sup>

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<sup>17</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

<sup>18</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

32. DFAT indicate that returnees will be processed by the Department of Immigration and Emigration, the State Intelligence Service, the CID (Criminal Investigation Department) and, at times, the TID (Terrorist Investigation Division) who check travel documents and identity information of returnees against the immigration and intelligence databases, as well as determining whether a returnee has any outstanding criminal matters. DFAT note that all returnees travelling on a temporary travel document are subject to a standard procedure to confirm their identity which often includes interviewing the returnee, contacting the police in their home area, contacting family and neighbours, and checking criminal and court records. Processing arrivals at the airport can take several hours, primarily due to the administrative processes and staffing constraints at the airport. DFAT also note that returnees are processed in groups and cannot leave the airport until the group has been processed, although returnees are free to go to the bathroom and to talk to one another during this time.<sup>19</sup> I accept the applicant may return to Sri Lanka on a temporary travel document. I am satisfied on the information before me that he has no identification concerns and I am not satisfied that he is a person with a criminal or security record that would raise the concern of these authorities. Further, I am not satisfied that any processing delays or investigative processes to which the applicant may be subject would constitute serious harm.
33. DFAT report that some returnees, including those in the north and east suspected of LTTE links, have been subjected to monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. 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 also states it is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits. DFAT assess that surveillance of returnees contributed to a sense of mistrust of returnees within their community. DFAT also report that some returnees reported social stigma from within their communities on return, and that in some communities people resent the financial support returnees are provided. DFAT also notes that limited job availability in the north and east further contributes to reintegration issues for returnees securing employment and housing. Overall, DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.<sup>20</sup>
34. While I accept that on return the applicant may face social stigma or societal discrimination within his local community due to his profile as a returnee asylum seeker, or reintegration issues, I am not satisfied that he would face treatment that would constitute serious harm. I accept there is indication from DFAT that authorities visit or telephone some returnees. However, even accepting that this may occur, on the information before me, I am not satisfied it would constitute harm, or that this, in combination with any societal discrimination together would constitute serious harm.
35. I accept on the information before me that returnees with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport or on their return home.<sup>21</sup> However, as noted above, I am not satisfied the applicant is a person who holds an ongoing adverse profile with the Sri Lankan authorities due to any actual or perceived links to the LTTE.

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<sup>19</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>20</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>21</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

36. For these reasons, and considering the applicant's individual circumstances, I am not satisfied he faces a real chance of serious harm due to his asylum application in Australia, his time spent in Australia, or due to being a failed or returning Tamil asylum seeker from Australia now, or in the reasonably foreseeable future, if he returns to Sri Lanka.
37. As noted in the delegate's decision, there are penalties under the Immigrants and Emigrants Act (IAEA) for departing Sri Lanka illegally.
38. DFAT report as part of this process, most returnees will provide a statement, be fingerprinted and photographed by the Police Airport Criminal Investigations Unit, and transported to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each returnee. DFAT advises that bail is normally granted to fare-paying passengers of a people smuggling venture whereas facilitators or organisers of people smuggling ventures, including the captain and crew of the boat, are usually held in custody. Bail conditions are imposed on a discretionary basis and according to DFAT, this can involve monthly reporting to police at the returnee's own expense. Apprehended individuals can remain in police custody at the CID Airport Office for up to 24 hours after arrival. Should a Magistrate not be available before this time – for example, because of a weekend or public holiday – returnees who are charged may be held in an airport cell for up to two days. DFAT is not aware of mistreatment of returnees during this process.<sup>22</sup>
39. I accept that as the applicant departed Sri Lanka irregularly by boat, he will be considered to have committed an offence under the IAEA. DFAT indicate that persons who have departed Sri Lanka illegally may face penalties that can include up to five years imprisonment and a fine. A fine varies from LKR 3,000 (approximately AUD 25) and up to LKR 200,000 (approximately AUD 1,633). Well-placed sources told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163). In practice, penalties are applied to such persons on a discretionary basis and, if the departee pleads guilty, in the form of a fine.<sup>23</sup>
40. The applicant stated in his SHEV statement that his family cannot afford bail so he will be forced to remain in detention on return to Sri Lanka where he will be interrogated, harassed, and beaten. I note the applicant didn't raise this concern in the SHEV interview when the delegate put to him that the information indicated he didn't appear to have a particular profile or that he was at risk of harm in Sri Lanka, including in relation to his illegal departure. On return to Sri Lanka, I find if the applicant pleads guilty to his illegal departure he would be charged and fined under the IAEA and then released. In the event that he elected to plead not guilty to the offence under the IAEA (which he has not indicated that he would do), he would either be granted bail on a personal surety or have a family member act as guarantor.<sup>24</sup> 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 imprisonment, but it is highly likely that he will be found guilty and fined. There is no credible evidence before me to suggest he and/or his family would not be able to afford the fine (or costs associated with bail) and I note it can be paid in instalments. I also note the applicant's evidence that he previously worked in Sri Lanka and there is no claim or evidence to suggest he would be unable to work and earn an income if returned. I further note his evidence that

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<sup>22</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>23</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>24</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

his family operated a farm and that [a number] of his siblings are [married]. On the evidence, I am not satisfied that applicant could not afford the fine (or any costs associated with bail) in connection with his illegal departure. Even if I were to accept he could not afford the fine (or bail costs), including through family assistance, I would not be satisfied that he would be detained and harmed for this reason. As noted above, DFAT report that returnees are not subjected to mistreatment during processing at the airport and those charged may be held in an airport cell for up to two days. While the applicant may be briefly detained, I am not satisfied that this would constitute serious harm.

41. 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. DFAT also report that some returnees charged under the IAEA report having to travel long distances to attend court hearings and have found this disruptive to their livelihoods. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the IAEA appear in court every three to six months and that they, in addition to their own court hearings, may be summonsed as witnesses in cases against the facilitators or organisers of people smuggling ventures.<sup>25</sup>
42. On the evidence before me, I find the imposition of any fine (which can be paid in instalments<sup>26</sup>), surety or guarantee would not of itself constitute serious harm. Nor am I satisfied that any lifestyle disruption or costs associated with any reporting conditions or court appearance/s would constitute serious harm to the applicant. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being applied to illegal departees with a profile such as the applicant. Further, DFAT has been advised by the Sri Lankan government that no fare-paying passenger on a boat has been given a custodial sentence and I also note DFAT's advice that fare-paying passengers, like the applicant, generally receive only a fine for breaking the IAEA.<sup>27</sup> I am not satisfied there is a real chance that the applicant would face imprisonment.
43. Additionally, I am satisfied that the application of the provisions and penalties of the IAEA do not amount to discriminatory treatment. The law is not discriminatory on its terms, nor does the country information before me indicate that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process the applicant may face on return to Sri Lanka, and any penalty he may face because of his illegal departure, would not constitute persecution for the purpose of the Act. In light of this I find that the applicant does not face a real chance of persecution from the Sri Lankan authorities due to his illegal departure or travel to Australia.
44. I have accepted that if returned to Sri Lanka the applicant, due to his ethnicity, may experience a level of official or societal discrimination. I have also found he may face some level of societal discrimination, social stigma, or monitoring as a returnee asylum seeker and that he will be subjected to a number of administrative procedures, and may be detained for several hours at the airport and potentially detained in a holding cell for a number of days. Having regard to the applicant's evidence in its entirety, including the country information, even when considered cumulatively, I am not satisfied he faces a real chance of treatment that would constitute serious harm now, or in the reasonably foreseeable future. I am not satisfied that he faces a real chance of harm in Sri Lanka due to past events in Sri Lanka, due to an actual or imputed LTTE profile or political opinion, due to his ethnicity, due to his prior

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<sup>25</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>26</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>27</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

place of residence in the north and/or in a HSZ, as a young Tamil from the north, as a returnee or failed asylum seeker, due to his illegal departure from Sri Lanka, or a combination of these factors.

### **Refugee: conclusion**

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

### **Complementary protection assessment**

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46. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

### **Real risk of significant harm**

47. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
48. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
49. I have accepted the applicant may face some level of societal discrimination, social stigma, or monitoring as a returnee asylum seeker. I also accept there will be a period of adjustment as he reintegrates into the community and life in Sri Lanka. He may also face some level of official or societal discrimination due to his ethnicity. The country information confirms that the trend of monitoring Tamil civilians in day-to-day life has eased since the end of the conflict. Having considered the applicant's own circumstances, and evidence discussed above, I am not satisfied that any monitoring, social stigma, discrimination, or reintegration issues he may face amounts to significant harm as defined in the Act. I am not otherwise satisfied he faces a real risk of harm as a Tamil or a young Tamil from the north.
50. I have also accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally, that he will be subjected to a number of administrative procedures, and that he may be detained for several hours at the airport and potentially detained in a holding cell for a number of days. On the country information, I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport. While I accept that he may be subjected to a brief period of detention in an airport holding cell, it does not amount to the death penalty, an arbitrary deprivation of life, or torture. Further, there is no intention to inflict pain or

suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention. While I accept he may be subjected to questioning and may be required to pay a fine or provide a surety on return to Sri Lanka, I am not satisfied that this amounts to significant harm. I find that the questioning, imposition of a fine and the potential of being held in detention, individually or cumulatively not to amount to the death penalty, arbitrary deprivation of life, torture or that there is an intention to inflict pain or suffering, severe pain or suffering or cause extreme humiliation. I am not satisfied this, or any other process the applicant may be subjected to in connection his illegal departure, amounts to significant harm as defined by the Act.

51. I have otherwise found that the applicant does not face a real chance of any harm in Sri Lanka for the reasons claimed. Based on the same information, and for the reasons set out above, I find he does not have a real risk of suffering significant harm in Sri Lanka.
52. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

#### **Complementary protection: conclusion**

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

#### **Decision**

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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.