



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/06112

Date and time of decision: 17 January 2019 16:37:00
S MacKenzie, 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 Kilinochchi District, Northern Province, Sri Lanka. He arrived in Australia [in] July 2013 as an unauthorised maritime arrival. On 27 January 2017 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 6 December 2018, 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.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
4. On 11 January 2019, the IAA received a written submission from the applicant's representative (IAA submission) and a statutory declaration from the applicant (IAA statement). The IAA submission and IAA statement in part comprise argument on issues before the delegate and also refer to claims and evidence that were before the delegate, and are part of the review material. I have had regard to these aspects of the IAA submission and IAA statement.
5. The IAA statement and/or the IAA submission refer to the following information and claims that were not before the delegate:
 - a. The applicant was released (from forced recruitment) by the LTTE (Liberation Tigers of Tamil Eelam) in 2008 because they were satisfied that his family had already provided significant support in other areas – through his father providing [equipment] and other financial support;
 - b. S, an informer working for the Sri Lankan government, may be under the impression that the applicant was with the LTTE from 2008 until 2010;
 - c. As he was from the same area as the applicant, S was in a position to have witnessed the applicant's interactions with the LTTE in 2008 and 2009;
 - d. As he returned from a battle zone at the end of the war, people would have assumed that the applicant was a LTTE combatant;
 - e. The applicant is perceived by the CID (Criminal Investigation Department) as being a former 'high level member' and/or high level supporter of the LTTE because:
 - i. his family were known or suspected to be strong supporters of the LTTE because he was permitted to be released from his obligation to fight for the LTTE in 2008;
 - ii. he is or may be perceived to have been with the LTTE since 2008 due to S; and
 - iii. he fled Sri Lanka while his LTTE links were being investigated.

6. The information and claims above not before the delegate constitutes new information that wholly relate to events that pre-date the delegate's decision. Neither the applicant nor his representative have provided reasons as to why this information was not and could not have been provided to the delegate or why it may be considered credible personal information. I have taken into account that the applicant was legally represented in terms of preparing his SHEV application and during his interview with the delegate on 8 October 2018 (SHEV interview), and this information not mentioned. Further, there was no mention of these claims or information in the applicant's post-SHEV interview statutory declaration dated 22 October 2018. In the circumstances, I am not satisfied that this information could not have been provided to the Minister before the delegate made her decision.

7. Turning now to whether I consider this new information is credible, in the sense of capable of being believed, I have considered the applicant's previous evidence, which I find, overall, inconsistent with the new information. For example, the applicant's claim that he will be perceived as 'a high level member' or supporter of the LTTE because he was released by the LTTE in 2008 due to the significant support his family had ready provided the LTTE, was inconsistent with his evidence in the SHEV interview that he was never advised by the LTTE why he was released, and that he was of the view that he was released because he was wearing a "white school uniform". I also note the applicant's evidence in his written statement of claims dated 15 December 2016 (SHEV statement) and in the SHEV interview that his father provided [equipment] to the LTTE to [assist their operations]; however, he made no mention of providing other financial support. The new claim that S may have suspected the applicant had been linked with the LTTE between 2008 and 2010 and that S may have personally witnessed the applicant's interactions with the LTTE in 2008 and 2009, due to him living in the same area, was different to the claims before the delegate. His evidence in his SHEV statement was that while S was originally from the applicant's home area of [Town 1] in Kilinochchi District, he actually lived in Vavuniya (Vavuniya District) and returned to [Town 1] in 2013. Further, the applicant's evidence in the SHEV interview was that his interactions with the LTTE in 2009 occurred outside of his home area, in [Town 2]. In respect of the new claim and reasons that the applicant would be perceived by the Sri Lankan authorities as a former 'high level member' and/or high level supporter of the LTTE, I note that at no time has he claimed that his family were known or perceived as strong supporters of the LTTE on account of him being released from the LTTE in 2008. Further, as noted above, his claim that he was or may have been suspected by S to have interacted with the LTTE since 2008 because S lived in the same area is different from his evidence in his written claims. In respect of the claim that he would imputed as a LTTE combatant due to him returning from a war zone after the conflict, I note this differs from his evidence in his SHEV statement and SHEV interview where he claimed that at the end of the conflict he and his family entered the army controlled area and were in a refugee camp before being resettled in their home village in 2010. I also note his evidence in the SHEV interview was that after deserting the LTTE in the final battle, he escaped and mingled with the general population, including with his parents and [family]. I also consider the applicant's new claim that he is perceived as high level due to him departing Sri Lanka while his links to the LTTE were being investigated as speculative. While I accept that the applicant had claimed before the delegate that he feared being perceived by the Sri Lankan authorities as a former-LTTE cadre who escaped rehabilitation, a profile that Department of Foreign Affairs and Trade (DFAT) assess is considered low-level¹, the claim that will be viewed as a high level member/supporter of the LTTE appears to now be mentioned in response to the country information cited in the delegate's decision that indicated that persons who evidenced past membership or connection to the LTTE would not normally come to the attention of the authorities unless

¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.53

they had a significant role in it. Having regard to the above, I am not satisfied that points a – e constitute credible personal information in the relevant sense.

8. In the IAA submission, the representative referenced a 2018 Human Rights Watch (HRW) and a 2018 International Crisis Group (ICG) report, plus several hyperlinks to other information, which appear to have been provided as evidence of the political situation in Sri Lanka. The representative states the country information referred to in the submission was not provided prior to the delegate's decision because it seeks to evidence events that transpired both prior to and after the date of the decision. He states that exceptional circumstances exist for considering the country information because the delegate 'relied heavily on country information that indicated that the political situation in Sri Lanka was improving for Tamils which is now clearly not the case'. While neither the HRW or the ICG report (or extracts) have been provided, I note both reports were published prior to the delegate's decision of 6 December 2018. In this context, I am not satisfied that this information reports on changes to the political landscape in Sri Lanka post 6 December 2018. I am also not satisfied that this information could not have been provided to the Minister before the delegate made her decision. Further, the provision of hyperlinks does not comply with the requirements set out in the IAA Practice Direction (provided to the representative on 19 December 2018) under s.473FB that states that if an applicant provides or refers to new information such as country information or media articles they must attach a copy of that information or extract part(s) of the information on which they rely and must identify the source of the information. Hyperlinks to publicly available documents are not acceptable. As noted above, neither the HRW nor ICG reports/ extract(s) have been provided. Further, it is not clear as to which parts of the IAA submission that the HRW and ICG reports refer. I find that Practice Direction 1 has not been complied with and under s.473FB(5) I have decided to not accept this new information.
9. The applicant's representative has also provided what appears to be unreferenced country information under the heading 'Changing political situation' where he refers to events in Sri Lanka in October 2018 and January 2019. The applicant appeared to refer to similar unreferenced country information in the IAA statement under the heading 'New information – political situation in Sri Lanka'. He claimed that he did not provide the information earlier because the situation was changing rapidly. As above, I find that Practice Direction 1 has not been complied with and under s.473FB(5) I have decided to not accept this new information. Even if I did, given the lack of a source and that the information is generally lacking in probative value in assessing the applicant's claims before the delegate, I would not be satisfied that exceptional circumstances existed that justified considering the information.

Applicant's claims for protection

10. The claims outlined in the applicant's SHEV statement can be summarised as follows:
 - The applicant is a Tamil male from [Town 1], Kilinochchi District, in the north of Sri Lanka;
 - In 2007 – 2008, the applicant's father allowed the LTTE to use his [equipment] to [assist their operations]. People saw the applicant's family as people who helped the LTTE;
 - In 2008, the applicant's [Relative A] was taken by the LTTE for compulsory training. Eight months later he died fighting for the LTTE;
 - In 2008, the applicant was taken and forced to join the LTTE. He was held for three days before being released with the assistance of his father and others;

- Following this, due to fear of forced recruitment, the applicant stayed at home and remained hidden. He was home schooled and only went out to attend his exams;
- As the war intensified, the applicant's family relocated to several different areas;
- One of the applicant's [family members] was severely wounded following a shell attack;
- [In] May 2009, the applicant and one of his [family members] travelled by sea to Sri Lankan Army (SLA) controlled [location], and were later joined there by other family members;
- The applicant and his family were captured by the SLA and taken to [a named town] and questioned. The applicant was not heavily questioned because he was carrying his wounded [family member];
- The applicant's family was taken to the [Camp 1] in Vavuniya District. While there, he was taken for an enquiry with the CID twice. When asked about his LTTE involvement, the applicant advised that he was in hiding (during the conflict) and did not know anybody in the LTTE;
- In February 2010, the applicant and his family returned to [Town 1]. There was a SLA camp nearby and the SLA were always watching. The applicant helped his father with farming;
- In June 2013, two CID officers took the applicant to the CID office. He was abused physically and verbally. He was threatened at gunpoint with death unless he admitted to being involved with the LTTE. He denied involvement but the CID did not believe him. They took the applicant's details, including his fingerprints and contact numbers. After many hours of enquiry, the CID released him and advised that he would be called on again shortly;
- After three days, two CID officers returned to the applicant's house and informed his father that he should return to the CID office. However, the applicant was staying at his [relative's] house due to fear. It was then that the applicant's father arranged for him to come to Australia;
- After he left Sri Lanka, the CID contacted his father repeatedly about the applicant's whereabouts. His father also informed the applicant that a person named S, one of the main persons of PLOTE (The People's Liberation Organisation of Tamil Eelam), a former Tamil militant group and now political party, came to [Town 1] in 2013 and was working as an informer for the CID, and that S is the reason the applicant was taken by the CID in June 2013;
- If returned to Sri Lanka, the applicant fears he will be harmed or killed by the CID due to his imputed LTTE links, arising from his Tamil ethnicity. He will be arrested because he is on the CID watchlist.

11. In the SHEV interview, the applicant provided the following additional information and/or claims:

- In 2009, prior to the end of the final war, he was taken by the LTTE, underwent 10 days military training, and then fought on the front line;
- Between 2010 and 2013, he was questioned and harassed by the SLA;

- When he was questioned by the CID in 2013, he was told that somebody had informed them that he was in the LTTE. He was also accused of joining the LTTE at the same time as his [Relative A] in 2008;
 - His father was approached by the CID about his whereabouts as recently as six months ago;
 - He fears harm from the CID due to his actual LTTE links.
12. In the post-SHEV interview statutory declaration dated 22 October 2018, the applicant further claimed that he will be perceived by the Sri Lankan authorities as a former-LTTE cadre who escaped rehabilitation, and that he will face harm on this basis.

Refugee assessment

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 originate from the district of Kilinochchi, Northern Province, Sri Lanka. He has provided some evidence of his identity, including a copy of his birth certificate and his 2012 issued driver’s licence. On the basis of his evidence, I accept that he is a Tamil male from this part of Sri Lanka.

Events in Sri Lanka

16. I accept that the applicant's father allowed the LTTE to use his [equipment] to [assist their operations] in 2007 and 2008. Country information in the review material confirms that during the conflict many civilians, particularly in the north and east of Sri Lanka, were forced to assist the LTTE with their activities.²
17. I also accept that the applicant's [Relative A] was taken by the LTTE for compulsory training in 2008 and died in combat eight months later. Country information confirms that the LTTE supported its administration through the forced recruitment of Tamils at the relevant time.³
18. In respect of the applicant's claim to have been forcibly recruited by the LTTE and held for three days, I noted some inconsistencies in his evidence. In his SHEV statement, he claimed that this occurred in 2008 (approximately aged [age range] years). He claimed that at the time he was studying '[a specified qualification]'. In the SHEV interview, he advised the delegate that he thought he was aged around [older age range] years at the time, which would have been in 2011 or 2012 and after the conflict had ended. Later in the interview, the delegate put this discrepancy to him for comment. In response, the applicant said that his memory was a "bit dodgy" and that he would have been aged between [a younger age range] when he was completing his [specified qualification], which I note still indicates that these events occurred after or near the end of the conflict. He claimed that he was told by the LTTE that nobody from his household had joined the movement and that he must. Consistent with his SHEV statement, the applicant advised the delegate that he was released when his father and some senior figures from his school and village intervened. Although I have some concerns, I give weight to the fact that this claim was broadly consistent with his earlier evidence in an interview with the Department on 9 August 2013 (arrival interview) where he advised that he was detained for three days while studying for his [specified qualification] exam, and that he was released following intervention from the education department. I accept that there was an attempt by the LTTE to recruit the applicant in around 2008 and that he was released after three days. I also find it plausible that following his release the applicant would have kept a low profile for fear of being taken again by the LTTE. I accept that he kept a low profile at home and was home schooled after this incident.
19. I accept that during the conflict the applicant and his family relocated to several areas. Country information confirms that over the course of the conflict (1983 – 2009) hundreds of thousands of people, particularly Tamils, were displaced with multiple displacements occurring in the northern and eastern parts of Sri Lanka.⁴
20. I find the applicant's claim, first raised in the SHEV interview that, in 2009, prior to the end of the final war, he was taken by the LTTE, forced to undertake 10 days military training, and then fought on the front line, unconvincing.
21. In the SHEV interview, the delegate asked the applicant why the CID questioned him in 2013 when the war in Sri Lanka had ended in 2009. In response, he said that after he was released from the LTTE his family were displaced to several locations. He said that he remained hidden in these various locations. He claimed that in 2010 he returned to his home village, and in

² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.64

³ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.35, 3.40, 3.64

⁴ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.2, 3.61; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 2.2, 3.68; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE9263205, p.15

2013 he was taken for interrogation by the CID who told him that somebody had told them that he was in the LTTE.

22. The delegate again asked the applicant why he was being asked about his LTTE involvement in 2013 when the war had ended in 2009. In response, he again said that during the conflict he and his family had been displaced. He also claimed that while living in his village between 2010 and 2013 he was questioned and harassed by the SLA who accused him of being in the LTTE.
23. The applicant advised the delegate that in 2013 he was taken from his home by the CID. He was grabbed by the throat and had a gun held to his head. He was told by the CID that someone had informed them that he was in the LTTE. He said he did not know who this person was until his father found out, after he had arrived in Australia. The CID accused the applicant of being recruited along with his [Relative A] in 2008. The applicant said that he repeatedly told the CID that had not been in the LTTE and had been studying during the war.
24. The delegate asked the applicant a third time why he had come to the adverse interest of the CID in 2013 in circumstances where the war had ended four years prior. In response, he raised a new claim that he had been detained by the LTTE prior to the end of the conflict. He maintained that he came to the adverse attention of the CID in 2013 because he was identified as a person who was in the LTTE, who he later found out was S. He said that S was taking a salary from the Sri Lankan authorities to identify former LTTE persons.
25. The applicant also advised the delegate that S had identified him to the CID due to the assistance that the applicant's father provided to the LTTE. He said that the authorities were not interested in his father because he only helped them with vehicles, but that the CID was interested in him because they said he was an LTTE fighter. At this point, the applicant provided further information in respect of the new claim earlier raised that he was detained by the LTTE prior to the end of the conflict. He claimed that:
 - He was caught by the LTTE in [Town 2] in 2009;
 - That he was forced to undergo 10 days of military training, including how to use an AK-47;
 - Following training he was taken to the front lines, but as he was new he was positioned in the third line of defence;
 - While in battle he threw away his weapon, ran away, and mingled with the general population before finding his parents and entering the army controlled area.
26. In the IAA statement, the applicant states that he did not provide details of his 2009 LTTE involvement prior to the SHEV interview because he was scared what would happen to him if he admitted this. He states that he was advised by his previous lawyer, who assisted him with his SHEV application, that LTTE combatants and those seen as LTTE terrorists can be refused visas in Australia and either locked up forever or sent back to Sri Lanka. However, I have difficulty accepting this explanation given his earlier evidence in the arrival interview that he had never received training in preparation for conflict and had never participated in armed conflict or fighting. I also note that he made no mention that he was detained or trained by the LTTE in 2009, that he fought in the war, or that he was threatened with death by the CID. I also find the applicant's evidence in the arrival interview that he started to make arrangements to leave Sri Lanka in May 2013, prior to his claimed interactions with the CID in

June 2013, not insignificant. I note that the IAA provided the applicant's representative an audio recording of the arrival interview on 19 December 2018 in response to a request to disclose information.

27. In support of his claims, the applicant provided a letter, dated [in] October 2018, from [Mr A], Justice of the Peace. The letter was obtained after the SHEV interview. The letter stated that the applicant's father approached him in 2013 and told him that his son had been taken to the [CID Camp 2] and tortured. He was accused of being a member of the LTTE. The letter also states that the applicant's father has been questioned a number of times by investigation and security officers, including by S.
28. In the IAA statement, the applicant states that he has only speculated as to what S may have told the CID about his LTTE involvement.
29. When considered cumulatively, the above evidence leads me to conclude that the applicant was not recalling a genuine personal experience in relation to certain events that transpired between 2009 and 2013. I consider that if it were true that the applicant had been forcibly recruited and trained by the LTTE in 2009, and fought in the war, that he would have mentioned such a material claim in his SHEV statement, prepared with the assistance of a legal representative. I do not accept that the applicant failed to mention these claims earlier on the advice of his former representative. I also find it difficult to accept the applicant's claim that his father was identified as a person who provided support to the LTTE but was never questioned directly in relation to this. Country information in the review material indicates that it was not just former LTTE fighters who were of interest to the Sri Lankan authorities following the conflict, but others including those who provided low-level support and family members of cadres.⁵ Further, I expect that if the applicant had been taken into CID custody in June 2013 after being identified as a former LTTE fighter by an informant paid by the authorities to identify such persons, and told that he was suspected of being a LTTE fighter, that he would not have been released the same day. In light of the evidence discussed and due to the prevalence of document fraud in Sri Lanka⁶ I give the letter purportedly issued from [Mr A] no weight. Having regard to the information before me, I am not satisfied that the applicant was forcibly recruited and trained by the LTTE in 2009. It follows that I reject his associated claims that he fought in the war alongside the LTTE, and that he has been identified as a former LTTE cadre by the Sri Lankan authorities on this basis.
30. I have accepted that the applicant's father provided support to the LTTE during the conflict, and that his [Relative A] died fighting for the LTTE in around 2008. I have also accepted that there was an attempt to recruit the applicant to fight for the LTTE in 2008 but that he was released.
31. Although I have concerns in respect of the applicant's claimed activities post-war, I am willing to accept he was questioned by the CID while at [Camp 1], and questioned and harassed by the SLA in his home area between 2010 and 2013 in respect of his movements during the war. I also accept that his [family member] was injured in the conflict. Country information documents the mistreatment of ordinary Tamils during the civil war, noting that LTTE support was at times imputed on the basis of Tamil ethnicity. Many Tamils, particularly in the north and east, reported being harassed and monitored by the security forces at this time.⁷ However, on the evidence before me, I am not satisfied that the applicant was a person of

⁵ United Nations High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.11, 27

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.56-5.57

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.8

adverse interest to the CID in June 2013 in relation to suspected LTTE links, including as a LTTE cadre, or for any other reason. It follows that I reject his associated claim that his father has been pursued by the CID since he departed Sri Lanka in 2013, including as recently as early 2018.

32. While I have accepted that the applicant was questioned and harassed by the SLA in his home area between 2010 and 2013, I am not satisfied that he faces a real chance harm for this reason, or any other reason, on return to Sri Lanka in 2019. Country information from the UK Home Office assesses that international protection is not warranted in cases where a person evidences past membership or connection with the LTTE, unless they had a significant role in it, or if they are, or perceived to be, active in post-conflict Tamil separatism.⁸ Similarly, DFAT assessed in 2018 that high-profile individuals with links to the LTTE would continue to be of interest to the Sri Lankan authorities, and indicate 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.⁹ In the applicant's circumstances, I am not satisfied that he was, or is perceived to be, a person who had a significant role in the LTTE, including its leadership, or a person active in post-conflict Tamil separatism. Nor am I satisfied that he was, or is perceived to be, a person who committed terrorist or serious criminal acts during the conflict, or who provided weapons or explosives to the LTTE.
33. According to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of those individuals that have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals that the Sri Lankan security services consider to be of interest, including due to separatist or criminal activities. The UK Home Office reported that the 'watch list' comprised minor offenders and former LTTE cadres.¹⁰ Based on my findings in respect of the applicant's circumstances, I am not satisfied that he is on a watch list of the Sri Lankan security services.
34. Having had regard to the entirety of the evidence before me, I am not satisfied that in 2019 the applicant is a person of interest to the Sri Lankan authorities due to any actual or imputed LTTE membership or links, including familial links. Accordingly, I am not satisfied that on return to Sri Lanka he faces a real chance of being imprisoned, mistreated, or killed, by the CID due to any imputed or actual LTTE activities, due to familial LTTE links, or for any other reason.
35. Although not expressly raised as a claim for protection, the delegate considered whether the applicant faced harm in Sri Lanka due to his profile as a Tamil from a former LTTE-controlled area in the north of Sri Lanka.
36. Country information indicates that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009. In 2018, DFAT 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.¹¹ While there is no official discrimination on the basis of ethnicity in public sector employment, DFAT assess that some

⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826, p.13

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.50, 3.52

¹⁰ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.37

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.3

Tamils report discrimination in employment, particularly in relation to government jobs. DFAT further assess that the limited Tamil appointments are a consequence of factors such as disrupted education due to conflict and language constraints.¹² The applicant has not claimed to have experienced ethnic based societal discrimination in the past, and nor has he claimed to have sought or been denied employment in the public sector. While I accept that the applicant may be at some risk of encountering a degree of societal discrimination solely on the basis of ethnicity, on the evidence before me, I am not satisfied that this would constitute serious harm.

37. In 2017, the UK Home Office reported that being of Tamil ethnicity does not in itself warrant international protection.¹³ Recent reports do not mention that Tamils are at risk of harm based on their prior place of residence.¹⁴ I have also considered the country information from DFAT and other sources which indicate that Tamils are not being systematically targeted and subjected to serious harm because of their race.
38. Having regard to the evidence, I am not satisfied that the applicant faces a real chance of harm from the CID, or any other arm of the Sri Lankan government, on account of his ethnicity, his previous residence in the north, or due to any residence in an area controlled by the LTTE, or a combination of these factors, upon his return to Sri Lanka now, or in the foreseeable future.
39. Country information indicates that persons suspected of certain links with the LTTE may be in need of international refugee protection, depending on the individual circumstances of their case. Given my findings about the profile of the applicant, and having regard to the country information before me, I conclude that he is not a person who faces a real chance of harm by virtue of any actual or imputed LTTE connections, including familial connections. I am not satisfied that on return to Sri Lanka the applicant faces a real chance of harm from the Sri Lankan authorities, including the CID.

Health

40. In support of his SHEV application the applicant provided a letter from [a named doctor], dated [in] October 2018. The letter stated that he is 'under psychology' at '[Agency 1]' and suffers with thoughts about his home. The letter also stated that he is worried about being sent to Sri Lanka. The applicant made no mention of his mental health in his SHEV statement or at the SHEV interview. There has been no mention of any mental health factors in subsequent statements and submissions. There is no evidence before me to indicate that the applicant has been diagnosed with a psychological condition or that he requires ongoing treatment. On the evidence before me, I am not satisfied that the applicant faces harm in Sri Lanka due to any mental health issues.

Illegal departure / Returning asylum seeker

41. Although not expressly raised as a claim for protection, the delegate considered whether the applicant faced harm in Sri Lanka due to being a 'failed (Tamil) asylum seeker who departed

¹² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.6-3.7

¹³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGD6E7028826, p.13

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGD6E7028826; US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka", 3 March 2017, OGD95BE926876; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017, OGD7C848D112

illegally'. 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 he would be identified by the Sri Lankan authorities as someone who departed Sri Lanka illegally.

42. In the SHEV interview, the applicant advised the delegate that he was aware of a recent report where nine Sri Lankans had been returned from Australia and were in trouble with the CID. According to the report from thaaimedia.com, provided to the delegate following the SHEV interview, the CID arrested nine Sri Lankans in September 2018 on arrival in Colombo following their removal from Australia. The report stated that they were detained by the CID and that investigations were being conducted. There is no indication from the report as to the profile of the persons or the reasons for their arrest, including whether it was in connection with an illegal departure or due to an asylum application in Australia.
43. Having regard to the other 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 asylum seeker. DFAT assess that all returnees are subject to the same standard procedures on return, regardless of ethnicity, and are not subject to mistreatment during processing at the airport.¹⁵
44. DFAT indicate that returnees will be processed by the Department of Immigration and Emigration, the State Intelligence Service, the CID 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.¹⁶ 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.¹⁷ I accept the applicant may return to Sri Lanka on a temporary travel document. 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.¹⁸ I am satisfied on the information before me that the applicant 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 to would constitute serious harm as defined by the Act.
45. DFAT report that while the Sri Lankan government has reportedly decreased surveillance of returnees, anecdotal evidence indicates that the CID regularly visited and/or telephoned returnees in the north of Sri Lanka in 2017.¹⁹ DFAT assess that surveillance of returnees contributed to a sense of mistrust of returnees within their community.²⁰ 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.²¹ DFAT further assess that societal discrimination can affect a returnee's ability to secure housing and employment.²² A small percentage (0.3%) of returnees interviewed by the UNHCR in

¹⁵ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.29

¹⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.28

¹⁷ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.29

¹⁸ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.28

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.40

²⁰ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.42

²¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.40

²² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.42

2016 indicated that they had security concerns following their return to Sri Lanka.²³ While I accept the applicant may be visited by the authorities following his return to Sri Lanka, and that he may face social stigma or societal discrimination within his local community due to his profile as a returnee asylum seeker, I am not satisfied that he would face treatment that would constitute serious harm as defined by the Act. I am also mindful that the applicant's family continue to reside in Sri Lanka and would be able to assist him to reintegrate into the community and life in Sri Lanka.

46. For these reasons, and considering the applicant's individual circumstances, I am not satisfied he faces a real chance of harm due to his asylum application in Australia, or due to being a failed Tamil asylum seeker from Australia now, or in the reasonably foreseeable future, if he returns to Sri Lanka.
47. As noted in the delegate's decision, there are penalties under the Immigrants and Emigrants Act (IAEA) for departing Sri Lanka illegally.
48. DFAT report as part of this process, most returnees will provide a statement, be fingerprinted and photographed, 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. Returnees who are arrested 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.²⁴ DFAT rates general prison conditions in Sri Lanka as not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions.²⁵
49. I accept that as the applicant departed Sri Lanka irregularly by boat, he will be considered to have committed an offence under the IAEA.²⁶ Country information indicates 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) for a first offence, and up to LKR 200,000 (approximately AUD 1,670); in practice, penalties are applied to such persons on a discretionary basis and usually in the form of a fine.²⁷
50. On return to Sri Lanka, I find the applicant would be charged and fined under the IAEA and then released. In the less likely event that the applicant elected to plead not guilty to the offence under the IAEA, he would either be granted bail on a personal surety or have a family member act as guarantor.²⁸ 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 any chance of imprisonment, but it is highly likely that he will be fined. As noted above, DFAT report that returnees are not subject to mistreatment during processing at the airport. While the applicant may be subjected to poor prison conditions during a short period of detention, I am not satisfied that the prison conditions to which the applicant may be subject of themselves constitute serious harm as defined by the Act. Further, I am not satisfied the applicant will face a real chance of harm during any brief time spent in detention. On the

²³ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.41

²⁴ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.30

²⁵ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.18

²⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.27

²⁷ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.32

²⁸ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.32

evidence before me, I find the imposition of any fine (which can be paid in instalments²⁹), surety or guarantee would not of itself constitute serious harm. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being levelled against illegal departees with a profile such as the applicant. In the context of a significant number of Sri Lankan nationals being returned to Sri Lanka, and the absence of any profile that would elevate the penalty the applicant would face, I find there is not a real chance that the applicant would face imprisonment.

51. I am also satisfied that the provisions and penalties of the IAEA are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. I am further satisfied that the process and penalties that the applicant may face due to his illegal departure do not amount to serious harm. Accordingly, I am satisfied that any process or penalty the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act. In light of this I find that the applicant does not face a real chance of harm from the Sri Lankan authorities due to his illegal departure, travel to Australia or for any other reason.
52. After having regard to the applicant's claims individually and cumulatively, I find that he does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

53. 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

54. 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

55. 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.

²⁹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.32

56. I have concluded that the applicant is not of interest to the CID, or any other arm of the Sri Lankan government, on account of any actual or imputed LTTE links (including familial links) and does not face a real chance of harm on this basis. I have also concluded that the applicant does not face a real chance of harm for any other reason including his ethnicity, his previous place of residence, his time spent in Australia, his health, or for being a returning asylum seeker. Based on the same information, I find that the applicant does not have a real risk of suffering significant harm on return to Sri Lanka.
57. I have accepted that the applicant may face some level of societal discrimination as a Tamil or as a returnee asylum seeker. The country information confirms that the trend of monitoring Tamil civilians in day-to-day life has eased since 2009. Having considered the applicant's own circumstances, and evidence discussed above, I am not satisfied that any monitoring or societal discrimination the applicant may face amounts to significant harm as defined in the Act.
58. I have 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 the applicant may be subjected to poor prison conditions during any period of detention, country information confirms this is due to overcrowding, poor sanitation and lack of resources. 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, severe pain or suffering, or extreme humiliation. In these circumstances, the poor prison conditions to which the applicant may be subject do not of themselves constitute significant harm as defined by the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention.
59. While I accept the applicant 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 amounts to significant harm as defined by the Act.
60. 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

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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