



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05372

Date and time of decision: 2 November 2018 10:35:00
A Harrison, 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. On 12 April 2016, the referred applicant (the applicant) applied for a Safe Haven Enterprise (subclass 790) Visa (SHEV). He claimed to fear persecution from Sri Lankan authorities and Tamil militant groups for reasons of being a young Tamil male from the north, his family links to the LTTE, imputed support for the LTTE, and as a failed asylum seeker returning from a western country who left Sri Lanka illegally by boat to India and then his illegal departure from India to Australia. He also fears persecution from Muslims as a Christian.
2. On 20 July 2018, a delegate of the Minister for Home Affairs refused to grant the applicant a SHEV because she found he was not a person in respect of whom Australia has protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan Tamil of the Christian faith from [District 1], Northern Province. His father, mother and [sibling] live in [District 1].
 - He used to go fishing with his father and uncle who were fishermen. They were assaulted on a daily basis by the Sri Lankan Navy (SLN).
 - His family were not members of the LTTE but they helped the LTTE during the war.
 - From about late 2009, they transported LTTE cadets who had fought the Sri Lankan government forces and who were in hiding and trying to escape to India. They had no real choice but to use their boat to transport them.
 - The Criminal Investigation Department (CID) came to know about what they had done and came to their house in March/April 2012, arrested his father, uncle and himself, and took them to the CID office in [District 1]. His uncle was taken to Colombo, whilst he and his father remained at the office where they were interrogated about links to the LTTE and information they had, and they were assaulted by the CID.
 - His mother made a complaint to the Human Rights Commission (HRC), and approached the village headman and the Reverend Father from their church. They approached the Officer-in-Charge at the station and he and his father were released on conditions.
 - He was arrested a second time, and released with the same conditions.
 - His uncle remained in custody in Colombo.
 - A few days after his release the CID came to his house looking for him. He was not there, so they arrested his father. His father was tortured and beaten at the CID office.

- Then the CID took his cousin, and interrogated him and beat him while in detention without charge. He was released after a few days. A few days after his release, he collapsed and died due to the beatings from the Sri Lankan authorities.
- He remained in hiding. He was unable to stay in his village and moved to Jaffna at the end of September 2012 to hide with relatives, but could not stay there for long because he knew he would be found by the authorities. He heard his first cousin was also arrested by the authorities. His body was found in August 2013.
- In September 2012, from his village he went to India by boat illegally. He had to register as a refugee, but was refused. He was allowed to live outside the camp. He left India in October 2012 and arrived in Australia [in] November 2012.
- In 2013, another uncle was taken and his dead body was found in the ocean.
- He had conflict with Muslims in the neighbouring village and this may happen again.
- If returned to Sri Lanka he will be persecuted because he is a young Tamil male from the north, because of his family links to the LTTE, his imputed support of the LTTE, and as a failed asylum seeker returning from a western country who left Sri Lanka illegally by boat to India and then his illegal departure from India to Australia.
- He will be questioned at the airport. The authorities will be advised of his previous links to the LTTE and he will be questioned in relation to those suspicions. He will be tortured. He will be visited by the police, CID or armed Tamil militant groups soon after his return home for suspected LTTE affiliations, because it will be known he and his family had transported LTTE cadets to India and his family were suspected of having had links to the LTTE. He will have to report to his home area as part of his bail conditions. Relocation will not be an option.

Factual findings

6. I accept the applicant is a Sri Lankan Tamil from [District 1], Northern Province, based on his identity documents. The applicant spoke fluently in Tamil during interviews with the department and spoke briefly about his religion. According to country information there is a sizeable Tamil Christian community in Sri Lanka, with concentrations in the Western and North-western Provinces.¹ I accept the applicant is a Christian, and his father, mother and [sibling], still live in their home village in [District 1]. I am satisfied Sri Lanka is the applicant's receiving country.
7. According to country information from 2012, the Department of Fisheries was the regulatory body dealing with fishing matters at the time, and was the only organisation with the authority to issue licences and register boats. During the conflict the SLN issued passes for outgoing boats, and they were not allowed to go out to sea without this pass. After the conflict, the SLN issued fishing permits to fishermen in areas where there was no Department of Fisheries representation. With the lifting of the state of emergency, the SLN no longer had responsibility for issuing fishing permits. The SLN undertook security checks of fishing vessels and crew before boats departed at some marshalling points around Sri Lanka to prevent illegal smuggling of goods and persons, which involved checking registration details against lists provided by local fishing cooperatives.² Information from the United Nations High Commission for Refugees (UNHCR) in 2012 also reports, in the context of returnees, that in

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

² DFAT, "CIS Request Sri Lanka Questions arising from recent applications", 29 November 2012, CX299951.

many areas of the north, including parts of Jaffna, [another district], and [District 1] districts, a special permit had to be obtained from the naval authorities to access coastal waters, and fishermen had to submit their civil documentation on a daily basis when going out on the water.³

8. I accept the applicant used to go fishing with his father and uncle who were fishermen, and he did this from late 2009 until 2012. The applicant consistently claimed to have finished school in [District 1] in around [year], worked for a year as a [occupation] at a [business] in Colombo in around [year], and then to have worked as a fisherman back in [District 1] from 2009 and up to 2012, and I accept this was the case. In the SHEV interview he said it was probably late 2009 that he started fishing, and this is consistent with his claimed address history because he said he returned to [District 1] from Colombo in the second half of 2009. The applicant also stated he did some fishing after finishing school and before he went to Colombo, and I accept he did. When answering the delegate's questions about what he did as a fisherman, the applicant claimed that daily they used to go fishing, and sometimes they went very close to the Indian border and that would cause problems. He claimed they had to go, they did not have any other options, they had to go to the border because they had to catch fish and they were assaulted by the navy; daily they used to hit them. For the reasons discussed below, I am not satisfied the applicant was his by the navy on a daily basis.
9. The applicant gave a copy of what he claimed to be his fishing pass, with his photograph on it, issued in [2011] and valid until [2012]. In the SHEV interview, he said the fishing pass was issued by the fishing society. The delegate asked the applicant if he had a pass issued before then given he claimed to have been fishing since 2009. The applicant claimed fishing passes were not issued before 2011. He claimed that when the LTTE controlled the area until 2009 they did not need fishing passes, and after the war the Sri Lankan authorities controlled the area; it was a high security zone for a period of time and restrictions applied, and then they were issued fishing passes. The delegate asked the applicant what he showed the SLN before he had the fishing pass while working as a fisherman, and the applicant said the SLN just checked inside the boat and then they went, and after they introduced these passes. He said the fishing boat belonged to his father.
10. The applicant also gave a copy of a certificate of membership of [a] Fisherman Co-operative Society, which states he had a fishing pass from [2011] to [2012]. I am satisfied the fishing pass and certificate of membership corroborate the applicant's claim to have worked in the fishing industry in Sri Lanka. While country information does not support the applicant's claims that fishing passes or permits were not issued around [District 1] in the later stages of the war and before June 2011, I am prepared to accept the applicant worked as a fisherman from late 2009, whether or not he had a pass for all of this time. The applicant claimed his father was the owner of the fishing boat, and I accept this was the case, and based on country information his father would have held the boat registration. According to DFAT in 2012, it was not aware of any reports that Sri Lankan Tamils (or any other ethnic groupings) were mistreated if they were caught illegally fishing.⁴⁵ Other country information about fishermen, including country information from the applicant, does not report allegations or evidence of fishermen being physically assaulted by the SLN after the war. Considering country information and the applicant's own evidence, which was not convincing, I am not satisfied the applicant experienced physical mistreatment from the SLN, in the form of being hit on a daily basis, because they fished close to the Indian border.

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

⁴ DFAT, "CIS Request Sri Lanka Questions arising from recent applications", 29 November 2012, CX299951.

⁵ World Socialist Web site (WSWS), "SEP campaigns in a Sri Lankan fishing village", 9 February 2009, CX291271.

11. I accept the applicant's family were not members of the LTTE but they helped the LTTE during the war. The delegate asked the applicant whether he had ever been involved with or affiliated with the LTTE, and the applicant said no, but he helped them by giving them food and water, helped to identify some locations, and if they wanted to go somewhere they provided transport. At the time the LTTE were living in their village. The delegate asked if any of his family members joined the LTTE and he said no, not his father, not his uncle, nor his [cousin]. However, his father and uncle helped the LTTE for a long time by transporting LTTE from one area to another, which was different to how he helped, and at that time the whole area was controlled by the LTTE so there were no problems. While the applicant later claimed to have transported LTTE during the war as well, I am not satisfied that he did, as he clearly stated that this was what his father and uncle did to assist the LTTE during the war that was different to him. Considering country information indicating that everyone living in the Northern Province had some level of involvement with the LTTE during the war,⁶ and the applicant's evidence, I am satisfied the applicant and his close family members, in particular his father, uncle, and cousin were not members of the LTTE, but they provided some assistance to the LTTE during the war, including food, water, identifying locations, and his father and uncle helped with transport.
12. However, the applicant's claims about what happened after the war are not convincing, and his documentary evidence does not support his claims. The delegate asked the applicant how long he, his father and uncle transported LTTE to India, how he knew they were LTTE, and what was their LTTE profile. The applicant said he knew they were LTTE members because when the LTTE controlled the area he had helped them, and they were living in their village. He said their role with the LTTE was [deleted]. The applicant said he did not think his written statement of claims was correct when it stated later in 2010 they gave transportation to LTTE cadets, because it was a short time after he started fishing which was in late 2009. He said he did the 10 to 15 minute journey by boat to India with LTTE more than 10 times and would have taken more than [number] LTTE, sometimes once a month, sometimes twice a month, whenever they asked, and there would be [number] LTTE cadets at a time. He said he would drive the boat, and his father and uncle assisted with direction and everything. He said at the end of the war most of the LTTE members were taken into custody and they were killed in the authorities' camps, so the LTTE members tried to escape from Sri Lanka. He thought the last time he did so was in February 2012, although that was a long time ago and it was hard for him to remember.
13. The delegate asked how they managed to transport more than [number] LTTE several times over three to four years without being noticed by authorities, and the applicant said they did not notice. He speculated that someone in the village must have given them information, which is why they found out in March or April 2012. According to country information and the applicant's own evidence, the SLN controlled the coastal waters around [District 1], and checked the fishing boats heading out to sea. The SLN would have been familiar with the applicant's father and his boat, as well as the applicant and his uncle, because they would have had to check in each day they wanted to go out to sea fishing. The LTTE cadets the applicant claimed to transport were allegedly from his home village in [District 1] and likely to have been known in the area, although the applicant claimed they had been in hiding. It is highly unlikely the applicant, his father and uncle would have been able to transport more than [number] LTTE members, sometimes [number] at a time, from [District 1] by sea to India from late 2009 until February 2012 without having come to the attention of the security forces, including the SLN and the CID, earlier than March/April 2012.

⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

14. The applicant gave copies of several documents to evidence his claims about what happened after the war, including a letter in English purportedly from his Parish Priest, dated [December] 2012, which states the applicant is a parishioner and known to him. Further, the letter states that after the applicant's studies he went fishing with his father's brother. In March 2012, there was an incident in which his uncle was arrested with three other fishermen. From that time onwards Police branch from Colombo came in search of the applicant, so he could not come out and he was in hiding. One of his relatives (the person named matches his cousin who lived with the applicant), was arrested in 2009 and was severely tortured in custody, and died in India [in] May 2012. Therefore, the applicant had to flee Sri Lanka. The author recommended the applicant be given asylum. On the face of it, the letter appears to have been written on official church letterhead. The content of this letter does not corroborate the applicant's claims involving his cousin, because the applicant claimed the CID took his cousin after March/April 2012, and a few days after his release, he collapsed and died. Neither does it corroborate his claim he was arrested with his uncle and father. The delegate asked the applicant about the reference to three other fishermen and the applicant said no, it was him, his father and uncle.
15. The applicant also gave a purported support letter in English from another Parish Priest, and [officer] of a health related rehabilitation facility. The letter is undated and appears to be on official letterhead. The content of the letter is similar to the other Parish Priest's letter. It does not state the applicant was detained, only the uncle and three other fishermen, and that a close relative was arrested in 2009, tortured, released and fled to India where he died. Although, there is some extra information in the letter about the navy being strict with fishermen and a special pass had to be obtained, and the applicant managed to escape the CID from Colombo every time they came in search of him, and his parents made use of the opportunity to send their son by boat to Australia, and an assurance was given that this is a genuine case in the aspect of humanitarian assistance. The delegate asked the applicant who this letter referred to when it said a 'close relative', and the applicant said one of his relatives, not his cousin. He said his cousin, the one who he called brother who lived with him, died in his village. However, the other letter from the Parish Priest named the cousin, the one who lived with him, and gave the same account of what happened to the 'close relative'. I am not satisfied the letter from the [officer] corroborates the applicant's claims about his arrest and detention, or that it corroborates what happened to his cousin who lived with him, or that it is about a different 'close relative'. I am not satisfied the applicant's explanation for these differences is convincing.
16. The applicant also gave a purported letter from a citizen's committee from [District 1], dated [December 2012], which is on what appears to be official letterhead. The content of the letter recounts what the applicant's mother allegedly told the office when she visited and made a complaint that her son, the applicant, fled to Australia due to harassment and torture by the SLN. The applicant's mother is reported to have said her uncle along with three other fishermen from the applicant's home village were arrested [in] April 2012 on suspicion, and they are all still in a detention camp. Further the applicant's mother said the security forces used to go to their home and inquire about her uncle and some other matters of which they were ignorant. Finally the security forces came in search of the applicant on several days. He was hiding with a relative. The applicant's parents took the opportunity to send their son, the applicant, to Australia. The author of the letter said he inquired about this, the letter of their parish priest and some of their close relatives who confirmed it, and therefore it is a genuine humanitarian case.
17. The three support letters describe the same version of events, except the citizen's committee letter does not mention the cousin or close relative who died in India. However, the version

of events in the support letters contradicts and differs to what the applicant claimed happened. The applicant's explanation that the reference to three fishermen being him, his father and his uncle, is not convincing, and neither is his explanation that one letter referred to another relative who died in India, not his cousin. I am not satisfied that any of the three letters corroborate the applicant's claims. Furthermore, I am not satisfied that these letters give a different but accurate account of events, and I do not give any of these three support letters any weight.

18. Additionally, the applicant gave two other documents purportedly relating to his cousin. In the SHEV interview the applicant said he had given two copies of the same document he claimed was issued by a Judge at the Magistrates Court in [District 1], dated [May] 2010. He claimed it related to the arrest of his cousin, who he referred to as his brother. He said the CID arrested his cousin without any reason and then he was released. The delegate asked the interpreter to read out the document, and from what he said the document apparently records that a lawyer, K, requested a person by the name of P who was in jail for one year and three months due to some personal grudge and this person needs to continue his education, so it was requested he be released, and this was issued by the HRC. The English copy of this document, which is before me, is not comprehensible, does not match what the interpreter read out from the Tamil version of it and it is incomplete. The documents are not on official letterhead, and while bearing a stamp stating from the District Magistrates Court [District 1], I am not satisfied they are official or authentic court documents. Given the apparent inauthenticity, incompleteness of the English version, and without a full and certified English translation of the Tamil version, I do not give these purported court related documents any weight in support of the applicant's claims involving his cousin.
19. The delegate said there is another document from the HRC dated [October] 2010, issued to the applicant's cousin for a complaint from [January] 2009. This acknowledgement letter from the HRC, which is in English, does not make any mention of what the complaint is about, other than it is the cousin's complaint, and it is addressed to him at the place where the applicant claimed to live with his mother, father, [sibling] and cousin. I am satisfied this is an authentic acknowledgement letter from the HRC. However, it does not corroborate the applicant's claim involving his cousin's treatment, just that he made a complaint. Neither does it corroborate the claim that his mother made a complaint to the HRC about his, his father's and uncle's arrest by the CID and detention in March/April 2012.
20. During the SHEV interview the applicant recounted the claims made in his written statement, corrected a couple of points (such as that it was the CID office they were kept in and assaulted by the CID, and it was late 2009 that they started transporting LTTE and not late 2010), but did not give any further detail about these claimed arrests, detention and mistreatment to what was written in his statement of claims. However, he claimed he had forgotten to put in his written claims that he was taken twice, but did not explain what happened the second time only that he was again released on the condition that when asked he must report to the camp and not to go anywhere else from the village. He also added that they did not release his uncle, he does not know what happened to him, whether he is still alive or not.
21. Given the contradictions and differences between what the applicant claimed and what his support letters have described, and the HRC acknowledgement letter not corroborating the applicant's claims involving him, his cousin or his mother's alleged complaint, and my concern the claim to have transported more than [number] LTTE for more than two years is highly unlikely without having come to the attention of the SLN and CID earlier, I do not accept that in late 2009 or late 2010, the applicant, his father and uncle transported LTTE cadets to India,

nor the consequences the applicant claimed flowed from these actions involving the applicant, several members of his family and the CID. I do not accept that in March/April 2012 the CID arrested his father, uncle and himself, and took them to the CID office in [District 1], the applicant's uncle was taken to Colombo and has not yet been released; I do not accept that the applicant his father remained at the CID office and were interrogated about links to the LTTE and information they had, and assaulted by the CID, and his mother made a complaint to the HRC, and approached the village headman and the Reverend Father from their church, who approached the Officer-in-Charge at the station and he and his father were released on conditions.

22. I do not accept the applicant and his father were detained or released, and it follows that I do not accept: a few days after being released the CID came to his house looking for him, he was not present, so they arrested his father; his father was tortured at the CID office and beaten; then the CID took his cousin (the one who lived with him), and he too was interrogated and beaten by the authorities while in detention without charge, and was released after a few days; a few days after his release, his cousin collapsed and died due to the beatings from the authorities; and I do not accept his uncle has not been released, and it is not known whether he is alive or dead.
23. I am not satisfied the applicant spent any time in hiding from authorities in his home village or in Jaffna before travelling to India. During the SHEV interview, the applicant said he travelled to Jaffna by motorbike and when he was in Jaffna, they found out he was there and they came to the home where he was residing with relatives and asked about him, and his relatives told him they were looking for him, so he thought it would be hard for him to remain there and so he went to India. The applicant did not mention in his written claims that he was found in Jaffna; he claimed he knew he would be found. He also claimed in writing that his fear was made worse when he heard his first cousin was also arrested by the authorities, and was not seen again, and his body was found in August 2013. The applicant has not given any other supporting evidence in relation to this claim, and did not discuss this claim during the SHEV interview when he had the opportunity. Based on the applicant's evidence, I am not satisfied the applicant's first cousin was arrested and his body found in August 2013.
24. I accept the applicant departed Sri Lanka illegally when he travelled to India. However, the applicant's claims about his travel from Jaffna via his home village to India, and that he only planned to travel to Australia after going to India are not convincing and I am not satisfied it is what happened. The applicant claimed he travelled back from Jaffna to his home village and did not let anyone know, and with the help of his friend and his friend's boat he went to India. He said he departed from his home village, and while in India he attempted to register as a refugee, was not able to do so and only then made plans to travel to Australia. I am satisfied the applicant travelled via India on his way to Australia; however I am not satisfied he went to India with any intention of seeking asylum. I am satisfied the applicant departed Sri Lanka illegally by boat, spent a brief period of time in India, and continued his journey on to Australia and arrived [in] November 2012.
25. During the SHEV interview, the applicant claimed that in 2013, after he came to Australia, another one of his uncles (his father's brother) was taken the same day that they came and harassed after he came to Australia, and his dead body was found in the ocean. The applicant did not detail this claim any further. He did not state who 'they' were or who they came to harass. The delegate asked where the applicant's father is living, and the applicant said in his village. The delegate asked how he had managed to remain in the village, and the applicant replied that he still had problems, but his mother does not tell him so that he does not worry,

and he rarely talks to his family. The applicant has claimed that one uncle and two cousins have died due to treatment from the authorities, or others, and one uncle is still detained by the CID or it is not known whether he is still alive or dead. However, his father continues to live at home in their home village with his mother and [sibling]. I am not satisfied the applicant's claims are coherent and credible.

26. I find the applicant was not detained by the CID and the CID was not looking for him. I am not satisfied the applicant's two uncles and two cousins have been detained, harmed, and killed, or that one of the two uncles remains in police detention or is dead, and I am not satisfied his father was detained and physically mistreated by the CID.
27. While I accept during the war the applicant, his father and uncle supported the LTTE by giving water and food, and identifying locations, and his father and uncle gave transport, I am satisfied the applicant, his father and uncle did not transport LTTE after the war. I find that when the applicant departed Sri Lanka he was not of any interest to the Sri Lankan authorities, including the CID and the SLN, because he was a fisherman, or in connection with the LTTE, or for any other reason.
28. During the SHEV interview, the applicant was asked whether he ever experienced problems in Sri Lanka due to his religious beliefs, and he said yes. The applicant claimed Muslim people live in the adjoining village to his village and there was some conflict between them. He claimed he and his friend would fight with them. He said he could not remember when exactly but around 2010-2011, and they fought because they practice a different religion. He claimed when talking about religious matters it quickly lead to physical conflict. When asked if this conflict was linked to the reasons why the applicant cannot return to Sri Lanka, the applicant said it was one reason. He said the Muslims still live in that area and there is religious conflict in his country, and it may be possible there will be conflicts. The applicant did not elaborate on the fighting, however the applicant's evidence was convincing. I am satisfied the applicant, a Christian, fought with Muslims in his neighbouring village about religious matters, when in conversation with them, about a year or two before he departed Sri Lanka.
29. There is a document before me which has four pages of information on it from what appears to be the applicant's Facebook account. The delegate did not put this information to the applicant and there is no mention of it in the delegate's decision. I am satisfied the information is immaterial to the review and is not in any way adverse to the applicant. I have not given it any weight.

Refugee assessment

30. 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

31. 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.
32. The applicant is a young Tamil male from the north of Sri Lanka who worked as a fisherman after the war, and he is a Christian. It is now more than six years since the applicant departed Sri Lanka illegally. I found that when the applicant departed Sri Lanka he was not of any interest to the Sri Lankan authorities, including the CID and the SLN, because he was a fisherman, or in connection with the LTTE, or for any other reason. It is now more than nine years since the conflict between the Sri Lankan government forces and the LTTE ended in May 2009.
33. According to DFAT, Sri Lanka's population was 21.2 million in 2017. It is estimated that 15.4 per cent of the population is Tamil, the second largest ethnic group in Sri Lanka. Tamils live throughout Sri Lanka, although mostly in the northern and eastern provinces, and Colombo is reported to have roughly equal populations of Sinhalese, Tamils and Muslims. Sri Lankans practise four major religions: Buddhism; Hinduism; Islam; and Roman Catholic and other Christian denominations.⁷
34. DFAT assesses that the LTTE no longer exists as an organised force in Sri Lanka. According to country information, since the end of the civil conflict, the Sri Lankan government has managed a large-scale rehabilitation process for former LTTE and those suspected of LTTE involvement, and this program is coming to a close.
35. DFAT has consistently reported that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Former LTTE members face no legal barriers to participating in public life, including politics. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA).⁸
36. DFAT assesses that monitoring of Tamils in day-to-day life has decreased significantly under the current government. However, DFAT assesses that surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues, such as missing persons, land release and memorial events.⁹ The applicant did not claim to have been involved in any events relating to missing persons, land release and memorial events in the past, and has not indicated an intent to do so in future.

⁷ Department of Foreign Affairs and Trade (DFAT), "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

⁸ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

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

37. While Sri Lanka is no longer at war, and the security situation has significantly improved, country information before me, including the reports given by the applicant from Human Rights Watch and International Truth and Justice Project (ITJP), reports allegations of serious human rights violations in the post-conflict environment being perpetrated by Sri Lankan authorities against a small number of members of the Tamil community for real or perceived LTTE connections. DFAT refers to recent information from the ITJP citing 24 cases of torture in 2016 and 2017 and an Associated Press article published in November 2017, which claimed 52 incidents of torture, including the cases reported by the ITJP. Having considered information from the ITJP and other credible sources, including the UN Special Rapporteur on human rights and counter-terrorism about the use of torture by police being routine and endemic for those arrested and detained on national security grounds; and the UN Committee against Torture claiming that torture is of a routine nature practiced all over the country, mainly in relation to police detentions regardless of the suspected offence, DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the conflict and is no longer state-sponsored. DFAT also assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture.
38. In June 2017, taking into account information from a range of credible sources about the situation in Sri Lanka and information gathered from its own fact-finding mission to Sri Lanka in July 2016, the UK Home Office was of the opinion that a person being of Tamil ethnicity would not in itself warrant international protection. Neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.¹⁰
39. Furthermore, the UK Home Office was of the opinion that participation in Diaspora activities, such as attending demonstrations, is not in itself evidence that a person will attract adverse attention on return to Sri Lanka.¹¹ There is no evidence before me that the applicant is active in post-conflict Tamil separatism or Diaspora activities. The information before me from the applicant's Facebook account is minimal and does not indicate any involvement by the applicant in post-conflict Tamil separatism or Diaspora activities.
40. The applicant claimed he would be targeted by Tamil militant groups on return, but did not name any particular groups. In any case, country information before me from DFAT and the UK Home Office, in particular, does not mention or raise concerns about the presence of, and criminal or extrajudicial activities of, Tamil militant groups in Sri Lanka, like in the past.
41. DFAT reports that agriculture and fishing dominate the economies of the Northern and Eastern Provinces, and while these two provinces have the lowest median household income per capita across Sri Lanka, post-conflict reconstruction has benefitted the majority of the population. DFAT also reports that the military continues to restrict access to some fishing areas, however there is no mention of fishermen facing any problems from the military or SLN because they are fishermen, or that Tamils, or Christian Tamils, in any part of the country are prohibited from participating in the fishing industry.¹²
42. I accepted that during the war the applicant, his father and uncle supported the LTTE by giving water and food, and identifying locations, and his father and uncle gave transport. However, I was not satisfied the applicant, his father and uncle transported LTTE after the

¹⁰ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹¹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹² DFAT, "Country Information Report Sri Lanka", 23 May 2018.

war. I found the applicant was not detained by the CID, and the CID was not looking for him. I was not satisfied the applicant's two uncles and two cousins were detained, harmed, and killed or that one of the two uncles remains in police detention or is dead, and I was not satisfied his father was detained and physically mistreated by the CID. Considering country information, I find there is not a real chance the applicant would be targeted for any harm by Sri Lankan authorities, Tamil militant groups, or others because he is a young Tamil male from the north, or because he, his father and uncle, gave support to the LTTE during the war, or because he is or was a fisherman.

43. According to DFAT, the government has publicly declared its commitment to religious and ethnic reconciliation, and constitutionally, Article 10 provides for freedom of religion, Article 14 for freedom of public and private worship, while Article 9 grants Buddhism a 'foremost place'. The constitutional reform process has included discussion of amending Article 9. DFAT reports that acts intended to insult religion are punishable by a fine and/or a maximum of one year in prison, and attacking places of worship or religious objects is punishable with a fine and/or a maximum of two years imprisonment. Sri Lanka recognises religious holidays for Buddhists, Hindus, Muslims and Christians, and school students can study their choice of the four main religions.¹³
44. While DFAT reports the existence of religious tensions in Sri Lanka, including documented attacks against Christians; Buddhists were perpetrators of most of the reported incidents, followed by Hindus and to a lesser extent, Catholics against other Christian denominations. Country information does not support a finding that Muslims are targeting Christians for any harm for religious reasons. However, DFAT reports that in November 2017, some Muslim businesses were temporarily boycotted because of tensions between the Tamil and Muslims communities in Batticaloa. And on 6 March 2018, the government declared a nationwide State of Emergency for 12 days in response to incidents of communal unrest between members of the Sinhalese Buddhist and minority Muslim communities in Kandy district, Central Province, which resulted in the deaths of four people and dozens of people being injured.¹⁴ However, country information indicates the state is willing to intervene quickly to protect people from communal violence and to stop it from escalating.
45. I was satisfied the applicant, a Christian, fought with Muslims in his neighbouring village about religious matters, when in conversation with them, about a year or two before he departed Sri Lanka. Considering country information and the applicant's own evidence, I am not satisfied there is a real chance the applicant would be targeted for any harm by Muslims or others because he is a Christian.
46. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many returnees have difficulty finding suitable employment. DFAT assesses that reintegration issues are not due to a failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face on return.¹⁵
47. A UNHCR survey from 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. And refugees and failed asylum seekers reported social stigma from their communities upon return. The UNHCR also interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return. As at May 2018, DFAT states that while the government has reportedly decreased systematic

¹³ DFAT, "Country Information Report Sri Lanka", 23 May 2018.

¹⁴ DFAT, "Country Information Report Sri Lanka", 23 May 2018.

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

surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017.¹⁶

48. The applicant is from the north, and while it is possible he may be monitored for a period on return to the north, and experience social stigma as a returning asylum seeker, I am not satisfied that it would amount to serious harm in this case. I am not satisfied there is a real chance of serious harm for the applicant in connection with being a returned asylum seeker, including a returning asylum seeker from a Western country.
49. DFAT reports that for returnees travelling on temporary travel documents, police undertake an investigative process, which can include: an interview, contact with the local police, contact with the persons' claimed neighbours and family, and checking criminal records and court records, in order to confirm identity, and persons with a criminal or terrorist background, or with court orders or arrest warrants. These are standard procedures, applied regardless of ethnicity and religion, and DFAT understands that detainees are not subject to mistreatment during processing at the airport. DFAT reports that the International Organisation for Migration meets assisted voluntary returns after immigration clearance at the airport. Processing of returnees at the airport can take several hours, due to administrative processes, interview lengths, and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed.¹⁷ There is no evidence before me of any other outstanding court orders or arrest warrants for the applicant, and I found the applicant was not detained by the CID, and the CID was not looking for him.
50. Based on country information, it is very likely the applicant will be questioned at the airport upon return and he could be charged under the Immigrants and Emigrants Act (1949) (the I&E Act) for his illegal departure from Sri Lanka when he went by boat to India before travelling on to Australia, and arrested by the Sri Lanka Police Airport Criminal Investigations Unit at Colombo international airport. If this happens, the applicant will have his photograph and fingerprints taken, and he will have to give a statement.¹⁸
51. DFAT advice is that illegal departees who are charged are at the earliest opportunity after investigations completed transported to the closest Magistrate's Court, after which custody and responsibility shifts to the court or prison services. The magistrate will then make a determination as to the next steps for the person. Such a person may remain in police custody at the CID's airport office for up to 24 hours after arrival, and if a magistrate is not available before this time, for example because of a weekend or public holiday, they may be detained for up to two days in an airport holding cell.¹⁹
52. Country information reports that if charged the person will be required to appear in court in the location where the offence occurred, which can involve legal and transport costs. Penalties for leaving Sri Lanka can include imprisonment of up to five years and a fine of up to LKR 3,000 (approximately AD 25) for a first offence to LKR 200,000 (approximately AUD 1,670). In practice, most cases result in a fine and not imprisonment. The Attorney-General's Department in Sri Lanka claims that no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. There is no evidence before me that the applicant was involved in people smuggling activities. If the applicant pleads guilty to an offence for illegal departure he will be fined, which he can pay in instalments, and

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

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

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

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

he will be free to go. If he pleads not guilty, he will be granted bail by the magistrate on the basis of personal surety or guarantee by a family member. Although DFAT was unable to obtain any data in support, it reports that anecdotal evidence is that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. Bail is granted to voluntary returnees, conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.²⁰

53. The evidence before me does not indicate that the processes and penalties imposed as a consequence of the I&E Act are discriminatory on their face or in their application or enforcement, and I am not satisfied that the processes and penalties imposed as a consequence of the I&E Act amount to serious harm. I am not satisfied they amount to persecution.
54. I am not satisfied the applicant has a well-founded fear of persecution in Sri Lanka.

Refugee: conclusion

55. 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

56. 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

57. 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.
58. While there is a possibility the applicant may face monitoring and social stigma for a period as a returned asylum seeker, I am not satisfied that such treatment would amount to significant harm. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied that it amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition 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.

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

59. I accept the applicant may be charged under the I&E Act for his illegal departure from Sri Lanka to India and is very likely to be questioned, fined, detained for up to 24 hours in an airport holding cell and may incur associated costs relating to the judicial process. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of his unlawful departure. The evidence does not suggest that the treatment and penalties the applicant may experience as an illegal departee are intended to inflict pain or suffering, severe pain or suffering, whether physical or mental, 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 conjunction with any treatment he may experience as a returning asylum seeker.
60. I have found there is not a real chance the applicant will face any harm from Sri Lankan authorities, Tamil militant groups, or others because he is a young Tamil male from the north, or because he, his father and uncle, gave support to the LTTE during the war, or because he is or was a fisherman, or because he is a Christian. I am similarly not satisfied that there is a real risk of significant harm on these bases.
61. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk he will suffer significant harm.

Complementary protection: conclusion

62. 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.