



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01077

Date and time of decision: 27 April 2017 16:26:00
Denny Hughes, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He applied for a protection visa [in] April 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] October 2016.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant made one submission to the IAA [in] November 2016. I have considered the applicant's submissions in terms of his concerns with the delegate's decision. I am satisfied this is now new information and I have had regard to those matters in this review.
4. The also includes reference to new information that was not before the delegate. Specifically, the applicant has submitted a Colombo Gazette article from April 2016, a First Post article from May 2016, and a May 2014 article from the News First website. Through these submissions, the applicant contends there is ample evidence to suggest that the Sri Lankan authorities are still tracking down LTTE suspects and harming them. He submits that the new information clearly shows that if he is returned to Sri Lanka he will be in danger and he urges the IAA to consider these matters for the purpose of the review.
5. All three articles were available prior to the visa refusal decision. I am not satisfied this information was not, and could not have been, provided to the Minister before the delegate made their decision. As general country information, I am also satisfied it is not credible personal information. I further note this information is consistent with other country information already before me that the government continues to pursue persons with certain LTTE or separatist profiles, and which I find to be uncontroversial. Weighing everything before me, I am not satisfied there are exceptional circumstances to justify consideration of the new information, and I have not considered the information pursuant to s.473DD of the Act.
6. In making this decision I have had regard to new information, specifically new country information regarding Tamils, Muslims, persons from former LTTE areas, and returnees to Sri Lanka (information not specifically about the applicant but about classes of persons of which the applicant is a member), from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017. This report was published after the delegate's decision and the delegate relied on the 18 December 2015 DFAT report for Sri Lanka which the 2017 report has updated. I am satisfied there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

7. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - He was born in [town 1].

- He was forced to leave Sri Lanka because he had many problems with the police and the Sri Lankan Army. He had many problems because the police and army believed he was involved with the LTTE because of where he was born. He was arrested many times and interrogated. In 2006 he witnessed [number of] people being killed by the Special Task Force (STF). Between 2008 and 2012, the applicant was charged and convicted of bogus crimes, and jailed twice.
- In 2012, the authorities (the CID/Army or STF) detained the applicant. They took him into the jungle and interrogated him. They accused him of transporting weapons for the LTTE. He was interrogated for [number] hours. They did not harm him, but they threatened him with their guns and he was fearful they would kill him. He was tied to a tree and left there without any food or water for three days. He was rescued by some [people].
- On return to Sri Lanka, he fears he will be harmed by the Sri Lankan Army and CID/Police. They harm him because many Sinhalese soldiers were killed during the war. He claims that ill feelings are still present among the soldiers. If he goes back he will be targeted because of the place he was born and raised. If he goes back they will know he is from [town 1] and they will think he was involved with the LTTE. He claims many people had family who were killed by the LTTE and they still hold a grudge.
- If he is forced to return to Sri Lanka he fears the same things will start happening again, that he will be arrested or killed for things he has not done. He believes the authorities intended to kill him by leaving him tied to the tree. He fears that if they found out he was alive they would have killed him.
- He cannot obtain protection as he fears harm from the authorities. He cannot relocate as Sri Lanka is a small island. If he relocated he would need to register with the authorities and people will identify him as from [town 1]. As soon as they see that, the news will circulate about where he is from and he would not be safe.

Refugee assessment

8. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

9. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion

- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
10. On the basis of the documentary and oral evidence before me I accept the applicant is a Tamil Muslim born in [town 1] in the north of Sri Lanka. I also accept he is married and has [number] children.
 11. I accept the applicant's family left Sri Lanka for India in 1990 due to hardship and intense fighting caused by the civil war in his home area. I accept he and his family returned in around 1992, and they moved to [town 2], spending some time in refugee camps. I also accept he moved to [town 3] in Ampara district in the east of Sri Lanka in/or around the year 2000.
 12. The applicant has claimed that he has never had anything to do with the LTTE, nor did he have any association with the group. Nor did any of his family members or friends. I accept this is the case.
 13. The applicant claims he was an [occupation] and he travelled regularly between [location], [town 2] and Colombo for work between 1996 and 2000. He claims that during this period he was regularly detained and interrogated by the army/authorities. He claims he was singled out because he was from [town 1] and he was suspected of LTTE connections. He was sometimes made to clean toilets and other places at the checkpoint. He was fearful he would be harmed or shot. He was typically detained for 2 to 3 hours, during which time he was asked questions. He stressed that he was never physically harmed during these periods.
 14. The applicant claims that he moved to [town 3] in or around 2000 and lived there until 2012. He found employment as a [occupation]. The area had a large Sinhalese population and he claims he would be stared at and questioned as to why he had come to live there. He said people were very suspicious of him as a Tamil, and they often made unwanted remarks or pretended they were going to hit him, however they did not physically harm him.
 15. In addition to the discrimination and harassment he experienced from Sinhalese locals, the applicant claimed in his written statement that he was arrested by the police between [number] times, despite the fact that he had done nothing wrong. He related two specific incidents. The first where he was accused of stealing a [vehicle]. He was threatened by the police and forced to sign a form indicating his involvement. He was convicted and jailed. He claims he was falsely accused by the [relative] of a Sinhalese police officer and that he was targeted because he was from [town 1], a Tamil and had no community support. At the interview, he claimed he was jailed for about a week.
 16. The second incident followed a disagreement with a member of the [official agency] over payment for [work]. The applicant asked for money for [work] and was reluctant to return the keys to the man when an argument broke out. He claimed that people cannot speak out against the police and the army, and they often do not pay people for their services. By asking for money, he made the man from the [official agency] angry.
 17. Two days later he was taken into custody by two non-uniformed men. He was handcuffed in a police jeep and taken to the police station. He was asked to pay money for his release. He said he could not give them money. He was again forced to sign a document. He was then charged

with [a crime]. He was sentenced to [number] days, before his wife negotiated his release through a lawyer.

18. The applicant did not detail the other claimed arrests ([number] occasions), but I am satisfied based on his oral evidence at the visa interview that in terms of those other incidents, he was never formally arrested, but would be questioned at home or asked to come to the police station and questioned in relation to other matters. I am satisfied he faced no other detention, charge or conviction during these periods.
19. While I found aspects of these claims lacking in detail, I nevertheless found his evidence broadly consistent and free from embellishment. Indeed, I find it significant that in several instances in his evidence the applicant has emphasised that he was not physically harmed during detentions. I also find his claims plausible, in particular when considered against the country information before me.
20. That country information is quite clear about the systematic and discriminatory treatment faced by Tamils from the Sri Lankan Army, other Sri Lankan authorities, paramilitary groups, the Sinhalese community, but also the LTTE, during the civil war and in its aftermath.¹ There is evidence of the harassment and mistreatment of Tamils through arbitrary detentions, questioning, interrogations, monitoring, forced and unpaid labour, corruption and misuse of power by the authorities, fabricated charges, societal and official discrimination, and other forms of systematic and discriminatory harm.
21. Having regard to that information, I accept he likely encountered arbitrary detention, harassment and interrogation and forced to labour (such as cleaning toilets) while travelling through checkpoints during 1996 and 2000. I accept when he moved to [town 3] he faced societal discrimination from the Sinhalese population. I also accept that he was likely subjected to questioning and monitoring by the authorities and required to attend the local police station for questioning. All of this is entirely consistent and plausible on the country information before me, but I also find it significant that he was never detained for any extended period on suspicion of LTTE involvement, subject to serious abuse, torture or other interrogation methods, or otherwise physically harmed by the authorities. I have weighed that against his claims to have an adverse profile with the authorities.
22. In terms of the two incidents that resulted in the applicant being charged and jailed for periods of [number of days], I have concerns about the applicant's ability to provide evidence, even generally, about which years these events occurred. I also found it unclear how the applicant was so promptly charged, convicted and jailed. The applicant appeared to indicate that he was detained on remand for one day, attended court the next day, before then being jailed. The country information before me indicates that the legal and judicial process in Sri Lanka is beset by long delays due to lengthy legal procedures, the number of detainees, qualified police, prosecutors and judges.² That is entirely at odds with the applicant's claims which suggest his charges were dealt with swiftly. Nevertheless, there is country information before me about false and fabricated charges, official discrimination against Tamils, and corruption within the authorities. In that context, I find it is plausible that he was forced to confess to false charges,

¹ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

² DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

and that his signed confession may have been dealt with summarily (and swiftly) by the courts, particularly if it was a lower end offence. On balance, I accept that these two events occurred, and that these were corrupt and serious abuses of power. However, I do not accept he had any ongoing criminal or other adverse profile with the police after he was released from jail, or that he was at any continued threat from his past convictions.

23. The applicant was vague about the details of when these events happened. As noted above, the applicant was asked when he was detained. He said he did not know what date, but he believed the incident with the man from the [official agency] (possession charges) happened in 2008. He was asked whether anything else happened to him, and he said around the same time, between 2008 and 2012, he was accused of stealing a [vehicle]. He was asked whether this occurred before the possession charges. He confirmed it was after, but then said he was not exactly sure.
24. The applicant was asked whether he had any troubles leaving Sri Lanka when he travelled overseas to work in [Country 1] between 2009 and 2010. He explained that by that time he had served time for the crimes he had been convicted of and there were no pending charges against him. He then varied that evidence and said that he did not exactly remember whether the [vehicle] incident was before or after he went to [Country 1].
25. I found his evidence in relation to the timing of these charges to be unconvincing and concerning. Given the significance of the events, and the fact that he was jailed on two occasions, I do not accept he would not recall the timing of those events in terms of which years they occurred. I consider he has been deliberately vague about the dates of these events to raise questions about whether he had a profile with the police. I am satisfied the [criminal] charges occurred in 2008, prior to his departure from the country. In terms of the later charge and conviction ([vehicle] theft), I accept it occurred, but weighing all his evidence, I do not accept it occurred after he returned from [Country 1]. I find instead that it took place in 2008 or 2009 prior to his departure from the country.
26. I note that despite having convictions, he was able to leave the country in 2009 and return in 2010 using a valid passport. This indicates to me that he either had no adverse or ongoing criminal history, or that whatever criminal history or profile he had was very low level and not of significance to the authorities.
27. I am satisfied and accept that he may have been questioned by the authorities/police on other occasions after he returned to the country in 2010, but I find that he was never again arrested, charged, convicted or jailed, whether on fabricated charges or otherwise. I am satisfied he has no outstanding charges, nor any other adverse criminal or security profile with the police that would put him at any chance or risk of harm on return to the country.
28. In addition to these claims, the applicant claims he was witness to a massacre near [town 3] in 2006. The applicant has provided documents in support of these claims. The first is a form of typed attestation from the applicant that appears to have been certified by the [leader] of a mosque in [town 3]. It details the applicant's account of the 2006 killings. Another document is from the [town 3] Police Station confirming the killing of a man [in] September 2006 by the LTTE, and indicates that a police report was made [in] September 2006, and a case filed in the [town 3] Court.
29. I note the police report differs from the applicant's account in that he claims the crimes were perpetrated by the Sri Lankan security forces, while the police report indicates that the LTTE was responsible. That discrepancy is not insignificant. However, if the Sri Lankan authorities

were involved in the attack, I find it plausible that the authorities would seek to blame the LTTE for the attacks, and vice versa. I am prepared to give no weight to that discrepancy.

30. A more significant issue I have with the documents is the applicant's own written attestation, which indicates that he and his [wife's relative] were arrested by the security forces. He claims he escaped, but the other man (his wife's relative) was killed. This is a significant difference from his oral evidence and his written visa statement in which he claims he was never arrested, but that he escaped and the authorities did not see his face. This discrepancy gives me some concern that the applicant has either fabricated or embellished his involvement in this incident. However, such a discrepancy could equally be attributed to time, trauma or a translation error.
31. Ultimately, I accept that his wife's relative was killed in this incident, and I am prepared to accept the applicant witnessed the event from a distance, but I do not accept that he was caught or arrested. In this respect, I give significant weight to his own evidence that his face was not seen and that other than the trauma of witnessing such an attack, he did not face any consequences from witnessing the attack in the six years he remained in his home area. If the applicant had been identified by the perpetrators, I do not accept he would have been able to avoid being targeted or that he would have stayed in that area. In this regard, I also give significant weight to his ability to later obtain a passport in Sri Lanka, as well as travel to the [country] and return to Sri Lanka without interference from the authorities. This strongly indicates to me that he did not have any adverse profile with the authorities from events that preceded his departure, and that he was not identified as a witness of the 2006 attacks.
32. The applicant did not claim that he feared any consequence from the STF or the Sri Lankan authorities (or the LTTE) from witnessing this attack if he returned to Sri Lanka. I am satisfied the applicant was not identified and there is no real chance of him being identified or targeted in connection with these crimes if he were returned to Sri Lanka.
33. The applicant claims to have been detained by the Sri Lankan authorities in 2012 on suspicion of LTTE involvement. He was abducted, interrogated, intimidated, and threatened, before being abandoned and left for dead. He claims he was detained on suspicion of transporting weapons or LTTE involvement.
34. I accept the applicant was from [town 1], but he left that area as a youth and had lived in [town 3] since 2000 until 2012. During that time, he was regularly questioned by the authorities, but was never detained on suspicion of LTTE activities, nor had he faced any serious mistreatment from the army or police for these reasons. The applicant had never had any LTTE involvement, nor did any of his friends or family. He had obtained a passport, and travelled in and outside of the country without difficulty, although he did claim he was questioned on return from Colombo to his home area in 2010.
35. The applicant had no obvious profile, and I can see no clear reason why the authorities would have taken an interest in him for the first time in 2012. The applicant's only "profile" was as a person from a former LTTE area ([town 1]), however by 2012 the UNHCR assessed that all persons living in such areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives, and that originating from an area that was previously controlled by the LTTE did not in itself result in a

need for international protection.³ This strongly undermines his claim to have been targetted on suspicion of LTTE involvement in 2012.

36. Furthermore, the country information indicates that persons found to have been involved or connected to the LTTE by the authorities were vulnerable to serious mistreatment, torture, death or disappearance, or more formal processes such as rehabilitation or imprisonment. This is at odds with the treatment the applicant claims he faced in 2012.
37. Having regard to the country information cited above about questioning and monitoring, it is entirely plausible that the army or police would have sought to detain and question the applicant about possible LTTE involvement in 2012. However, I find it difficult to accept that if the authorities seriously considered the applicant had links to the LTTE that he would only have been questioned for a few hours, mistreated and then abandoned.
38. I am prepared to accept these events did occur, and that abandoning the applicant was a callous and cruel act, however I am not satisfied that the authorities concluded the applicant had any LTTE links or that their intention was to kill him. If it were otherwise, I find he would have been detained and interrogated, possibly tortured, imprisoned or placed in rehabilitation, or even killed. If they had intended to kill the applicant, I consider the authorities would have unambiguously done so and sought to conceal that killing in some way. Instead, I find that the authorities determined the applicant had no profile of interest, but decided to let him live, albeit in a cruel and dangerous way. Given these findings, I am satisfied the applicant would face no chance or risk of being harmed in connection with these events.
39. Looking to his profile more broadly, I again note the applicant had no involvement with the LTTE, nor did any of his family members or friends. He does claim that because he was from a former LTTE area ([town 1]) he was suspected of being associated with the LTTE and was regularly set aside at checkpoints for additional questioning and detention. When he moved to [town 3] he also claims he was harassed, questioned, monitored and required to attend to the police station on a number of occasions. I again note that, other than the 2012 incident, the applicant claims that he was never subject to any physical harm or extended detention on LTTE suspicion (the jailing incidents related to fabricated criminal charges).
40. Effectively, the applicant's only profile or link to the LTTE is the fact that he is from [town 1]. As noted above, according to the current UNHCR guidelines, being of Tamil ethnicity alone, or originating from an area that was previously controlled by the LTTE would not result in a need for international refugee protection.⁴
41. In 2016, the UK Home Office assessed that the Sri Lankan government is still sensitive to the potential re-emergence of the LTTE, which is consistent with comments made by the applicant in his submission, however the report did not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor where they originate or reside in an area that was previously controlled by the LTTE. The information before me also does not indicate that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age or place of origin.⁵ The UK Home Office report also states that even a person who evidences past membership or connection to the

³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁵ UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

LTTE would not warrant international protection unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport.⁶

42. In this regard, I am satisfied the applicant has never had such a role or connection, whether directly or through his friends or family, and there is no indication or evidence to suggest such a role would be imputed to him, or that he would be at risk on this basis. Given his limited profile, I have no reason or basis to believe that he is on any official stop list.
43. In terms of his past detentions at checkpoints, I have accepted this occurred, but having regard to his lack of any profile, and the country information before me, I am satisfied there is no real chance of him being monitored, detained or interrogated at checkpoints or at his home if he returned to Sri Lanka.
44. I have considered whether the applicant could be the victim of fabricated charges or police corruption if he returned to Sri Lanka in the reasonably foreseeable future. While the country information clearly indicated corruption and impunity within the Sri Lankan authorities in the past, the country has also seen significant changes since the end of the civil war in 2009, and particularly so following the change of government and the commencement of the Sirisena presidency in January 2015.
45. The country information indicates the current government has taken active steps to address corruption within the Sri Lankan authorities. The Sirisena government, which campaigned on an anti-corruption platform, has established a Presidential commission headed by a High Court Justice to look into numerous allegations of corruption and misuse of power.⁷ There are other positive indications, such as government initiatives aimed at increasing the Tamil presence in the police and armed forces,⁸ and mechanisms aimed at addressing Tamil issues with the police and other authorities, such as formal complaint processes.⁹ DFAT also advises that since the Human Rights Commission of Sri Lanka began random visits to police stations in 2010-11, there has been a significant drop in complaints about illegal detention or abuse. More broadly, DFAT indicated that many Tamils, particularly in the north and east of the country, reported being monitored, harassed, arrested or detained by security forces under the previous governments, but it now assesses that monitoring and harassment of Tamils has decreased under the Sirisena government and, on a day-to-day basis, the Tamil community feels more confident to refuse or question the motives of monitoring activities undertaken by authorities, if such activities occur.¹⁰
46. In summary, I have accepted he was harassed and questioned by the police and other authorities on multiple occasions, and that two fabricated charges were levelled against him in 2008 and 2009. However, I am satisfied the applicant has no ongoing criminal record or profile that puts him at risk on return. In this regard, I again give weight to his ability to obtain a passport and travel in and out of the country in 2009 and 2010 after the convictions. Furthermore, given the lack of any specific targeting of the applicant in the years that followed the convictions (other than questioning), and the current government's measures to deal with official corruption discuss above, I find there is no real chance that the applicant would be seriously harmed in a similar way in the future, nor is there any real chance of him being

⁶ UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

⁸ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

¹⁰ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

targetted or seriously harmed in connection with his past charges and convictions if he returns to the country.

47. In terms of his ethnicity and origin from a former LTTE area, I have accepted the applicant was the victim of discrimination from Sinhalese in the past. In relation to discrimination, the US Department of State suggests that Tamils maintain there is systematic discrimination in university education, government employment, other matters controlled by the government, land ownership and surveillance and harassment. Significantly, though, both the US Department of State and DFAT refer to a number of positive developments for Tamils in the country politically and socially, as well as government initiatives to address these concerns. Those improvements are evidenced by indicators such as decreases in monitoring and harassment of Tamil civilians, looser restrictions on movement in the country and a greater representation for Tamils in all levels of government.¹¹ I accept there remains a degree of societal and official discrimination, and questioning and monitoring in the country of Tamils, but having regard to the information before me I am satisfied it is low level, that its incidence continues to reduce, and that if it did occur, it would not constitute serious harm, whether separately or cumulatively. I find there is not a real chance of the applicant being seriously harmed for reasons his ethnicity, or as a Tamil from a former LTTE area in [town 1].
48. The applicant contended during the interview that the country information does not reflect the reality for Tamils living in the country. I accept he has very difficult experiences in the past within the country, but in view of the above country information about the improved situation for Tamils and the reduction of questioning and detention of ordinary Tamils, including those from former-LTTE areas in the north and east of Sri Lanka, and having regard to my assessment of the applicant's low profile, I find there is not a real chance of the applicant being harmed by the Sri Lankan authorities, the army or police, or any other group or person (including Sinhalese) on the basis of his ethnicity, for any actual or imputed political opinion or profile connected to the LTTE, or any past history of charges or convictions he may have faced.
49. The applicant did not claim to fear harm on the basis of Muslim faith, however I have assessed that as part of his claims, in particular given the 2006 massacre involved Tamil Muslims.
50. Muslims are the third largest religious group (and are also regarded as an ethnic group) in Sri Lanka. Muslims are represented in the parliament, and several Muslims hold cabinet and ministerial positions. DFAT assesses official discrimination on the basis of religion is rare as there are no official laws or policies that discriminate on that basis. DFAT advises that it is aware of reports that the former Rajapaksa Government sanctioned religious discrimination, through the support of an extremist Buddhist group Bodu Bala Sena (BBS), the most serious recent example being the Aluthgama Riots which occurred between Buddhists and Muslims in 2014.¹²
51. DFAT assesses that, given the size of the Muslim population in Sri Lanka and the relatively low number of incidents of violence, there is a low risk of political or religious violence for Muslims in Sri Lanka. DFAT further assesses that, like other religious groups, Muslims in Sri Lanka are generally able to practise their faith freely. However, the risk of harassment or violence increases where practitioners attempt to proselytise/convert others. The applicant has not

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

claimed to have been engaged in religious conversion or proselytisation, and I find he is not at risk on this basis.¹³

52. While there is little or no evidence of official discrimination, the US Department of State indicates that Muslims are viewed as the least assimilated of all the country's many ethnic and religious communities. They are also frequently the target of criticism, especially by Sinhalese, for their distinct cultural practices in dress, food, and lifestyle. Nevertheless, the reduction in religious tensions and violence described above means that DFAT assesses there is a low risk of societal discrimination against Sri Lankan Muslims.¹⁴
53. I accept there have been instances of violent incidents directed towards Muslims in the country. However, I also note that these incidents remain relatively isolated, that the BBS has declined in activity since the change of government, and the current government's reform agenda includes a renewed commitment to investigate and prosecute officials implicated in criminal activity or responsible for inciting religiously based violence.¹⁵ While I accept the applicant may experience some low level societal discrimination, I am satisfied that there is not a real chance of the applicant being seriously harmed on the basis of his religion, whether discretely or in connection with his ethnicity as a Tamil.
54. I have also considered whether the applicant would be at risk as a returnee, as a person who left the country illegally, or as someone who sought asylum in Australia.
55. While the applicant previously held a valid passport, I accept that he departed the country illegally under Sri Lankan law. I also accept on the information before me, including the way he departed the country, that there is a possibility he would be assessed by the Sri Lankan authorities as having sought asylum in Australia.
56. In making this assessment, I have had regard to the previous and most recent DFAT advice. DFAT has assessed the risk of torture or mistreatment for the majority of returning Tamils is low, including for those suspected of offences under the Immigrants and Emigrants Act (the I&E Act). On arrival in Sri Lanka, returnees, including those on charter flights from Australia, are processed by different agencies, including the Department of Immigration and Emigration, the State Intelligence Service and the CID. Returnees are processed en masse, and individuals cannot exit the airport until all returnees have been processed, which may take several hours due to administrative processes and staffing constraints at the airport.¹⁶
57. DFAT advice is that those returning to Sri Lanka on temporary travel documents are subject to police investigations to confirm the person's identity, to address 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, contacting the person's claimed home area or town police, and contacting the person's claimed neighbours and family, and checking criminal and court records. Returnees will also be checked against the authorities' sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases.¹⁷

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

¹⁵ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

58. Through that processing, I am satisfied the authorities will acquire a full history of the applicant's past, including his low level criminal convictions. I am satisfied it would be determined that he has no LTTE links, outstanding criminal matters, or any other adverse profile of interest to the authorities, as I am satisfied was the case when he travelled between 2009 and 2010. Given my earlier findings, if he were to return to the country, I find that he would again be assessed as having no adverse profile.
59. Given his low profile, I am also satisfied he would not be listed on any stop or watch lists. I am further satisfied he would not be identified as someone trying to conceal their identity, or who has outstanding court orders/arrest warrants or a criminal/terrorist background.
60. Nevertheless, given his illegal departure, I accept the applicant may be charged under the I&E Act by the Sri Lankan police. As part of this process, most returnees will be fingerprinted and photographed, then transported to the nearest Magistrates Court at the first available opportunity. However, returnees may be required to remain in police custody at the CID airport office for up to 24 hours. If a Magistrate is not available before this time, such as on a weekend or public holiday, he may be held at a nearby prison. The US Department of State reports that general prison conditions in Sri Lanka are poor due to gross overcrowding and poor sanitary conditions.¹⁸ DFAT reports fines rather than custodial sentences are issued to persons who were passengers on a people smuggling boat. The fines are issued as a deterrent and the amount of the fine varies on a case-by-case basis and is payable by instalment.¹⁹
61. The reports indicate that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, although DFAT understands that conditions are rarely applied, and a person will only need to return to court when the case against them is being heard. There is no evidence before me that the applicant would be unable to have a family member attend to act as guarantor if required, or that he would be unable to pay any fine.
62. DFAT assesses that ordinary passengers, such as the applicant, are generally viewed as victims of people smugglers, rather than persons that have committed a crime.²⁰
63. According to DFAT, through 2008 and 2015, over 1,500 asylum seekers were returned from Australia to Sri Lanka as well as thousands from the US, Canada, the UK and other European countries, the majority of which have been Tamil. Of the thousands of returnees who have returned since 2009 there have been relatively few allegations of torture or mistreatment. I accept there have been credible risks to persons with certain profiles returning to the country (principally LTTE, separatist or other political connections),²¹ however I am not satisfied these reports are indicative of the circumstances that would be faced by the applicant upon return, given his low profile. In that regard, I note the most recent DFAT report assesses the risk of

¹⁸ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

²¹ Human Rights Watch (HRW), "United Kingdom Halt deportation flight to Sri Lanka", 15 September 2012, CX311600; Tamils Against Genocide, "Returnees at Risk: Detention and Torture in Sri Lanka", 1 September 2012, CIS24826.

torture or mistreatment for the majority of returnees as low, and indicates that its incidence continues to reduce.²²

64. DFAT advice is that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion, and they are not subject to mistreatment during processing.²³ The information before me does not indicate that having lived outside Sri Lanka for several years, departing illegally, or seeking asylum in Australia, would lead the authorities to impute the applicant with an LTTE connection or other adverse profile. I am satisfied he has no such profile, nor would one be imputed to him on return.
65. On the information before me, I am also satisfied the applicant was not involved in people smuggling, but was merely a passenger. Based on country information I find that the applicant may be detained and questioned at the airport for up to 24 hours, and that the detention or processing time may be in a Sri Lankan prison. Given his low profile, and the country information about the circumstances in which a person may be detained, I find the prospect of the applicant being detained in a prison is likely remote. Nevertheless, if it were to occur, for the following reasons I am not satisfied it would constitute serious harm.²⁴
66. Whether a loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty. I accept the applicant has had some past traumatic experiences, however, he has no obvious health or other vulnerabilities and I have found he has no adverse profile. In that context, should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. I accept any detention would be stressful and challenging, however even having regard to the generally poor prison conditions, I do not consider that such a period of detention would constitute the necessary level of threat to his life or liberty, or to significant physical harassment or ill treatment under s.5J(5) of the Act, or that it would otherwise amount to serious harm for the applicant.
67. I accept there is a real chance he may be detained en masse with other returnees for several hours at the airport, but given his limited profile, I am satisfied this will be temporary and he will face no additional detention, penalty, or fine beyond that of other low profile returnees. I do not consider any such detention, questioning or processing of the applicant by the authorities at the airport on arrival, or the imposition of any fine, surety or penalty under the I&E Act, would constitute serious harm under the Act, or that there is any real chance of him facing serious harm in this context.
68. On a separate and independent basis, as noted above the country information indicates that all persons who depart Sri Lanka illegally are subject to the I&E Act on return. The information before me does not indicate that the I&E Act is discriminatory on its terms, that the law is applied in a discriminatory manner or that it is selectively enforced. I am also satisfied there is a legitimate object to these laws, being to regulate the movement of Sri Lankan and other nationals in and outside the country. Accordingly, I am satisfied that any investigation, prosecution and punishment of the applicant under the I&E Act would be the result of a law of general application and would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

²² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

²³ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

²⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

69. Viewed together, I am satisfied there is no real chance of the applicant facing serious harm as a returnee, as a former asylum seeker, on the basis of his limited profile, or as a person who departed the country in breach of Sri Lankan law.

Refugee: conclusion

70. Weighing all the information before me, I accept that as a Tamil male from a former LTTE area, or as a Tamil male living in the east of the country, he may face some low level discrimination, questioning and/or monitoring by the authorities on return. I also accept that as a returnee who departed the country illegally he may be detained, questioned by the authorities, processed and potentially fined. Whether separately or cumulatively, I am satisfied this would not constitute serious harm, or that there is any real chance of him being seriously harmed for these reasons.

71. I am satisfied there is not a real chance of the applicant being seriously harmed by the Sri Lankan authorities, the police or army, the Sinhalese community, or any other group or person on the basis of his ethnicity, his religion, as a Tamil from a former LTTE area, as a Tamil living in the east of Sri Lanka, on the basis of any actual or imputed profile or connection to the LTTE, as a returnee, former asylum seeker, on the basis of his illegal departure, or for any reasons connected to his past criminal convictions.

72. 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

73. 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

74. 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.

75. I have accepted the applicant may face a low level degree of societal discrimination, questioning and monitoring by the authorities on his return to Sri Lanka, on the basis of ethnicity or religion. I have also accepted there is a real chance the applicant may be detained at the airport, questioned and fined on return to the country. I do not accept these matters would amount to significant harm as defined under the Act. I find that they would not constitute the death penalty, arbitrary deprivation of life or torture. I am also satisfied they

would not involve the intentional infliction of pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or would be intended to cause extreme humiliation. Whether separately or cumulatively, I do not accept the applicant will face discrimination or treatment in Sri Lanka that would amount to significant harm for the purposes of s.36(2A).

76. I have accepted the applicant may be detained for a short period either at the airport or at a prison, subject to an opportunity to appear before a magistrate. I have found the applicant does not have an adverse profile and the likelihood the applicant will be detained in a prison is remote, but if he does I accept the applicant may experience poor prison conditions during a brief detention. However, I am satisfied the applicant is a healthy young man, and while he has had some traumatic experiences in the past, I am satisfied the he has no obvious vulnerabilities that would preclude the possibility of a brief detention. I am satisfied that there is no real risk that any such detention would result in the death penalty, or that the applicant would be arbitrarily deprived of his life or tortured. Furthermore, while the conditions in the prisons are poor, I find any detention would not involve the intentional infliction of pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or would be intended to or cause extreme humiliation. It follows that I find that any detention or penalty the applicant may face would not constitute significant harm, again whether considered singularly or cumulatively.
77. In the reasons given above, I have found that there is not a real chance of the applicant facing serious harm from the Sri Lankan authorities, the police or army, the Sinhalese community, or any other group or person on the basis of his ethnicity, his religion, as a Tamil from a former LTTE area, as a Tamil living in the east of Sri Lanka, on the basis of any actual or imputed profile or connection to the LTTE, as a returnee, former asylum seeker, on the basis of his illegal departure, or for any reasons connected to his past criminal convictions. Based on the same information, and for the same reasons as set out above, I am also not satisfied that there is a real risk that he would face significant harm for these reasons if he were to return to Sri Lanka.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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