



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07634

Date and time of decision: 28 January 2020 16:40:00
M Oakman, 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 of the Christian faith from Northern Province, Sri Lanka. He arrived in Australia [in] November 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 17 March 2017. On 22 November 2019 a delegate of the Minister (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. I have considered a new report on Sri Lanka by the Department of Foreign Affairs and Trade (DFAT) published on 4 November 2019.¹ This DFAT 2019 report contains current information on the situation for people with a profile similar to the applicant's in Sri Lanka. It replaces and updates the previous DFAT report on Sri Lanka, published on 23 May 2018, which was both before and relied upon by the delegate. The DFAT 2019 report has been specifically prepared for the purpose of assisting with determination of protection obligations in Australia. I am satisfied there are exceptional circumstances to justify considering this information.
4. On 23 December 2019 the IAA wrote to the applicant and invited him to comment on information from the 2019 DFAT Report which may be the reason, or part of the reason for affirming the decision of the delegate to refuse him a protection visa. The relevant information from the report was summarised for the applicant, and a full copy of the report was also sent to him. The invitation specified that he should respond by 20 January 2020. As at the date of this decision, the IAA has not received any response to that invitation.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He fears that if he is forced to return to Sri Lanka he would be seriously harmed because of his imputed political opinion. He fears this harm from the Sri Lankan Criminal Investigation Department (CID) and the Sri Lankan Army (SLA);
 - If he is returned to Sri Lanka, he is afraid that he will be subject to serious harm including being beaten and harmed;
 - He fears that he would be instantly recognised as he was well known within the CID community. He knows they are still watching his house, if he returns they will take him instantly and accuse him of leaving without permission. He fears for his life; and
 - There is also a picture that was taken by the smugglers when their boat stopped in [Country 1]. His friend posted this photo on [social media]. He fears that he will be identified.

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

Factual findings

Receiving country

6. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from the Northern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Christian.

Background

7. Based on the details supplied in the applicant's entry interview (January 2013) and his SHEV statement (March 2017) the applicant was born in [Village 1], Jaffna, Northern Province in [year] and lived there at different addresses until he left Sri Lanka in 2012. He also travelled to [Country 2] in 2011 and stayed for about four months for work. The applicant is not married and does not have children. He is in contact with his mother in Sri Lanka who lives in his aunt's house in [Village 1] (where the applicant also resided for a number of years while in Sri Lanka). He attended school between [years], completing his O-Levels. He worked in Sri Lanka as a self-employed fisherman from 2008 to 2010. He also has a business in Sri Lanka, with people working in and running the business for him, and the money from that business goes to support his grandmother.

Problems in Sri Lanka

8. In summary, as set out in his SHEV statement, the applicant claims he had problems with the CID. His father went missing in November 1990, when the applicant was [age]. His father went to work one day, he was a fisherman, and never came home. His uncle wanted to look for his father straight away but the Fishing Committee said it was too dangerous that day because of the fighting that was going on. The next day his uncle searched and found his father's boat with several holes. His uncle thinks his father was shot at, causing the boat to sink. His father's body was never found. The applicant does not think his father is in hiding, but believes the CID took him.
9. After his father went missing in 1990 they were initially troubling his mother and told him his father was in hiding. People in his area mostly supported the Liberation Tigers of Tamil Eelam (LTTE). He didn't really know about his father's involvement with the LTTE until he was 11 or 12 years old. He used to see people search their house, they would frequently come by and his mother told him they came because his father was supporting the LTTE. She told him that at times the CID or the SLA would come and impose a curfew to search the village for LTTE supporters. His father was mainly a fisherman but would if necessary transport LTTE supporters by boat to another area and help them escape. In or around December the CID came looking for his father and after that they came frequently, sometimes monthly. They would harass his mother and look through their home. In 1995 someone informed the Red Cross they had seen his father and from then the situation got worse. The CID began coming more frequently than before. They would come randomly at night. Although young, being [age] at the time, he recalls them holding a gun on his mother while they searched the house. They threatened her and accused her of harbouring and hiding his father.
10. In 2008 he started working as a fisherman. Many of the fishermen in the area supported the LTTE and assisted the LTTE with transportation. As he grew older he faced problems with the CID. In 2010 while he was working the CID would come to his home and accuse him and his

father of now being part of the LTTE and that he helped them. He denied it every time, and said he didn't know his father. When he denied it, the CID would accuse his family of being involved with the LTTE. They would come to his work and watch while he did things. They would make him get alcohol and other things for them, beating him if he refused.

11. In or around July 2010 the CID started to come more and more frequently. He cannot recall the amount of time they would take him for questioning, but it was a lot, sometimes twice a month or during the week. They would keep him for one to three days each time at a CID or EPDP camp. They would always keep him in a dark room and question him about whether he transported any LTTE supporters across the sea, did he bring anyone with him, and when he didn't answer they beat him. He was sent back home on condition he would have to come back if they asked. It seemed to him that every time there was a shooting or fight happened they would call him. Eventually it got worse and they would appear randomly and take him. He stopped going to work and started staying with an uncle so they wouldn't find him. However they would go to his house looking for him and harass his mother while he was at his uncle's place. When he arrived home they took him away again.
12. He decided to leave Sri Lanka because his life was always at risk, he would constantly be taken and beaten. In addition, the camps they took him to always had shootings and bombings near it. He felt like he was watched and everywhere he went they would come and find him. If he wasn't home they would harass his mother until she came home. Fearing he would be killed, he decided to leave for somewhere safe. He went and stayed with his aunt but the CID continued to harass him and his aunt was scared so he went and stayed with a priest. He wasn't safe with the Church so he left for [Country 2]. In 2011 while he was in [Country 2], the CID took his mother and accused her of sending her son outside of Sri Lanka to assist the LTTE. They threatened her and the applicant was scared for her so he was forced to return home. When he returned from [Country 2] in 2011 he was able to get back through the airport but when he returned to his aunt's house the CID questioned him. His mother was also staying at his aunt's house. They questioned him about why he left, insinuated he was following his father's work and continuing to assist the LTTE, and beat him. He was fearful the authorities would continue to harm him so he went back to live with the priest. The priest warned him he would continue to face problems so he left Sri Lanka in July 2012.
13. A photo was published of him waiting in a queue in [Country 1] in the [Country 1] media. The smugglers took a photo when their boat was stopped in [Country 1] and his friend posted it on [social media]. He fears the authorities may have seen the media photo or he might be identified from the [social media] posting. He also fears they may question him on return about his family's previous problems and he could be beaten, harmed or even killed. As he has been away so long and in different countries they may think he is linked and connected to former LTTE people there. Two weeks after he left Sri Lanka the CID came to his house and asked his mother about him. She cried and said she didn't know where he was or if he was even alive. Since then they would come frequently to ask about him. His mother says they don't come as often but they have people who sit outside his house sometimes and watch who comes in and out. In Australia he attended the LTTE Heroes' Day commemoration for Tamil people who have died.
14. The UN High Commissioner for Refugees (UNHCR) confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.² The Department of

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

Foreign Affairs and Trade (DFAT) reports that incidents of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, and assesses that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war.³ The Sri Lankan authorities possessed extensive powers to arbitrarily detain and arrest people under the *Emergency Regulations (Sri Lanka)* and under the *Prevention of Terrorism Act 1979 (Sri Lanka) (PTA)*, and those powers were in wide use by the authorities during the war and in its aftermath.⁴

15. In assessing the applicant's evidence I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin, including factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, or a lack of cohesive narration due to trauma. The applicant was consistent in both his entry interview and his SHEV statement about his father going missing in 1990 and that he and his mother faced problems from the CID as a result. However, I found the applicant's claims in relation to the adverse attention he received from the Sri Lankan authorities to be largely unconvincing.
16. In particular, I do not consider it credible that the CID would show such a high level of interest in the applicant from 2010 onwards, apparently based on his father's history of LTTE involvement, when the applicant was only a baby when his father disappeared and by 2010 had been missing for some 20 years. I also do not consider it credible that the CID could be sufficiently interested in the applicant to frequently come and detain, question and beat him, and continue to harass his mother and watch who entered his house for years after he left Sri Lanka, but never once arrested him, charged him or utilised their not inconsiderable powers under the PTA to subject him to long term detention. I also do not consider his ability to travel legally to [Country 2] and then return to Sri Lanka via the airport in 2011 to be consistent with this claimed level of adverse interest from the Sri Lanka authorities. Additionally, and while acknowledging the limitations of entry interviews, I do not consider it credible that the details in his SHEV statement are not consistent with the details he provided in his entry interview. For example, in his entry interview he claimed he was questioned and beaten by the CID in 2010 when he was asked about his missing father, but suggests it only happened once and he was not detained on that occasion. He also said in his entry interview that masked men chased him and the priest into a Bishop's office, but made no such claim in his SHEV statement. His address history is also inconsistent with his SHEV statement claims – showing, for example, that he was living at his aunty's place from 1995 and that he did not live with the priest until after he got back from [Country 2].
17. Given he was consistent about his father's disappearance in his entry interview and SHEV statement, and a copy of his father's fisherman's card was in his property when he arrived in Australia, I am prepared to accept that his father was a fisherman in Jaffna; his father assisted the LTTE by sometimes transporting LTTE supporters when the authorities were searching the area; and his father went missing in late 1990 after his boat was found shot up and sunk. Based on the country information about the general harassment and monitoring of Tamils in Sri Lanka during the war, I am also prepared to accept that during the 1990's the applicant's home was searched on occasion by the CID and SLA and his mother questioned about his missing father. However, given the credibility issues I have identified with his other evidence, I am not

³ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

⁴ Danish Immigration Service (DIS) "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; and US Department of State (USDOS), "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

satisfied that from about 2008 and particularly from 2010 onwards, the applicant was subjected to frequent harassment by the CID, including questioning, mistreatment and detention for one to three days at a time; and that his mother was harassed in his absence. It follows from rejecting these claims, that I am also not satisfied that he went to [Country 2] or moved in to the priest's place for the reasons claimed; and that the CID or anyone else has been enquiring about his whereabouts, or watching his house, since he left Sri Lanka in 2012. Given my general credibility concerns about his evidence, and in the absence of any other supporting evidence such as copies of the photos in question, I am also not satisfied that there was a photo of the applicant in the [Country 1] media or on a friend's [social media] account; nor am I satisfied that the applicant has attended a LTTE Heroes' Day commemoration in Australia.

Asylum Seeker

18. The applicant claims to have left Sri Lanka in about August 2012 to travel to Australia in a boat organised by a smuggler, first travelling to [Country 1] after engine problems and then on to Australia in November 2012. He left his passport in Sri Lanka. I find that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities. The applicant was one of a number of asylum seekers who were in immigration detention in early 2014 whose information was published by the Department due to a data breach on its website.⁵

Refugee assessment

19. 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

20. 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.

⁵ Protection visa decision record, 22 November 2019, page 6.

Tamil ethnicity, LTTE links and imputed political opinions

21. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.⁶ However, in 2015 there was a change of government with the election of President Sirisena and the Sri Lankan government focussed on post-conflict reconciliation, transitional justice, and governance and economic reform.⁷ The UK Home Office (UKHO) indicates the 2015 government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms to restrict executive powers, and took steps to restore the independence of the judiciary. In contrast to the approach of the previous Rajapaksa government, it also initiated a new, more open dialogue with the international community, including human rights organisations, and signalled its willingness to address long-standing allegations of past human rights abuses and violations.⁸
22. The Sirisena government has implemented a number of confidence-building measures to address grievances of the Tamil community. It has replaced military governors with civilians in the Northern and Eastern Provinces. The Office of National Unity and Reconciliation continues to coordinate government reconciliation efforts, promoting social integration, securing language rights for all Sri Lankans and supporting a healing process through a proposed Commission. During 2017 the Tamil National Alliance and the Defence Ministry initiated a formal dialogue on returning military held lands, and the army chief publicly committed to the military prosecuting personnel who committed criminal acts during and after the war.⁹ The United Nations High Commissioner for Human Rights observed in February 2016 that one of the most important long-term achievements in the past year had been the restoration of the legitimacy and independence of the Sri Lanka's Human Rights Commission (HRCSL). The UN noted in 2016 that the Sirisena government has created a political environment conducive to reforms, significant momentum had been achieved in the process of constitutional reform and it had taken important symbolic steps towards reconciliation and changing the majoritarian political culture.¹⁰ The US Department of State (USDOS) notes that the HRCSL generally operated independently of, and with a lack of interference from, the Sri Lankan government.¹¹
23. DFAT has reported for a number of years that Tamils face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. Some members of the Tamil community report discrimination in employment, particularly in relation to public sector employment. However, DFAT assesses that the limited Tamil appointments are largely the result of disrupted education because of the war and language constraints. DFAT states that Tamils have a substantial level of political influence and their inclusion in the political dialogue has increased since 2015. DFAT understands that Tamils do not receive unwarranted attention from the authorities because of their political involvement, and assesses that there are no barriers to Tamil political participation. As discussed above, many Tamils in the north and east reported being monitored, harassed, arrested or detained by security forces during the war. Members of the Tamil community in the north and east continue to claim the authorities monitor public gatherings and protests, and practise targeted surveillance and questioning of individuals and groups. DFAT assesses that the monitoring of Tamils in day to day life decreased significantly under the Sirisena government, but surveillance of Tamils in the north and east continues, particularly for those

⁶ USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

⁷ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

⁸ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

⁹ USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

¹⁰ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

¹¹ USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

associated with politically sensitive issues.¹² The UKHO fact finding visit to Sri Lanka in July 2016 identified a number of ongoing concerns for the Tamil population in relation to human rights and other issues, but a number of the sources they consulted conceded that there had been improvements for Tamils since the change of government in 2015.¹³ DFAT has reported for a number of years that the security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the war in 2009.¹⁴ There was an increase in security activity, including the use of roadblocks, security checkpoints and increased detention powers for the police and military, following the Easter 2019 bombings. However, such checkpoints have since been removed, the emergency regulations that gave increased detention powers have lapsed, and the heightened security posture in the north has subsequently eased.¹⁵

24. The applicant does not claim he or his family suffered any incidents of, or harm from, societal discrimination while in Sri Lanka. Similarly, the applicant is Christian but he has not claimed that he experienced any discrimination or harm in Sri Lanka, and makes no protection claims, on that account, including any fears arising from the Easter 2019 bombings. The country information indicates that although some monitoring still occurs, overall the monitoring and harassment of Tamils in the north and east has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation for Tamils generally has substantially improved in the years since the applicant left Sri Lanka.
25. I am not satisfied that the applicant's fear of harm in Sri Lanka, whether on account of his Tamil ethnicity, his LTTE links, for any imputed political opinions, or for any other reasons, is well-founded. DFAT confirms¹⁶ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE. While the UKHO also notes that persons with an actual or perceived significant involvement with the LTTE or in post-conflict Tamil separatism may be at risk, in its view simply being a Tamil does not give rise to protection claims nor, in general, does a person's past membership or connection to the LTTE.¹⁷
26. There are still reports of torture occurring in Sri Lanka since the change of government in 2015, including from UN Special Rapporteurs, the HRCSL, and other sources,¹⁸ although DFAT is unable to verify allegations of torture in Sri Lanka since 2016.¹⁹ Since 2015 the number of

¹² DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹³ UKHO, "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 Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112.

¹⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064 and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁷ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OGD6E7028826.

¹⁸ Including Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881; "Sri Lanka's Special Task Force", International Truth and Justice Project (ITJP), 23 April 2018, CIS7B83941895; United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; and 'Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka', UN Human Rights Council, 23 July 2018, CIS7B839419490.

¹⁹ DFAT, "UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

torture complaints has greatly reduced and white van abductions are seldom reported, but new cases of Tamil victims continue to emerge, there are reports of excessive use of force against civilians by police and security officials although the civilian authorities generally maintain effective control over the military.²⁰ DFAT has assessed for a number of years that Sri Lankans face a low risk of mistreatment that can amount to torture overall.²¹ The operation of the PTA was also suspended for a couple of years recently, although in that time it was still used in response to isolated incidents.²² The PTA was revived following the 2019 Easter bombings in Sri Lanka. Although the Sri Lanka government remains committed to the repeal and replacement of the PTA, such action has stalled following the events of Easter 2019.²³

27. I accept that the applicant and his family lived in an area that was controlled by the LTTE at times during the war. I accept that the applicant's father used to transport LTTE supporters in his boat; and his father went missing in 1990. I also accept that during the 1990's the CID and SLA searched his home and questioned his mother about his father. However, having regard to the information before me, I am not satisfied the applicant faces a real chance of harm now or in the reasonably foreseeable future, for a number of reasons. First, as the UKHO report notes, residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection. Secondly, although the Sri Lankan authorities questioned his mother and searched their home in relation to his missing father during the 1990's, on my findings the applicant was not himself ever harassed or questioned by the authorities about his father, nor otherwise subject to adverse attention from them. The applicant was a baby when his father disappeared and it is now some 30 years since that disappearance. Any interest the Sri Lanka authorities had in his father has long since dissipated over that lengthy period of time. Thirdly, it is now over seven years since the applicant left Sri Lanka for Australia and during that time the general situation and country conditions for Tamils in Sri Lanka have improved substantially. Nor, on my findings, have the authorities made any enquiries about the applicant since after he left Sri Lanka in 2012. Additionally, as the UKHO report notes, a person's past LTTE connections no longer generally gives rise to a need for protection.
28. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE.²⁴ The UKHO report indicates that although the Sri Lankan authorities may monitor overseas activities, they are only interested in significant involvement in pro-Tamil separatist diaspora activities and activity such as attending demonstrations overseas is not in itself evidence that a person will attract interest from the Sri Lankan authorities.²⁵ DFAT states that high profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and assesses that the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. DFAT understands some returnees have been subject to monitoring, including those with suspected LTTE links, but also states that Tamils who had failed to secure asylum in Australia and since returned to

²⁰ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OGD6E7028826; and USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

²¹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²² DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; "Assassination plot against Sumanithiran: Indictments to be served in Colombo High Court tomorrow", Sunday Observer, 29 July 2018, CXBB8A1DA36303; "CID permitted to detain Indian national under PTA", Daily Mirror, 27 September 2018, CXBB8A1DA36347; and "Country Information Request CI181005093018339 – Current status of PTA in Sri Lanka", DFAT, 4 November 2018, CXBB8A1DA37923.

²³ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²⁵ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OGD6E7028826.

the Northern Province told DFAT that they had no protection concerns, had not experienced harassment by the authorities nor received monitoring visits.²⁶ The applicant, on my findings, has not been involved in any pro-Tamil separatist or pro-LTTE diaspora activities in Australia. Nor does he claim he was involved in any such activities when he was in [Country 2] in 2011 or [Country 1] in 2012. I am not satisfied that the applicant's profile, which as discussed is not one that places him at a real chance of harm, will be increased by the fact that the applicant has spent more than eight years outside of Sri Lanka in [Country 2], [Country 1] and Australia, and he has claimed asylum outside of Sri Lanka. Nor am I satisfied, given his profile, there is a real chance that he will be monitored because of his time living outside Sri Lanka and/or as a Tamil asylum seeker, if returned.

29. The applicant does not have a profile that country information suggests he faces a real chance of harm, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political view, and/or because of his Tamil ethnicity. I do not consider that the Sri Lankan authorities had any adverse interest in the applicant when he left Sri Lanka in 2012, nor, given that the Sri Lankan authorities have not made any enquiries about the applicant's whereabouts after he left Sri Lanka, and the general harassment and monitoring of Tamils has significantly decreased since 2015, together with a person's past LTTE connections no longer generally being of interest, that he would be of any adverse interest to the Sri Lankan authorities, or that he faces a real chance of suffering harm, if he returned to Sri Lanka. I am not satisfied he faces a real chance of harm for reason of his ethnicity, background and for any real or imputed links to the LTTE.
30. I am not satisfied that the applicant will face a real chance of persecution on the basis of his links to the LTTE, for any imputed political opinions, and/or because of his Tamil ethnicity, if returned to Sri Lanka, now or in the reasonably foreseeable future.

Returning asylum seeker and illegal departure from Sri Lanka

31. I accept that, on his return to Sri Lanka, the applicant may be identified by the authorities as an asylum seeker who departed Sri Lanka illegally.
32. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. DFAT has been advised by the Sri Lankan government that no fare-paying passenger on a boat has been given a custodial sentence. A guilty plea attracts a fine, which can be paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court. Bail conditions are discretionary and can involve monthly reporting. Although fines are often low, the cumulative costs of attending court over a protracted period of time can be high. The Sri Lanka government claims no returnee from Australia has been charged under the PTA but DFAT cannot verify this claim.²⁷
33. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times the Terrorism Investigation Department, who check returnees' travel documents and identity information against immigration databases, intelligence

²⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²⁷ Ibid.

databases and the records of outstanding criminal matters. Processing can take several hours and returnees are processed as a group and individuals have to remain until all returnees are processed.²⁸

34. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.²⁹
35. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted, photographed and have a statement taken by the police. If former LTTE members, the police will further enquire about their activities abroad. They are transported by police 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. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours after arrival and should a magistrate not be available before this time, for example because of a weekend or public holiday, those charged may be detained for up to two days in an airport holding cell.³⁰
36. I accept that the applicant may be considered a failed Tamil asylum seeker on his return. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and is not aware of mistreatment of returnees during processing at the airport. There is country information containing reports of some returnees being tortured.³¹ DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport or on their return home. However, on my findings, the applicant is not such a person. The applicant was affected by the 2014 data breach, however, the information released would only confirm that he had been detained in Australia for arriving without a visa and that he had sought asylum in Australia,³² which the Sri Lankan authorities would in any event be aware of because of the circumstances of his return to Sri Lanka from Australia. On that basis, I am not satisfied that the data breach increases the applicant's profile with the Sri Lanka authorities or otherwise places him at risk, if returned to Sri Lanka.
37. Taking into account my findings about his profile, including the data breach and the country information, I am not satisfied that the applicant will be at risk of adverse attention or that he

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Including "Situation Update: Sri Lanka Tamil Returnees", COIS, 5 September 2017, CRF00C22F109; "LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)", Immigration and Refugee Board of Canada, 10 November 2017, OG020B81694; UKHO, "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 Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112; ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881; "Sri Lanka: COI Compilation", Austrian Centre for Country of Origin & Asylum Research and Documentation, 31 December 2016, CIS38A80123251; and "TID arrests another Tamil man on return from abroad – VIDEO", Ceylon News, 19 May 2016, CX6A26A6E4702.

³² Protection visa decision record, 22 November 2019, page 6.

faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether when processed at the airport or on his return home.

38. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. I have found that the applicant's profile is not one that places him at a real chance of suffering harm. The applicant is from Jaffna in the Northern Province, and I am satisfied that this is the area to which he will return. As discussed above, I am not satisfied that with his profile there is a real chance that he will be monitored because of his absence from Sri Lanka, or as a failed Tamil asylum seeker, if returned.
39. DFAT assesses that refugees and returnees may face re-integration issues in relation to employment and accommodation issues. DFAT states some refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities, and that continued surveillance of returnees can contribute to a sense of mistrust.³³
40. The applicant worked for a number of years in Sri Lanka as a self-employed fisherman. He has a business in Sri Lanka, with people working in and running the business for him. He attended school up to his O-levels. He is a relatively young man and has shown himself to be resourceful and generally resilient by adapting to life outside of Sri Lanka in Australia. The applicant will be returning to an area he is familiar with and where some of his family reside. He has remained in contact with his mother in Sri Lanka. Given those factors, I am satisfied that the applicant will be able to re-establish himself in the Northern Province without suffering harm in relation to any housing and employment difficulties. I accept that he may face some social stigma on his return as a returned/failed asylum seeker. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
41. I am not satisfied that there is a real chance that the applicant would face serious harm on his return as a failed Tamil asylum seeker. I accept that the applicant may be processed under the IE Act at the airport and may face court action and a fine under the IE Act as well. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.³⁴ In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the processing, investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
42. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a returned Tamil asylum seeker who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
43. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

³³ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

³⁴ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

Refugee: conclusion

44. 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

45. 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

46. 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.

47. I accept that, if he returns to Sri Lanka, while re-integrating the applicant may face some level of societal discrimination as a returned asylum seeker, in the form of social stigma. As acknowledged above social stigmas may at times be hurtful, however, I am not satisfied on the evidence that any hurt he may suffer from social stigma will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigma may be hurtful or harassing but it does not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by the applicant as a returned asylum seeker amounts to significant harm as defined in ss.36(2A) and 5 of the Act.

48. I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, taking into account his profile and history, if he is returned to Sri Lanka. As 'real chance' and 'real risk' involve the same standard,³⁵ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.

49. However, I accept that the applicant may be subject to investigation and processing under the IE Act at the airport and may also face possible action under the IE Act for his illegal departure. DFAT advises that, once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed. Returnees may be questioned and in custody for up to 24 hours at the airport and, subject to the unavailability of a Magistrate over a weekend or on a public holiday, may be detained in the airport holding cells for up to two days before they are taken to court. At court he may be subject to a bail surety or the magistrate may require a bail guarantor, in which case he may have to wait for a family member to attend court. If on bail the applicant may have to attend court, and/or report to the police, on a number of occasions over time. A fine may be imposed. DFAT states

³⁵ *MIAC v SZQRB* (2013) 210 FCR 505.

that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, it is not aware of returnees being mistreated during processing at the airport and assesses that Sri Lankans face a low risk of mistreatment that can amount to torture overall. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of his illegal departure. The evidence does not suggest that the treatment and penalties the applicant may be subject to because of his illegal departure are intended to inflict pain or suffering, severe pain or suffering, or are intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis, or when considered in combination with any treatment he may experience as a returned asylum seeker.

50. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.

51. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

Complementary protection: conclusion

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

Decision

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.