



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA16/00169

Date and time of decision: 19 May 2016 10:20:59

Patricia Tyson, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka. [In] September 2015 he lodged an application for a Safe Haven Enterprise Visa (SHEV), claiming to fear harm from paramilitary groups who were attempting to extort money from him, and on account of his Tamil ethnicity, as a failed asylum seeker and as a consequence of his illegal departure from Sri Lanka.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) accepted the applicant's claims as credible, but found he could relocate to another area of Sri Lanka where he could access state protection and where there would not be a real chance of harm from paramilitary groups. The delegate found that any penalty the applicant would face on account of his illegal departure would not amount to persecution, and concluded there was not a real chance that he would be harmed for any of the other reasons claimed, and so did not meet the definition of a refugee. In considering the complementary protection criterion, the delegate found there was not a real risk that the applicant would suffer harm.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

Applicant's claims for protection

4. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - The applicant was born in Jaffna province in the north of Sri Lanka, lived in [another country] as a refugee between [specified year] and [year], and then lived in Colombo until May 2008 when he married and moved to live with his wife's family in [City 1]. He worked as [Occupation 1], first for his father and then for his [Relative A].
 - Although not targeted by the Sri Lankan authorities while living in Colombo, the applicant was harassed and treated harshly by the authorities because of his Tamil ethnicity, and lived in fear. He was questioned and interrogated at check points and round ups.
 - In May 2008 shortly after the applicant married, his [Relative B] was abducted. The family paid ransom, but the [Relative B] remains missing. The family believe that members of paramilitary groups working in collusion with the Sri Lankan authorities were responsible. Prior to the applicant's marriage, his [Relative A] had also been abducted, but was released after a ransom was paid.
 - After the applicant's [Relative B] was abducted, the applicant feared for his own safety and lived in hiding at home. In January 2012 the applicant received a telephone call from an unknown person speaking Tamil and was threatened that he would be killed if he did not pay money. He was given a week to have the money ready and told not to approach police or lodge a complaint. He did not pay, but continued to receive such calls and kept requesting extensions of time.

- In August 2012, the applicant left Sri Lanka and travelled to Australia by boat, believing his life to be in danger. Since his departure, unknown persons have come in search of him several times. He believes these to be the same people who had threatened him, and suspects they are members of a Tamil paramilitary group, who work closely with the government to target Tamil businessmen.
- The applicant's [Relative C] has formed a group to protest against abductions. They have made complaints to the Human Rights unit, United Nations High Commissioner for Refugees (UNHCR), the president, courts and police.

Refugee assessment

5. 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

6. 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
 - 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.

Applicant's background

7. I accept based on the documentary evidence submitted, the applicant's consistent evidence, and evident fluency in the Tamil language that the applicant is a national of Sri Lanka, of Tamil ethnicity, that he was born in Jaffna and spent periods of his life in [another country], Colombo and [City 1]. I further accept based on his evidence, supported by the English translation of his marriage certificate, that both his father and [Relative A] are [Occupation 1s]. At the SHEV interview [in] December 2015 (SHEV interview), the applicant was able to offer a relatively detailed history of his work making [products] first for his father and his [Relative A], and I accept that the applicant also worked as a [Occupation 1] or [related occupation] as claimed.

Threats and extortion from paramilitary groups

8. The applicant fears being harmed or killed by members of Tamil paramilitary groups working with the government because he is a wealthy Tamil businessman. He says he cannot seek protection because the paramilitary groups operate with the support of the authorities. The applicant's representative submitted that the large military presence, coupled with paramilitary activities, would cause a problem for a man of the applicant's age in [City 1].
9. Since a biodata interview [in] September 2012 the applicant has consistently claimed that his [Relative B] was abducted and that the applicant himself has been threatened with abduction. Country information indicates that there have been incidents of kidnapping for ransom¹ and many Sri Lankans remain missing or unaccounted for.² I accept that these events occurred as claimed. In this context, I am also willing to accept that the applicant's [Relative A] was previously abducted and then released after paying a ransom, and that his business and others in the area are regularly extorted. The applicant's evidence in his statement was that he began receiving requests for money in January 2012, and was able to avoid paying any money or being harmed by asking for extensions until the time of his departure from [City 1] in late July. Although he claims to have been in hiding, he described this as involving staying at home. I accept that he took such precautions, and am willing to accept that unknown persons have come to his home looking for him since his departure, as he claims.
10. The applicant speculates that the abductions and threats were carried out by paramilitary groups connected to the Sri Lankan authorities, and the newspaper article regarding the applicant's [Relative C] describes a naval officer as being involved in the kidnapping of his [Relative B]. It would be speculative to conclude that the threats against the applicant were in some way connected to the kidnapping of his [Relative A] and [Relative B], particularly as these things occurred years apart, and the only link between the incidents is the fact that the person(s) who called the applicant's [Relative A] demanding ransom, and who requested money from the applicant, spoke Tamil. However, given the country information that paramilitary groups such as the People's Liberation Organisation of Tamil Eelam (PLOTE), Eelam People's Democratic Party (EPDP), People's National Liberation Tigers (TMVP or Pillaiyan group) and Karuna Faction engage in extortion, kidnapping and ransom and have links to government security forces,³ I accept that each of these incidents may have involved paramilitary groups connected to the armed forces.
11. Country information indicates that despite having renounced their paramilitary activities, there are credible reports that Tamil militant groups continue to be active in Sri Lanka, including in criminal activity.⁴ I accept that these groups continue to operate and that if the applicant returns to [City 1], there is a real chance that he may again face threats and extortion demands.
12. The applicant claims he is unable to relocate because the paramilitary groups are well connected and linked to the Sri Lankan forces. He claims that the whole of Sri Lanka is

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF141434, 4.10.

² Ibid, 4.4; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.16.

³ UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.17, 19; UK Home Office, "Sri Lanka March 2012", 7 March 2012, 3523, 8.56-8.59; DFAT, "Paramilitary groups in post-war Sri Lanka", May 2010, CX243874.

⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF141434, 2.35; US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, p.1-2.

controlled by such groups so wherever he goes he will be targeted. He says people are aware of his status and that his [Relative A] is rich but old, and so he, as the younger man in the family, will be targeted wherever he does business. He says the extortionists will be angry with him and target him because he was not in Sri Lanka for a long period of time.

13. I do not accept these claims. I am mindful of UNHCR guidance that internal relocation is not available in Sri Lanka where the feared harm emanates from elements associated with the state.⁵ However, while I accept that through their official connections, the group or groups which extorted the applicant and the family would have the resources to locate him in a different area of the country, I do not accept they would have the motivation to do so. I have taken into account that unknown persons, who may have been the extortionists, came in search of the applicant several times after his departure. However, given the lapse of time between the various incidents and the fact that the applicant was able to avoid harm for approximately six months despite not meeting the extortionists' demands, I find that the persons who threatened the applicant did not have an interest in the family or the applicant to such a level that they would pursue him beyond the immediate area. Rather, the business was one of many in the area that they targeted for money. I am not satisfied that these groups have an interest in the applicant such that they would attempt to locate him in a different area of Sri Lanka. Furthermore, the applicant's father is also a [Occupation 1]. The applicant does not claim that his family experienced such problems during the approximately [number] years that he lived in Colombo, nor in his parents' current home of [District 1]. While I accept that abductions and extortions also occur in Colombo and [District 1], including of Tamil businessmen,⁶ I find the harm facing the applicant to be localised and the prospect of the applicant being targeted for extortion or otherwise harmed by paramilitary groups in Colombo or [District 1] to be remote. I find that there is not a real chance that the applicant will be harmed by paramilitary groups or other extortionists in Colombo or [District 1], and so am not satisfied that the real chance of harm relates to all areas of the receiving country, as required by s.5J(1)(c).

[Relative C's] protest activities

14. The applicant claimed at his arrival interview in January 2013 and at the SHEV interview that his [Relative C] has been involved in protests regarding abductions, has formed a group to protest against abduction, and has made complaints to various Sri Lankan and UN agencies. In support of his claims, he submitted a letter from the President of the [support group] and a newspaper article which describes the abduction of his [Relative B] and states that his [Relative C] and other women met with [a government agency] to present their cases regarding abduction of their family members. Although some of the details in these documents vary from the claims made by the applicant in his SHEV application, I do not view these discrepancies as significant. I accept that the applicant's [Relative C] has been active in protesting against and pursuing government authorities over the disappearance of her son.
15. The applicant's representative submitted to the delegate that the activities of his [Relative C] may have an adverse impact on the applicant. I have had regard to information that under the previous government, government critics were subject to adverse attention including monitoring, harassment, arrest and detention, and some NGO staff working on human rights issues have faced threats, intimidation, arrest or abduction.⁷ These conditions have reportedly

⁵ UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.5.

⁶ See Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286, p.29.

⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF141434, 3.77-3.79.

improved since January 2015.⁸ Further, in its 2012 Guidelines, UNHCR included 'certain witnesses of human rights violations and victims of human rights violations seeking justice' as among potential risk profiles in Sri Lanka, and states that the same may apply to family members of such persons.⁹ There have been reports of such persons being attacked, harassed, threatened, arrested and tortured in attempts to make them withdraw their cases.¹⁰ However, more recent country information indicates that the government has introduced various initiatives to receive complaints about persons who went missing during the war,¹¹ and has taken seriously its engagement with the UN Working Group on Enforced or Involuntary Disappearances.¹² Further, the applicant does not claim that his [Relative C] or any other family members have experienced any problems – whether from government authorities or paramilitary groups – in connection to their complaints about his [Relative B's] disappearance. In these circumstances, I am not satisfied that there is a real chance that the applicant will suffer harm in connection to the activities of his [Relative C].

Tamil ethnicity

16. The applicant claims that Tamils in Sri Lanka are still having problems, and are being targeted and persecuted, describing recent reports of five people being arrested in a round up in Jaffna. He claims that when the authorities want to arrest Tamil people, they accuse them of having links to the LTTE, whether or not they do. He claims that when Tamil people pass checkpoints, they are questioned, threatened and beaten up, but cannot complain to the police. The applicant's representative points to the large military presence in Tamil areas as leading to a real chance of harm, particularly to a man of the applicant's age.
17. The applicant has claimed that Tamils may be associated with the LTTE and face harm for this reason. According to guidelines issued by the UNHCR in 2012, certain links with the LTTE continue to expose individuals to treatment which may give rise to a need for protection.¹³ These guidelines are now over three years old but they remain the most current assessment by the UNHCR of persons at risk in Sri Lanka and are referred to in the more recent report from DFAT.¹⁴ While not exhaustive, the UNHCR guidelines state that people with the certain actual or perceived profiles may be at risk. The profiles relate to various types of involvement with the LTTE or Tamil paramilitaries, or family relationships to such persons.
18. DFAT assesses that the Sri Lankan authorities remain sensitive to the re-emergence of the LTTE and monitor former members and supporters.¹⁵ However, the information does not support a finding that all Tamils are imputed with LTTE support or membership. On the contrary, UNHCR indicates that even those Tamils who lived within LTTE-controlled areas and had contact with that organisation and its civilian administration in their daily lives are not, without more, in need of protection.¹⁶ The applicant spent the majority of the civil war in Colombo. He does not claim that he or any of his family were members of the LTTE, had any connection with that

⁸ Ibid.

⁹ UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.31-32.

¹⁰ Ibid.

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF141434, 4.6.

¹² United Nations Office of the High Commissioner for Human Rights (OHCHR), "Preliminary observations of the Working Group on Enforced or Involuntary Disappearances", 18 November 2015, CXBD6A0DE16003.

¹³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNBOI83EA8, p.26.

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143, 3.35.

¹⁵ Ibid, 3.36.

¹⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNBOI83EA8, p.26

organisation, or were ever imputed with such membership or connection. There is not a real chance that the applicant will be seen to have actual or perceived links to the LTTE on return to Sri Lanka on the basis of his Tamil ethnicity, including on the basis of being a young Tamil male from the east of Sri Lanka. I have considered the applicant's claim that when the government wants to arrest Tamils, they do so on the basis of false accusations of LTTE association. However, as the applicant has never been a person of interest to the Sri Lankan security forces, I find the prospect of this happening to him to be extremely remote.

19. I accept the applicant's claims that in the past he suffered harassment and that he experienced problems at checkpoints and roundups. However, monitoring and harassment of Tamils in day to day life has generally eased since the end of the conflict.¹⁷ Country information indicates that in Colombo, surveillance and the risk of arrest no longer dominate the lives of the Tamil population¹⁸, although the Sri Lankan security forces continue to maintain a significant security presence in the north and east, which includes [District 1] and [City 1], and the military or police continue to monitor public gatherings.¹⁹ There are nonetheless still incidents of harassment. US Department of State cited reports of Tamils being harassed in 2014²⁰ and an excerpt from a September 2015 report of the Office of the United Nations High Commissioner for Human Rights submitted by the applicant's representative indicates that there were 26 cases of harassment and intimidation by military and intelligence services in the North and East between January and August 2015. However, on the whole, monitoring and harassment of Tamil communities has reportedly reduced under the Sirisena government.²¹
20. I also accept that Tamils were historically discriminated against in Sri Lanka.²² However, Tamils are now represented in the government with the Tamil National Alliance (TNA) winning 16 seats in the August 2015 election and leader of that party being appointed to the position of Opposition Leader.²³ DFAT considers that there are now no official laws or policies that discriminate on the basis of ethnicity or language; including in relation to education, employment and access to housing; and that the implementation of other laws and polices is generally without discrimination.²⁴ Recent advice from DFAT states that both Sinhala and Tamil are recognised as official languages of Sri Lanka and all people have the right to communicate in these languages, as well as in English.²⁵ While there may be difficulties in accessing education or communicating with authorities due to language barriers,²⁶ this is attributed to a lack of qualified language teachers, the disruption caused by the conflict and previous discriminatory language polices, rather than any current discriminatory practices directed at Tamils by the government.²⁷ Information from DFAT is that 'moderate levels' of societal discrimination remain between ethnic groups as a result of the conflict,²⁸ and the US Department of State also reports discrimination against Tamils,²⁹ although I note that was in respect of 2014, prior to the election of the Sirisena government.

¹⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF141434, 3.38.

¹⁸ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, page 29, CIS25286, p.6.

¹⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF141434, 3.38.

²⁰ US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, p.62

²¹ DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143, 3.9.

²² Ibid, 2.1.

²³ Ibid, 2.26.

²⁴ Ibid, 3.9.

²⁵ Ibid, 3.3.

²⁶ Ibid, 2.18, 3.6.

²⁷ Ibid, 3.3.

²⁸ Ibid.

²⁹ US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, p.2.

21. I accept that Tamils historically faced discrimination and that Tamil males, including the applicant, faced questioning and harassment. However, the applicant has no links to the LTTE and does not have a history of being of interest to the Sri Lankan authorities. He does not claim to have experienced social discrimination, and his evidence indicates that he attended school, his children attend school, and his family have been able to run businesses. Overall, on the country information set out above I am not satisfied that there is a real chance the applicant will face harm on the basis of his Tamil ethnicity now or in the reasonably foreseeable future.

Harm on the basis of imputed political opinion as an asylum seeker and illegal departee

22. The applicant claims he is at risk of being harmed for having fled Sri Lanka illegally and claimed asylum in Australia, and as a Tamil, will be viewed as an LTTE supporter or member. The applicant's representative submits that returnees are being targeted, arrested and detained upon arrival, that Tamils continue to be held under the Prevention of Terrorism Act (PTA) and that Sri Lankan law permits detention for up to five years without custodial sentence.
23. I accept that the applicant departed Sri Lanka illegally by boat, that if he returns to Sri Lanka, it will be as a failed asylum seeker, and that by manner of his return, the Sri Lankan government will know or suspect this to be the case. DFAT advises that upon arrival in Sri Lanka, all involuntary returnees are processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS) and a unit of the CID.³⁰ Their travel documents and identity is verified by DoIE, SIS checks them against an intelligence database and the CID verifies their identity to determine whether the person has any outstanding criminal matters. Police investigate whether returnees travelling on temporary documents are trying to conceal their identity due to a criminal or terrorist background or to avoid court orders or arrest warrants. This often involves an interview, contact with the police in the returnee's home area, their neighbours and family, and checking criminal and court records. DFAT has observed that this process can take several hours,³¹ and up to 24 hours.³² During this time, returnees are held in police custody at the CID Airport Office.³³ According to DFAT, all returnees are treated according to these standard procedures irrespective of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.³⁴
24. The applicant claims that he will be viewed as an LTTE member or supporter. The applicant's representative submits that standard procedure on return involves calling a person's local police and checking whether the person can be released from the airport, and points to a possibility of remand for more than a few days. The representative provided an excerpt from a report of the United Nations High Commissioner for Human Rights regarding persons detained under the PTA. Some reports do indicate that persons associated with the LTTE or who otherwise are unable to obtain security clearance may face prolonged detention beyond this initial airport processing.³⁵ The representative also submitted an article from the Sri Lanka Mirror regarding the arrest of a Tamil man on return to Sri Lanka, which states that 19 Tamil returnees have been arrested since Sirisena took office. Other material before me reports similar arrests of some Tamils on return to Sri Lanka.³⁶ However, this material variously refers to at least some of those arrested being former LTTE members, as working in the middle east

³⁰ DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143, 5.29–5.31.

³¹ Ibid.

³² DFAT, "RRT Country Information Request - LKA41452 - Request for clarification", CX306710, 1 March 2013.

³³ Ibid

³⁴ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, 5.29-5.31.

³⁵ See Immigration and Refugee Board of Canada, "Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka", 22 August 2011, LKA103815.E.

³⁶ "Two Tamils arrested on return to Sri Lanka", Tamil Guardian, 6 February 2015, CXBD6A0DE1684.

rather than being failed asylum seekers, or having a history of opposing government policies.³⁷ I accept that those of security concern or with connections to the LTTE may face arrest or detention on return to Sri Lanka. However, there is nothing in the evidence before me to suggest a real chance that the applicant would face such treatment. He does not claim to have an adverse security record and I have found above that he has no connection with the LTTE and will not be imputed as an LTTE supporter or member on the basis of his Tamil ethnicity.

25. The information before me does not support a finding that returnees who are failed asylum seekers and/or who left Sri Lanka illegally, including Tamils, are imputed with a pro-LTTE or anti-government opinion or harmed on that basis. According to information from DFAT, thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, the US, Canada and the UK and other European countries, the majority of which were Tamil.³⁸ An excerpt from a September 2015 report of the Office of the United Nations High Commissioner for Human Rights submitted by the applicant's representative also refers to incidents of torture of 'a few' rejected asylum seekers and of other returnees. DFAT states that there have been a small number of allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka but it has not been possible to verify these reports.³⁹ DFAT considers that under the previous government the risk of torture or mistreatment for returnees was greater for those suspected of committing serious crimes, such as terrorism offences, due to the possibility of extended periods of pre-trial detention, but notes that monitoring and fears about mistreatment have reduced under the current Sirisena government.⁴⁰ DFAT has observed that it is difficult to verify if the intent to improve general conditions has led to an actual lower risk of harm for returnees, but overall, assesses that the risk of harm for the majority of returnees is now low.⁴¹
26. I accept that there may be some risk of further investigation or prolonged detention or harm if a returnee is identified as having an adverse profile, such as a serious criminal record or suspected connection to the LTTE, and that there have been some reports of returnees being subjected to mistreatment. However, I am not satisfied that the applicant will be imputed with an anti-government or pro-LTTE opinion on the basis of being an asylum seeker and having departed Sri Lanka illegally, including in combination with his Tamil ethnicity and connection to his [Relative C] who has protested against the government, and the evidence before me does not suggest that he would otherwise be perceived as having a criminal background. To the extent that the CID may have been involved in the incidents of abduction, extortion or threats against the applicant's family in [City 1] (which is itself speculative), I find the possibility that this would somehow lead to a real chance of the applicant being harmed while being processed by the CID unit at the airport or facing further detention after that time to be remote. There is nothing in the applicant's background to suggest an adverse security record, and even accounting for the time that it may take the CID to contact authorities in the areas where he has lived, I find that the clearance period at the airport would not take more than a few hours and the applicant will not be mistreated during that time. I find that this short period of detention does not amount to a threat to the applicant's liberty⁴² and is not otherwise serious harm.

³⁷ Ibid; Immigration and Refugee Board of Canada, "LKA103815.E: Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants", 1 August 2011, CIS29896.

³⁸ DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143, 4.23 and 5.37.

³⁹ Ibid, 4.22.

⁴⁰ Ibid, 4.23.

⁴¹ Ibid.

⁴² *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22; *SZTEQ v MIBP* [2015] FCAFC 39.

27. I accept, as set out below, that the applicant will be identified as an illegal departee and potentially held on remand as part of that process and have considered this below. However, I am not otherwise satisfied that the applicant faces a real chance of serious harm on return to Sri Lanka for reasons of being a Tamil illegal departee and asylum seeker, including in combination with his other circumstances, now or in the reasonably foreseeable future.

Illegal departure

28. Under Sri Lanka's *Immigrants and Emigrants Act 1949* (the I&E Act), it is an offence to depart Sri Lanka other than via an approved port of departure. Penalties for leaving illegally can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees.⁴³ As set out above, most returnees are questioned on return. Where police suspect an illegal departure, the returnee is arrested and charged under the I&E Act. According to DFAT, this generally occurs at the airport and detainees are then transported to the closest Magistrates Court at the first available opportunity after investigations have been completed. The Court then makes a determination as to the next steps for each individual. As I have set out above, those arrested can remain in police custody at the CID airport office for up to 24 hours, and if a Magistrate is not available before this time (eg because of a weekend or public holiday) the detainee may be held at a nearby prison.⁴⁴
29. DFAT advises that no ordinary passenger has been given a custodial sentence. Instead, they are imposed with a fine, which can be paid by instalment.⁴⁵ If a person pleads guilty, they are fined and released and if they plead not guilty, will need to obtain bail.⁴⁶ Country information indicates that in most cases, bail is granted either on personal surety, or otherwise requires a family member to act as guarantor, although no payment is required.⁴⁷ DFAT states that the accused will then need to attend court only when the case against them is being heard (or if required to give evidence as a witness in another case).⁴⁸
30. There is no evidence before me to suggest that the penalties or treatment faced by persons charged with illegal departure under the I&E Act vary depending upon their ethnicity, status as failed asylum seekers, area of origin, imputed or actual political opinion or any other matter, other than whether they were a passenger on a boat or involved in people smuggling⁴⁹. The applicant was a passenger on a people smuggling vessel and has not claimed to have been involved in or accused of organising or facilitating people smuggling. I find that if the applicant pleads guilty he will be fined and released and if he pleads not guilty, will be granted bail and required to return to court at a later time where, if he is found guilty, he will also be fined. I accept that if the applicant is required to have a family member act as guarantor, this may involve waiting until that person comes to court to collect him.
31. Regarding both the ability of a relative to act as guarantor and the applicant's ability to pay a fine, the applicant has given evidence that he has a number of family members in Sri Lanka, including relatives in Colombo, parents in [District 1], and his wife and in laws in [City 1]. He has also said that although his [Relative A's] business is not running as well as it did previously, the family has no problem money-wise and has savings. On the applicant's evidence, I am satisfied

⁴³ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, 5.27.

⁴⁴ Ibid; DFAT, "RRT Country Information Request - LKA41452 - Request for clarification", CX306710, 1 March 2013.

⁴⁵ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, 5.33.

⁴⁶ Ibid.

⁴⁷ DFAT, "RRT Country Information Request - LKA41452 - Request for clarification", CX306710, 1 March 2013; DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, 5.33.

⁴⁸ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, 5.33.

⁴⁹ See Ibid.

that he has relatives who will be able and willing to act as guarantor if required, and that whether in instalments or upfront, he will be able to pay any fine which is imposed without any threat to his capacity to subsist. The applicant's representative has submitted that it may take some time for his wife or [Relative A] to travel to Colombo to bail the applicant, exposing him to a longer period in detention. However, given the information that a person can be released on personal surety, and noting the applicant's evidence that he has relatives in Colombo and [District 1], I find the prospect of the applicant spending more than a few days in detention, including the period on remand prior to being brought before a Magistrate, to be remote.

32. The applicant's representative submits that the longer a person is held in remand, the more possibility of being harmed. I do not accept that there is a real chance that the applicant will face mistreatment in the course of being charged or detained in relation to an offence under the I&E Act. DFAT has assessed that the risk of torture or mistreatment for the majority of returnees is low, including those suspected of offences under the I&E Act.⁵⁰ The applicant has no political, criminal or suspected LTTE background and I have found above that there is not a real chance he would be harmed on the basis of his Tamil ethnicity, in connection with his [Relative C's] activities, or because he is a failed asylum seeker. There is no evidence before me to suggest that businessmen or wealthy persons are targeted for harm in detention, or that the past incidents of abduction, threats and extortion of the applicant's family could in some way lead to him being harmed while in detention. Even considering these matters together, I am not satisfied that there is a real chance that the applicant would be subjected to mistreatment while on remand.
33. I accept that the applicant may be detained for a number of days pending bail, and that prison conditions in Sri Lanka are poor due to gross overcrowding and the lack of sanitary facilities.⁵¹ Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, in *MIBP v WZAPN*⁵² the High Court endorsed the position taken in *SZTEQ v MIBP*,⁵³ finding that whether a risk of loss of liberty constituted serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty. In the applicant's case, I find that even considering the possibility that he arrives on a weekend and is detained until he can appear before a magistrate and then until bail is granted, the period of detention will be brief, at the most a matter of days. 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. Considering the totality of the treatment that the applicant will experience including being detained for several hours at the airport, then potentially being detained on remand for a number of days during which he will be held in overcrowded and unsanitary conditions, and having to pay a fine, I find that this treatment does not amount to serious harm.
34. I further find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.⁵⁴ In this case, the evidence does not suggest that the law is selectively enforced or that it is applied in a discriminatory manner. Accordingly, I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be

⁵⁰ Ibid, 4.23.

⁵¹ US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, p.17; DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, 5.13.

⁵² *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

⁵³ *SZTEQ v MIBP* [2015] FCAFC 39.

⁵⁴ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

the result of a law of general application and does not amount to persecution within the meaning of s.5J(4).

Refugee: conclusion

35. The real chance of harm to the applicant as a wealthy Tamil businessman, [occupation], and [relative] of his [Relative A] does not relate to all areas of Sri Lanka, and there is not a real chance that the applicant will suffer harm in Sri Lanka on the basis of his Tamil ethnicity, activities of his [Relative C], or status as a failed asylum seeker. The treatment that the applicant will suffer as a result of his illegal departure, and in being processed at the airport, does not amount to persecution. The applicant does not have a well-founded fear of persecution within the meaning of s.5J and so 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

36. 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

37. Under s.36(2A), a person will suffer 'significant harm' if

- the person will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the person; or
- the person will be subjected to torture; or
- the person will be subjected to cruel or inhuman treatment or punishment; or
- the person will be subjected to degrading treatment or punishment.

38. I have accepted above that there is a real chance that the applicant will be detained for several hours at the airport, potentially detained on remand for a number of days pending bail, during which he will be held in overcrowded and unsanitary conditions, and then imposed with a fine. As 'real chance' and 'real risk' involve the same standard,⁵⁵ I similarly find there is a real risk that he will experience such treatment. However, I find this does not amount to significant harm. Firstly, as I have found above, I do not accept there is a real risk that the applicant will be mistreated while held at the airport or in remand, or face a total period of detention of longer than a few days. The investigation of the applicant, and subsequent detention, is for the purpose of establishing his identity, obtaining security clearance and then waiting for a magistrate to authorise his release and bail to be processed. To the extent that the applicant will be detained in crowded and unsanitary conditions, the evidence before me is that this treatment arises from the application of Sri Lankan law and that the prison conditions in Sri Lanka are poor because of a lack of resources.⁵⁶ Considering the entirety of this treatment, I

⁵⁵ *MIAC v SZQRB* (2013) 210 FCR 505.

⁵⁶ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, 5.13.

am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation, as is required by the definitions of torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment in s.5(1). The treatment does not consist of the death penalty or arbitrary deprivation of life. I find that this treatment does not amount to significant harm within the meaning of s.36(2A).

39. While I have accepted the applicant will be fined for his illegal departure, I similarly find that imposition of a fine, which I have found that the applicant will be able to pay, does not amount to significant harm within the meaning of s.5(1) and s.36(2A).
40. I do not otherwise accept that there is a real risk that the applicant will face harm as a result of being a failed asylum seeker, an illegal departee, a Tamil, or in connection with the activities of his [Relative C], whether while being processed at the airport, held on remand, or elsewhere in Sri Lanka, as a necessary and foreseeable consequence of return. As I have said above, the applicant's [Relative C] and other family members have not been threatened or faced harm in connection to their protests and complaints over his [Relative B's] disappearance, and I do not accept there is a real risk that the applicant would face any harm in this regard in the reasonably foreseeable future. The applicant does not have any connection to the LTTE and does not have a history of being of interest to the Sri Lankan authorities. On the country information I have set out above, and in consideration of the applicant's particular background and circumstances, I am not satisfied that there is a real risk that he would face harm on return to Sri Lanka on account of his Tamil ethnicity, area of origin, or that he would otherwise be imputed to be an LTTE supporter or member, or to have an anti-government opinion, including because he sought asylum in Australia or because he departed Sri Lanka illegally.
41. For the reasons I have given above, I accept that there is a real risk that the applicant will face harm in [City 1] from paramilitary groups, potentially working in connection with the authorities, or other persons who seek to extort money from him. However, I find that this harm is localised and does not extend to other parts of Sri Lanka such as Colombo or [District 1]. Considering the applicant's claims as a whole, I do not otherwise accept that there is a real risk that the applicant will face significant harm in Sri Lanka.

Qualifications to the real risk threshold

42. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:
 - it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm; or
 - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm; or
 - the real risk is one faced by the population of the country generally and is not faced by the person personally.
43. I accept there is a real risk that the applicant will be harmed by paramilitary groups or other extortionists in [City 1]. However, I have earlier found that the applicant does not face a real chance of being harmed by paramilitary groups or other extortionists in [District 1] or Colombo. For similar reasons, I conclude there is not a real risk that he will face such harm in those areas, given the extortionists' lack of personal interest in the applicant or the family, the applicant's ability to avoid harm for approximately six months prior to his departure despite

not meeting the demands, and the past situation of the applicant and his father in Colombo and his father's situation in [District 1]. For the reasons I have given above, I am not satisfied that there is otherwise a real risk that the applicant will face significant harm in Colombo or [District 1].

44. When asked at the SHEV interview why he could not move to [District 1] or Colombo with his family, the applicant claimed that he or his [family] would be targeted wherever he went. Similarly, under the heading 'Why I think relocation to another area in my country is not an option' in his statement submitted with the SHEV application, he referred to the paramilitary groups being able to find him wherever he moved. The applicant did not raise any other reasons why he would not be able to relocate and nor did his registered migration agent, who was present at the interview, make any submission that relocation would be unreasonable. Based on his evidence at the SHEV interview, I find that the applicant has relatives in Colombo and that he lived there from [year] until his marriage in 2008. Furthermore, the applicant's parents are in [District 1]. The applicant is a young man with skills and experience in [occupation]. I do not accept that the treatment I have found the applicant will experience on return to Sri Lanka, including being processed at the airport, held on remand and fined, would make relocation unreasonable. I am satisfied that in the applicant's particular circumstances, it would be reasonable for him to relocate with his family to Colombo, where he lived for a long period of his life and has relatives, or to [District 1], where he has close family.
45. As the qualification in s.36(2B)(a) applies, there is taken not to be a real risk that the applicant will suffer significant harm.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
 - (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.
- ...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
- (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.
- ...