



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/07871

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IAA reference: IAA20/07872

Date and time of decision: 6 March 2020 15:43:00
M Anderton, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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

Background to the review

Visa application

1. The applicants are father (IAA20/07871) (hereinafter referred to as applicant 1) and son (IAA20/07872) (hereinafter referred to as applicant 2) who claim to be Sri Lankan citizens from the Northern Province. They arrived in Australia by boat [in] July 2013.
2. On 8 August 2017 they applied for safe haven enterprise visas. The applications revolved around fear of harm from authorities because applicant 1 provided assistance to the Liberation Tigers of Tamil Eelam (LTTE) and both applicants escaped an IDP camp.
3. On 7 February 2020 the delegate of the Minister for Immigration refused to grant the visas because he was not satisfied they were refugees or that they would face a real risk of significant harm upon return to Sri Lanka.

Information before the IAA

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

Applicants' claims for protection

5. The applicants are father and son and they make separate claims as summarised below.
6. Applicant 1's claims can be summarised as follows:
 - He is a Tamil Hindu from Kilinochchi, Northern Province. He fled Sri Lanka in 2009 with his family because of persecution due to his perceived association and involvement with the Liberation Tigers of Tamil Eelam (LTTE).
 - His son (applicant 2) and daughter also came to Australia by boat in July 2013. His wife and three [children] remained in [Country 1] and were settled in [Country 2] under UNHCR resettlement. The daughter who came with him to Australia went to [Country 2] sponsored by her husband in August 2016. All his siblings are in [Country 3], via government scholarship programs or being sponsored by siblings.
 - Tamils have long been discriminated against by Sinhalese people, politicians and the government. There was no freedom. As a Tamil person he spent his whole life living in a war zone with the army constantly attacking Tamil areas. Where he lived in Kilinochchi it was under LTTE control at various times since he was a child and it was assumed that many people in the area were members of the LTTE. There was bombing in 1985 and 1990 and after 1990 they were in constant fear for their lives until they fled in 2009.
 - In 1985 he was arrested by the army in a round up. He was chosen at random and taken to the army camp. They took off his clothes, tied his hands and tortured and interrogated him for three months. His parents informed a human rights organisation who arranged for his parents to see him. They gave evidence that he was studying and he was eventually released. In 1989 his brother in [Country 3] tried to assist him to come to [Country 3] but he was not able to leave the area as it was controlled by the LTTE.
 - His wife's sister joined the LTTE in 1990 and was killed in 1996.

- He was a member of [Organisations]. They would support farmers and submit petitions to the government when they failed to give supplies or made things difficult. When the LTTE organised protests against the government, these organisations assisted and they had to help them.
- In 2005 he ran a [Products 1] retail business. The LTTE requested that he import [Products 1] and sell to them. He would buy the [Products 1] from people who managed to smuggle them into the LTTE area. He ran [Business 2] also and LTTE members would buy his [Products 2] and other items.
- In January 2009 the war escalated and there was severe fighting around them so they surrendered to the army. They were taken to camps and the army controlled area and two or three weeks later they registered with the UNHCR at [Location] camp. Every now and then CID would visit and ask personal details. As the war was ending more people came to the camp and CID took many away for enquiries.
- After 5 or 6 months in the camp on his way back from the shop, CID told him to go to their office for questioning. They asked him about his connection to LTTE and to identify LTTE members. They knew he supplied the LTTE with goods. He told them he did not know anyone there and they tied him up and beat him badly. It happened twice. CID also went to the school and questioned the children if they knew who applicant 1 had supplied the goods to.
- He did not feel safe so he slowly sent his wife and children to the hospital and arranged for an agent to help him and his son escape through the barbed wire fence. He paid some money to a person at the hospital to get the rest of the family out of the hospital.
- In July 2009 they went into hiding, staying at relatives' houses, jungle areas and sleeping under trees in Vavuniya. They went to Colombo and made arrangements to flee. Applicant 1 already had a passport. He paid someone to obtain passports for the family. They were genuine. They left for [Country 4] [in] September 2009.
- They went to [Country 5] by bus on 10 day tourist visas. In October 2009 they registered with UNHCR. He and his wife were interviewed. They received refugee cards in March 2010. His brother in [Country 3] applied to sponsor them to [Country 3].
- Undercover CID secret service harassed them in [Country 5]. At the end of 2011 the [Country 5] government announced people who overstayed their visa needed to go to immigration, be interviewed and prints taken. They did not want to go, so fled by boat to [Country 1] in February 2012.
- They were detained at the [City 1] airport on their way to [City 2] and in immigration detention in [City 1]. In March 2012 they were registered with UNHCR in [Country 1]. They were invited to attend an interview at the [Country 3] embassy in [Country 5] in mid-2013 but could not attend as they were in [Country 1]. They remained in detention for a long time and finally it was too much for applicant 1 so he decided to leave and took his older children with him. His wife remained in [Country 1] with younger two children. UNHCR told them to bear with them and keep waiting, but he could not. He found out about a boat to Australia and arrived in Australia by boat [in] July 2013.
- He cannot return to Sri Lanka as he will be stopped and questioned and identified as someone who was associated with the LTTE in the past. He will be handed over to CID who will interrogate him about his LTTE involvement and escape and will be punished for his perceived LTTE involvement. He has been tortured before and believes it will happen again. He has been subject to the immigration data breach which will further identify him as a person associated with the LTTE to be interrogated, detained, beaten

and tortured on arrival. They might send him to a rehabilitation centre, prison or detention or be shot or disappeared.

- His wife in [Country 2] has his ID card and to try to live in Sri Lanka without this card will be suspicious. He does not have any relatives in Sri Lanka anymore and will have nowhere to go or to protect him. Without documents he will be more suspicious to authorities. If released he will be harassed by authorities as a Tamil with no community protection due to discrimination against Tamils that still exists.
- He is afraid his son will be detained, interrogated and tortured as he has been and could not live with himself if this happened to his son.

7. Applicant 2's claims are summarised as follows:

- He is a [age] year old Tamil Hindu male born in Kilinochchi, Northern Province. He fled Sri Lanka in 2009 with his family because of persecution of his father's perceived association with the LTTE.
- Growing up he always lived in a war zone. Once when riding his bike there was a nearby bomb blast and a piece of material came close to hitting him.
- In 2009 while detained in the camp and on the way to school, investigators asked him questions about his father. He was very scared and thought they would take him away or his father.
- His father arranged for them to escape the camp. They went into hiding. His father organised everything to leave. They left from Colombo to [Country 5] and after a few months they got a UN card. He went to school in [Country 5] but found it hard as he did not speak [Country 5's language] so stopped and did some short courses. In 2012 they went to [Country 1] and were detained in an immigration hotel. It was lonely and the space restricted and he could not do anything. He hated it and could not sleep. After a more than a year he left with his father and sister through an open door as he could not continue there.
- He has no passport. He did not have an ID card as he was [age] when he left and too young for an ID card. He cannot return to Sri Lanka because he will be stopped and questioned on arrival in Sri Lanka and as he has no ID or passport it will be suspicious. They will know he escaped from the camp and he will be identified for questioning. He will be handed over to CID and interrogated about his father because they think he is an LTTE member. Due to where he lived and who his father is and that he escaped they may think he was also associated with the LTTE or they will torture him to obtain information about his father or the people whom he sold goods to. He may be sent to prison or rehabilitation centre.
- He has been subject to the immigration data breach which will further identify him as a person associated with the LTTE to be interrogated, detained, beaten and tortured on arrival.
- He has no family in Sri Lanka and will be vulnerable to harassment by authorities. He does not know how to live in Sri Lanka and there is no one to protect him or notice if something happens to him. As a Tamil man with no family, authorities may continue to harass him about the whereabouts of his family who escaped the camp or about his father or members of the LTTE.
- Colombo is not safe. There is still a lot of discrimination against Tamils by Sinhalese. He has no networks or nowhere to live and will be vulnerable to discrimination. He will need an ID card wherever he goes, which will bring him to the attention of authorities.

It is strange he does not have an ID card and in questioning him they may discover he escaped the camp and his association with his father and assume he is LTTE connected or has information they need. They will beat and torture him when he does not answer what they need.

8. Both applicants added at the protection interview that the former defence minister had taken over as president who was against Tamils and they could not return to Sri Lanka and live in fear in the current situation.

Refugee assessment

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. I accept the applicants are Tamil Hindus from Northern Province, Sri Lanka. According to the documentary evidence provided they are Sri Lankan citizens. I am satisfied the receiving country is Sri Lanka. I accept they lived in Northern Province which was variously under LTTE and army control during the conflict.
11. Applicant 1's claims about his LTTE involvement and beatings have developed and been added to over time. Initially in his screening interview in August 2013, he said he had no involvement with the LTTE other than living under their control and having to pay taxes. He did not mention provision of goods to the LTTE or any beatings, torture or detention. When the interviewer noted that if he had been suspected LTTE he would have been transferred to a rehabilitation camp, applicant 1 did not mention his provision of goods to the LTTE at that point, but said he was a high target because he ran a business and they could want money.
12. On 4 February 2014, immigration informed applicant 1 he was screened out as a person owed protection. Then a 22 February 2014 email, from the case manager indicated applicant 1 was agitated he had not been given a chance to talk about things in detail at the screening interview and had added new claims and information. He added he had to do business with the LTTE in [Products 1, 2 and 3] and that CID and police constantly harassed them in the IDP camp, including questioning his daughter to identify LTTE and any LTTE involvement. He added that CID put pressure on them because they knew his sister was in the LTTE and died fighting for them.

13. Then in his arrival interviews on May and November 2014. He added that in 1985 he was taken in a round up, detained for 3 months and beaten by the army. The army beat and harassed him. He also added that as they lived in an LTTE controlled area they had to be involved in LTTE protests against the government on May Day, or when atrocities occurred. He also was head of the [Organisations] and represented others welfare when they wanted water for their fields. In May 2014 interview he said he was threatened in the IDP camp, but in November 2014 interview he said was detained and tortured in the IDP camp.
14. The delegate put concerns to applicant 1 that he had said he was not personally involved with the LTTE and only raised the claims of supplying goods to the LTTE after he had been informed he had been screened out of protection obligations.
15. Applicant 1 explained saying his mind was in fear, he was just off the boat, mentally affected and he told the truth but the screening interview was only 15 minutes. I note the screening interview was 50 minutes long and held 8 days after he had arrived by boat. I am mindful of the observations in *MZZJO v MIBP* [2014] FCAFC 80 and *DWA17 v MIBP* [2019] FCAFC 160 about reliance of early interviews and omissions.
16. I have some concerns that he did not mention provision of goods to the LTTE at the outset and stated he had no personal involvement. However, I acknowledge that the country information indicates that everyone living in LTTE controlled areas had contact with the LTTE. I accept that applicant 1's wife's sister may have been LTTE and killed in 1996, given it was during the conflict. I accept given applicant 1 had a business and lived in an LTTE controlled area that he would have had to pay taxes and sold goods to the LTTE as part of daily business and coming into contact with many people who were LTTE. However, I do not accept he was personally involved with LTTE outside of that context or a supplier, smuggler, supporter or interested in their cause.
17. I note also that applicant 1 did not initially mention his 1985 round up and three month detention and torture. While I have some doubts given he did not mention this at the outset, it may be that he did not at that point because it was some time ago and not immediately relevant to the reasons he left Sri Lanka in 2009. Given country information that roundups and detentions of Tamils during the conflict in the North were not uncommon, I prepared to accept applicant 1 was rounded up, detained and harmed in 1985. Further, I accept that when under army control the applicant may have been harassed as many Tamils were during the conflict. However, despite this and since then I note applicant 1 was able to own and conduct his own businesses which included paddy fields, a [business] and sale of [Products 1] until January 2009.
18. Given his business background and ownership of paddy fields, I accept that he was a member of [Organisations] and other groups, and represented others interests in the community, for instance if they wanted water for the fields or other needs during the conflict. Given he lived in an LTTE controlled area, I accept applicant 1, in those organisations and as person living in an LTTE controlled area, may have been forced to be part of LTTE protests on May Day, against atrocities and protests and had no choice and to obey orders during the conflict. The applicant confirmed at the protection interview that he had to obey orders. However, I note in January 2009 the applicant, with his family, left the area and surrendered to the army in January 2009. He also confirmed at the protection interview that he did not support any Tamil or separatist groups. There was no claim that he intended to protest, support the LTTE or participate in politically sensitive issues upon return.

2009 camp

19. The applicants claimed they surrendered to the army in January 2009 when the fighting escalated in their area and were taken to internally displaced persons camps (IDP) in army controlled areas. The applicants have consistently claimed this and it is consistent with country information that many thousands of Tamils went to IDPs towards the end of the war and afterwards.
20. Applicant 1's claims about what happened in the camp have varied. Initially in his screening interview (August 2013) applicant 1 claimed they had many enquiries and interrogations from police, military and CID while in the camp. In the February 2014 email from the case manager, applicant 1 had indicated to the case manager that CID and police would constantly harass them and accuse them of being LTTE. He said they went to his daughter's school and questioned her about her involvement. I note there was no mention either at the screening interview or in the February 2014 email that he had been taken in for questioning by CID twice and beaten each time.
21. I note however, in his May 2014 arrival interview, applicant 1 mentioned he was twice questioned by CID in the camp but let out again. While he said he was beaten during his 1985 detention he did not mention any beating in respect of the 2009 camp questioning.
22. It was, in his November 2011 interview that applicant 1 added he was tortured in 2009 at camp. He elaborated in the 2017 statement. Applicant 1 stated he was questioned twice by CID after being in the camp 5 or 6 months. He claimed they knew of his provision of goods to the LTTE and wanted him to identify LTTE members. He could not identify any and so he was beaten. He also stated that on the way to school his son was questioned about him. However, the statement did not mention that his daughter had been questioned.
23. I accept that with the passage of time that memories may fade and accounts may not be exactly the same in terms of how often one might be questioned or by whom. I accept that applicant 1 and the family would have been questioned while in the camp, as the information before me indicates that this was not uncommon. Further, applicant 1 has consistently claimed he was questioned while in the camp. In his arrival interview, applicant 2 also confirmed his father was taken and interrogated in the camp and bashed. However, applicant 1 had not mentioned the beatings in the camp in his screening interview (August 2013) or his May 2014 interview. Further, given he mentioned his 1985 beating, I find it difficult to believe that he would not also mention he was twice beaten in 2009. Further, it was the more recent event and relevant to his claims. The 2009 camp beatings were not reported in the case manager's February 2014 email either. Further, I find it difficult to believe that he would mention his daughter being harassed and questioned in the camp, but not that he was beaten. I consider applicant 1's account has changed and that he has embellished his claims about treatment in the camp in that regard. However, given country information about treatment of Tamils during the conflict and shortly thereafter, I accept applicant 1 may have been beaten at the camp when being questioned by CID. I accept also he and his family were questioned and harassed about LTTE involvement and asked to identify LTTE (and they could not).
24. I accept that the applicants and the family would have been questioned at the camps about LTTE connections and assistance. The applicant claimed they put pressure on him as they knew his wife's sister had been LTTE and killed in 1996. They also knew he had provided goods to the LTTE. I accept the authorities may have known applicant 1's wife's sister was LTTE and killed in 1996 and that applicant 1 was a businessmen who sold and provided goods to the LTTE during the conflict. However, that the applicants were not taken away to rehabilitation camps or separated is strong evidence that the applicants were not of interest to authorities or considered or suspected LTTE. The applicant confirmed in his statement that CID took many

people away for inquiries and investigation and people would go missing from the camp. Country information indicates that many thousands suspected LTTE were sent to rehabilitation camps. Further, that they were in the camps for a six month period questioned but not taken away or sent to rehabilitation camps further reinforces my view that the applicants were not of ongoing adverse interest to authorities.

25. The applicants claim to have escaped the camp in July 2009 by paying a bribe and were in hiding until their departure from Sri Lanka in September 2009. I note country information in the referred material that 5000 people managed to buy their way out of IDP camps. Given the country information and that applicant 1 has consistently claimed this since his initial screening interview, I accept they left the camp by paying a bribe in September 2009.
26. The applicants feared their escape from camp would further identify them as suspected LTTE and that they were wanted by authorities. They claimed they went into hiding in jungle areas and at relatives' houses and made arrangements to flee Sri Lanka and departed by plane from Colombo [in] September 2009.
27. However, if they were wanted as LTTE and for their escape, I find it difficult to believe they could not have been found at relatives' homes where he said they sometimes stayed. Further, according to the country information the checkpoints were not lifted until 2015, and I find it difficult to believe they could have travelled from the north to Colombo without detection.
28. At the protection interview, applicant 1 added another account. When asked why the authorities were looking for him, applicant 1 said because he left the camp and they wanted to know for what reason. I note the applicant did not say they wanted him for his LTTE connections. When asked how he knew the authorities were looking for him, applicant 1 said his younger brother, who worked in a lodge, was shown a photograph and asked about him. Applicant 1 had not made any such claims previously. Further, if they were looking for applicant 1, I find it difficult to believe the authorities would show a photograph of applicant 1 to his brother. Authorities would only need to ask his brother where he was. There would have been no need to show his own brother a photograph of him. Having listened to the interview, I consider applicant 1 was making up this account. I do not accept that anyone was looking for him or asked his brother where he was.
29. Further, applicant 2 was able to obtain a passport. Applicant 1 already had a passport and made arrangements to obtain passports for his wife and four children. He paid an agent to get them and they were genuine passports. If they were wanted by authorities, I find it difficult to believe that they could have obtained four new passports. Even if they paid an agent to get the passports, I find it difficult to believe that authorities would have issued five new passports, if they were wanted or of adverse interest to authorities.
30. Further, they departed from Colombo airport and had no apparent difficulties. Applicant 1 said he paid some money to a person in the airport. In his statement applicant 1 said while they were entering the airport, some official person called and talked to him and said if he wanted to leave he had to pay some money. So he paid and let him go, so they had no problems leaving. While applicant 2 confirmed his father gave some money to a person in the airport he had little details and given his age at the time and was not sure.
31. Further, I found applicant 1's evidence about this at the protection interview vague and unconvincing. When asked to describe how he went through the airport if he was wanted by authorities, applicant 1 stated he got passports, bought tickets to [Country 4] all with money. The delegate referred to information that at the time authorities had many airport checks and

people identifying LTTE and doubted they could have gone through the checks if they had been wanted by authorities. Applicant 1 agreed it could have happened that way. It was not until the delegate again put concerns that if they were wanted they could have been identified at the airport, that applicant 1 said a person came and talked to him in Tamil and maybe it was one of those persons, but he could not identify him. The delegate expressed doubts that he would pay any person who spoke to him. The applicant said generally when asked for money and support he would give money and added he protected his family and gave whatever he had. The applicant could not identify the person. Further, if the payment was requested upon entering the airport it is difficult to believe that the applicant was identified at that point as a person wanted, given he would not have gone through check in, security or immigration checks at that point. I do not accept applicant 1 was wanted or avoided being caught by paying a bribe at the airport. I do not accept that applicant 1 paid a bribe to either obtain passports or depart the country.

32. I have considered the letter from the MP dated [April] 2014 which indicated the applicant and his family were well known to him, applicant 1 had two businesses ([Business 2] and [Business 3]), and while he was detained at the 'welfare centre' he was suspected of [Products 1 and 2] so he escaped the country.
33. The letter was a photocopy. The typed part was not straight or aligned on the page under the document header. Further, the email address of MP was a Hotmail address, rather than a parliamentary or government address. The website address was also not a parliamentary or government address but a general .com address. Also the letter did not explain how the MP knew the applicant. Applicant 1 had claimed he ran a [Business 2] and [Business 1] purchasing wholesale [products] and selling them, which was not consistent with the MP statement that the applicant ran a [Business 3]. The letter stated that 'in order to arrest him, he was searched' by the military. I consider this is an odd description – that in order to arrest a person he was searched. There was no mention of applicant 1 or 2 being questioned or applicant 1 being beaten badly. The letter is not consistent with the applicant 1's claims, that he was questioned twice and beaten in the camp. Further, applicant 1 had not claimed he was arrested. Further, there was no mention of the applicants escaping the camp by payment of a bribe. I find it difficult to believe that such key parts of the applicants' claims were not mentioned in the letter, particularly given the claim applicant 1 was well known to the MP. Given the differences in account, I do not consider the letter suggests personal knowledge of the events. I do not consider it is a reliable account of events. Given the anomalies, I place no weight on it.
34. I accept that applicant 1 and 2 had been questioned by the authorities while in the camp and applicant 1 may have been beaten. I accept that they (along with the family) escaped the camp by payment of a bribe. However, I do not accept the applicants were wanted by authorities for LTTE activities or suspicions, or for their escape from the camp or for any reasons. I do not accept applicant 1's explanation they wanted Tamils out. Country information in the review material indicates that of the 289,000 Tamils displaced in IDP camps at the end of the war, 10,000 were held in separate detention centres on suspicion of LTTE links. If the applicants had LTTE links or suspected LTTE links it is highly likely they would have been sent to separate detention centres or rehabilitation camps. Country information also indicates that many people also managed to buy their way out of camps and resettled. I do not accept the applicants were wanted for escaping the camp. According to the country information, many thousands did and resettled. Further, given it was not long after the war ended and the many checkpoints at the time, I find it difficult to believe that a family of six could have travelled from the north to Colombo and avoided detection if they were wanted for escaping or LTTE suspicions or for any reason. It is not credible.

35. Further, that the applicants (and the entire family of six) were able to depart on genuine passports in September 2009, shortly after the end of the conflict is strong evidence that applicants 1 and 2 were not of adverse interest or wanted by authorities and further reinforces my view the applicants were not wanted or of adverse interest to authorities.
36. Further, according to the delegate's information, both applicants have had new Sri Lanka travel documents issued to them in [Country 2] in 2019. The applicants claimed they did not know about them and indicated perhaps applicant 1's wife obtained them and would ask her. However, I find it difficult to believe the applicants did not know they had newly issued Sri Lanka travel documents as they would have had to provide photographs and signatures for travel documents.
37. I note also that applicant 1's daughter (who also escaped the camp came to Australia with him) had recently visited to Sri Lanka as she had married and her in-laws were in Sri Lanka. There was no evidence that she faced any harm during that visit, which also reinforces my view that the applicants are not wanted or of adverse interest.
38. While I accept life was difficult being displaced in [Country 5] and [Country 1] and being detained in [Country 1] immigration detention, I do not accept that anyone was looking for them after they departed Sri Lanka or that undercover CID harassed them in [Country 5].
39. While I accept that the applicants sought the protection of UNHCR and applied for asylum I do not accept that they were granted asylum. It was evident the applicants departed [Country 5] and [Country 1] before their claims were assessed. While I accept that applicant 1's wife and other children may be in [Country 2] via a resettlement program of some sort, there is no evidence before me that the applicants have been assessed as refugees. Further and in any event, I must make my own assessment. I accept applicant 1's brothers live in [Country 3], some on the basis of having studied there and other were sponsored by siblings.
40. Having considered the applicants' claims, I do not accept that the applicants were of interest to the authorities, were suspected LTTE or wanted for their escape from the camp.

Persecution

41. I accept that during the conflict Tamils, particularly in the North and East faced harassment and harm. However, the situation has improved considerably since 2009 and even more so since the change in government in 2015.
42. The UK Home office 2017 stated that persons of Tamil ethnicity would not of itself warrant international protection and neither in general would a person who evidences past LTTE membership or connection unless they have or are perceived to have had a significant role in it or in active in post conflict Tamil separatism and threat to the state.
43. I have accepted that applicant 1 was detained and tortured in a round up in 1985 and his wife's LTTE sister was killed in 1996. I consider the wife's sister connection remote in terms of relationship and time, given she was killed many years ago. I do not accept the applicants are or will be of adverse interest due the deceased LTTE sister in law. I accept that applicant 2 also grew up in a war zone and experienced a bomb blast near him.
44. Country information indicates that Tamils were routinely harassed, harmed or rounded up during the conflict. However, I do not accept that, these events put the applicants at risk of harm or mean the authorities have or will have any interest in them as they were in the context of the civil conflict which ended in 2009 and remote in time.

45. As discussed above, I do not accept applicant 1's provision of goods to the LTTE, protests or representations on behalf the community during the conflict or being from an LTTE controlled area puts any of the applicants at risk of harm or raises their profile. Further, applicant 1's activities were in the context of living in an LTTE controlled area during a conflict that ended in 2009, when everyone had some LTTE contact.
46. Further, as discussed above, applicant 1 was in an IDP camp for 7 months and questioned (and beaten twice) by the authorities a number of times in 2009 and they were aware of his activities and let him go each time. I accept also applicant 2 was questioned about his father in 2009 at the camp and was let go.
47. That neither of the applicants were separated or sent to a rehabilitation camp indicates that neither were suspected LTTE or of adverse interest.
48. Further, I do not accept applicant 2 faces a real chance of interrogation about his father or LTTE connections, as I do not accept his father is or will be so suspected or of adverse interest. I do not accept either of them faces interrogation about escaping from the camp in 2009. Further, I do not accept they face a real chance of detention, imprisonment, rehabilitation, being shot, disappeared, abducted or tortured or otherwise harmed.
49. Further, country information¹ indicates that authorities are not interested in persons like the applicants, but only those who committed crimes, were high profile LTTE or involved in Tamil separatist activities. Neither applicant has such a profile or suspected profile.
50. While I accept that there are reports of continuing risk of harm for certain persons suspected of LTTE involvement or persons involved in a Tamil unitary state, I do not accept either of the applicants are of such a profile or will be suspected as such. I note the authorities have sophisticated intelligence about separatists and suspects. Further, the applicants were questioned in 2009 and let go and I have not accepted that they were or are of adverse ongoing interest.
51. While I accept the applicant was harassed (including physically harmed in 1985) during the conflict, the credible country information before me is that the security situation has improved considerably since the end of the conflict in 2009, particularly for the Tamil population. UNHCR eligibility guidelines in 2012 confirmed (that due to the improved human rights and security situation there was no longer a need for group based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity. The more recent credible country information in the material before me (DFAT reports, UK Home Office) continues to confirm this is the case.
52. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly, surveillance of Tamils in the north and east continues, particularly those associated with politically-sensitive issues. However, I do not accept either of the applicants has been or will be involved in Tamil separatism or any politically sensitive issues upon return. I do not accept the applicants face a real chance of any monitoring or surveillance or harm.
53. At interview the applicants said they were afraid to return because the former defence minister, was now president and against Tamils.
54. I have considered the 2019 events in Sri Lanka, including the state of emergency that was lifted and that the Easter Sunday attacks resulted in increased security presence in the

¹ UK Home Office, DFAT

country. According to the country information, the attacks were by Muslim extremists against Christian churches and luxury hotels. The perpetrators have been arrested or killed. Unfortunately, the Muslim community has been subject of reprisal attacks from some in the community. However, the applicants are Tamil, and the country information does not indicate that they face a real chance of harm on this basis. DFAT assessed that non- Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste. I do not accept the applicants face a real chance of harm in relation to such matters.

55. I have considered the country information in the review material about the 2019 presidential election and win of Gotabaya Rajapaksa and return of his brother Mahinda as Prime Minister and concerns about their past involvement in the civil war and the ethnic tensions as a result. According to International Crisis Group article there were concerns that police investigations into disappearances and attacks on journalists that occurred under Mahinda Rajapaksa previously may stall or be dropped. However country information indicates that Rajapaksa tried to reassure minorities and wants to focus on the future. He urged communities who voted against him to work with him and pledged to make no distinction between ethnicity and religion. The President extended an olive branch to all, including those who did not vote for him and pledged to act for Sri Lankans, including those who did not vote for him.
56. While I accept the applicants may not feel at ease upon return given their absence and fears, I do not accept that they face a real chance of harm from the military, police or authorities. I do not accept any of the applicants face a real chance of rehabilitation or being detained or imprisoned or harmed upon return.
57. Even considering the 2019 elections, I do not accept the applicants face a real chance of harm as Tamils from north or formerly LTTE controlled areas or due to their past experiences, association, circumstances or family connections. Further, I do not accept applicant 2 as a young Tamil male now of age will be of adverse interest to authorities.
58. The applicants were concerned that they had no family in Sri Lanka as they were all in [Country 3] and had no one to protect them. Applicant 2 claimed he would be vulnerable to discrimination because of this and he did not know how to live in Sri Lanka as he was young when he left and has no support if returned.
59. However, applicant 1 confirmed that while he did not have immediate family in Sri Lanka, he had relatives in Sri Lanka, being his father's cousins and their children. Further, I note that while in Australia, applicant 2 sent money twice to people in Sri Lanka. According to the protection interview, the money was sent to applicant 1's aunty who he claimed lived in [Country 6] but visited Sri Lanka frequently. Applicant 1 confirmed that his daughter, who had come with him to Australia, had returned to Sri Lanka for a visit with her husband and his relatives. I note there was no mention of any harm to her on that visit. Further, applicant 1 has been a businessman in Sri Lanka in the past. Applicants 1 and 2 both are employed in Australia ([Occupation 1]-applicant 1), and [Occupations] for applicant 2) and have employment skills and experience. They both have high school education. Applicant 2 is now [age] years old and speaks fluent English. I consider they are both resourceful and resilient with good education and employable or entrepreneurial skills. Applicant 1 also confirmed he owned a house, business and other assets ([crop] plantation, paddy fields) in Sri Lanka. His relatives there helped looked after them and his [Country 3] relatives also visited to keep an eye on it. I do not accept the applicants do not have any family or connections in Sri Lanka.

60. Further, I do not accept they face a real chance of discrimination. DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing. I note applicant 1 still has his own property and businesses in Sri Lanka, which continue to be run for the family. I consider they will have the support of each other upon return. Further, applicant 2 has been educated, speaks English as well as Tamil and has employment experience and has demonstrated resourcefulness and adaptability. I do not consider they face a real chance of any employment or accommodation difficulties, or a real chance of social stigma or discrimination upon return.
61. I do not accept they will be vulnerable to discrimination, have no protection or face a real chance any harm on this basis upon return.
62. Even considering applicant 2's claims about unfamiliarity with Sri Lanka, I do not accept he faces a real chance of any harm. He has lived in Sri Lanka as a child, departing when he was years old. He has also been resourceful and adaptable in living in other countries before coming to Australia. He speaks and understands English as well as Tamil. He will have the support of his father upon return.
63. In his screening interview applicant 2 mentioned a fear of abduction because his father was a businessman. Applicant 1 mentioned CID can falsify their identity and he could be target because he ran a business and want money. According to DFAT extortion and kidnapping for ransom was common during the war, particularly in the north and east. While they are still known to occur, their incidence has decreased considerably in the post-war period. Where extortion and kidnapping for ransom occurs, the motive is usually business-related. DFAT assesses that wealthy Sri Lankans face a low risk of extortion or kidnapping for ransom. However, there was no mention by the applicants of any extortion or similar threats in the past during the war. Given the country information of the reduction of such threats, and that the applicants were not targeted previously, I am not satisfied that they face a real chance of any harm in that regard upon return.
64. The applicants claimed they did not have identity documents or passports and would face suspicions as a result upon return. Applicant 2 did not have an ID card as he left before he was old enough to have one issued. He was issued with a birth certificate however. Applicant 1's wife has applicant 1's original ID card in [Country 2]. I note he received some documentation by mail previously and can see no reason his wife could not send him the original ID card either.
65. Further, information was that both applicants had Sri Lankan travel documents issued to them from [Country 2] in 2019. They said they were not aware of that and would check with applicant 1's wife in [Country 2] who may have applied for that. I do not accept they would not have identity documents or face a real chance of any harm in that regard.
66. While applicant 2 may need to be in Sri Lanka to have his ID card issued for the local grama niladhari, he has other identity documents with him and available to him. Country information from DFAT report indicates that birth certificates and passports are frequently used for identification also in Sri Lanka. I do not accept applicant 2 would not be able to obtain a NIC or that he faces a real chance of harm while waiting for one to be issued upon return. I do not accept he faces a real chance of harm upon arrival either without an ID card as it will be evident that he departed Sri Lanka as [age] year old child and before he was eligible for an ID card. Further, I do not accept the applicant is or will be of adverse interest to authorities.

67. I do not accept that either of the applicants face a real chance of harm on the basis of their past experiences, circumstances, ethnicity, background, family connections, political opinion or particular social group or being absent from Sri Lanka for a significant period.

Returning asylum seekers and data breach

68. The applicants departed legally on their own passports and I am not satisfied they will be subject to any penalties under the Immigrants and Emigrants Act.

69. The applicants believed that due to the immigration data breach the Sri Lankan authorities would be aware of they sought asylum and assume applicant 1 was an LTTE member and be interrogated and beaten upon return. I accept they were subjects of the immigration data breach. There is no evidence that their claims were disclosed in the data breach. Given their return on temporary travel documents the authorities may be aware that they sought asylum in any event.

70. I accept that as the applicants no longer hold valid passports if they return to Sri Lanka, they would do so as returning asylum seekers on a temporary travel documents and may face questioning at the airport.

71. Credible country information in the DFAT reports indicates that returnees are not mistreated upon arrival or questioning at the airport. All returnees are treated the same regardless of their ethnicity. I do not accept that Tamil returnees are treated differently. Further, the UK Home office noted that IOM stated that claiming asylum abroad was not an offence and that persons who return after being absent for many years would not be questioned on this. They would only be interested if there were outstanding criminal charges and the applicants have none.

72. I do not accept their departure from Sri Lanka or seeking asylum means they will be imputed with LTTE associations. Even considering (though not claimed) that most of the family live overseas, I do not consider that puts the applicants at risk or raises their profile. DFAT reports that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, and claimed asylum. Many thousands of Sri Lankans also live, work and reside overseas. I do not accept that having sought asylum in other countries as well puts them at a real risk of harm or raises their profile.

73. Although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants and I have not accepted that the applicants have such a profile or would be suspected or perceived as such. I have not accepted that either of them is or will be of interest to authorities or anyone.

74. I do not accept the applicants face any harm upon questioning or that they face a real chance of harm as returnees, having sought asylum, being absent for a lengthy period, escaped from the camp, departed not long after the war ended or due to the data breach.

75. I note there is country information in the DFAT 2019 report about returnees and failed asylum seekers facing practical challenges to a successful return to Sri Lanka due to debt from their journey and difficulties finding suitable employment and housing, but that they do not experience societal discrimination for seeking asylum elsewhere. As discussed above I consider the applicants have good education, employment skills and experience and applicant 1 has some connections in Sri Lanka. Further applicant 1 has his own home, business and other

property in Sri Lanka. I do not consider the applicants in this case face a real chance of harm as returnees resettling, finding employment or accommodation.

76. I am not satisfied that they face a real chance of social stigma, economic or other difficulties as returnees. Further and in any event, I do not consider social stigma amounts to serious harm.
77. Based on the country information and the applicants' circumstances I do not accept either of them face a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish their identity and history or as a result of authorities checking with their home area about identity as I do not accept they are or will be of adverse interest to military, police, army, CID, the authorities or anyone once they returns to their home.
78. I have had regard to all of the evidence before me and I have considered the applicants' claims individually and cumulatively, as well as considering their personal circumstances. I am not satisfied the any of the applicants have a well-founded fear of persecution from CID, police, army, navy or any Sri Lankan authorities, or anyone for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if they return to Sri Lanka.

Refugee: conclusion

79. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

80. Under s.36(2)(aa) of the Act, 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

81. 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.

82. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

83. I have found that the applicants do not have a real chance of harm on any of these bases. For the same reason and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not

satisfied the applicants will face a real risk of any harm, including significant harm on any of those bases if removed to Sri Lanka.

Complementary protection: conclusion

84. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

Member of same family unit

85. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include dependent children.

86. As neither of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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.