



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

NEPAL

IAA reference: IAA21/09330

Date and time of decision: 7 July 2021 09:39:00

S MacKenzie, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Nepal. He arrived in Australia in June 2013 as an unauthorised maritime arrival and subsequently lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV). The applicant primarily fears harm in Nepal due to his political opinion.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 7 June 2021, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Nepal.

Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 21 June 2021, the applicant sent an email to the IAA indicating there were no changes to his protection claims.
5. Included in the review material is an audio recording of Part 2 of an 'Irregular Maritime Arrival & Induction Interview' the applicant had with the then Department of Immigration and Citizenship on 3 August 2013. Having had regard to the material before me, it appears that the while the delegate was aware of the audio recording, she did not have regard to it. It also appears by virtue of its inclusion in the material referred to the IAA that the Secretary considers this information relevant to the review. While the delegate appeared to have before her the written record of the Irregular Maritime Arrival & Induction Interview (Part 1 and Part 2,) I consider the audio recording of Part 2 to be new information. I have listened to the audio recording and note the applicant advised that his earlier travel to [Country 1] and [Country 2] was due to security concerns in Nepal. This is corroborative of his later evidence in his SHEV application that he departed Nepal for these countries due to concerns for his safety. In all the circumstances, I am satisfied that exceptional circumstances exist to justify considering this new information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is a citizen of Nepal;
 - He was a member of the Nepali Congress (NC), which resulted in him and his family coming to the adverse attention of the opposing Maoist party;
 - If returned to Nepal, he fears harm due to his past connections with the NC and his opposition to Maoist party ideology.

Refugee assessment

7. 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

8. 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.

9. Since his arrival in Australia, the applicant has consistently claimed to be a Nepalese citizen from the village of [Village 1] in [a named] District. Although he has not been able to provide any documentary evidence of his identity, the delegate accepted that his identity is as claimed. In coming to this conclusion, she gave weight to the applicant’s detailed narrative to the Department about his life in Nepal, including in his Irregular Maritime Arrival & Induction Interview and throughout the SHEV process. On the evidence before me, I also accept that the applicant is a national of Nepal and that his identity is as claimed. I find Nepal to be the receiving country for the purpose of this decision.

10. The applicant’s written claims and evidence about events in Nepal was initially set out in a written statement dated 21 August 2017 (SHEV statement). In summary, he claimed that he and his family were long-time supporters of the NC. He joined the NC as a general member in around 1999 and about two years later (approximately 2001) he joined the NC’s youth fraternity in [Village 1] known as the Tarun Dal. Shortly after, he was appointed [Position 1] of the Tarun Dal. He organised sporting and cultural events in his village and [organised] the NC’s [resources]. He was targeted by the Maoist party in two ways. Firstly, he was asked to join the Maoists. Secondly, he was asked to hand over the NC’s [resources] to the Maoists. They threatened to kill him if he did not comply. As a result of the threats, the applicant went into hiding in Kathmandu where he sometimes drove a taxi. He also lived in Chitwan and Pokora. During this period, he continued to support the NC but due to fear did not attend any party meetings. The Maoists discovered the applicant was in Kathmandu and again threatened him and asked him for money. His taxi was also damaged. He didn’t report these incidents to the police because the Maoists are connected with the authorities. In around 2006-07, while the applicant was still living in Kathmandu, his brother was kidnapped and killed. The applicant suspects the Maoists were responsible. He also suspects the Maoists mistook his brother for him, and that the Maoists carried out the killing because the applicant refused to pay them money. The applicant reported his brother’s murder to the police, but they did not help. Following this, the Maoists threatened the applicant stating they would kill

him like they did his brother. Due to the threats, the applicant left Nepal. He travelled to [Country 3] and onto [Country 2] where he worked [for a specified agency]. Due to the security situation in [Country 2], he returned to Nepal in around 2009. The Maoists again approached him and asked him for money and, when he refused, they threatened to kill him. He moved to Kathmandu, but the threats continued. In around 2011, he again left Nepal. He travelled to [Country 3] and onto [Country 1] where he again worked [for a similar agency]. After around 19 months abroad, he returned to Nepal. He had heard that the Maoists were asking his family for money so decided to reside in [District 1]. He later returned to Kathmandu. He received death threats and requests for money by telephone until around December 2012. Due to the threats, he decided to leave Nepal.

11. The applicant also claimed in his SHEV statement that his father died [in] December 2016. He said he did not know how he was 'killed', but that it was not from natural causes. Since then, his mother has told him not to return to Nepal.
12. The applicant gave oral evidence about events in Nepal in a telephone interview with the delegate on 3 May 2021 (SHEV interview). Overall, I found his evidence in that interview in respect of his claimed involvement with the NC and Tarun Dal unconvincing. The delegate asked the applicant a range of probing questions about what the NC stood for, what goals they sought to achieve, how they planned to achieve those goals, and what he liked about the party's policies. His responses to those questions indicated he knew very little about the NC. He repeatedly advised the delegate that the NC had a policy to develop his village and improve the country as a whole. However, he provided little in the way of examples of NC policy or how the party sought to achieve its goals. As noted by the delegate, his evidence in this regard was vague, repetitive, and lacking in meaningful detail. I also found the applicant's evidence about his role as [Position 1] for the Tarun Dal unpersuasive. When speaking about this role, he predominately spoke about how he arranged sporting and cultural events in his village. He indicated that as [Position 1] he was simply required to [direct resources] because [detail deleted]. The delegate also asked the applicant how Maoist ideology differed from his own beliefs. He repeatedly advised that Maoists killed cows and ate beef. He speculated that the Maoists may not have liked Hinduism. The delegate also asked the applicant about his current political beliefs. He said that while he hadn't had any involvement with the NC for 19 or 20 years, nor any involvement with any Nepalese political organisations in Australia, he still believed in the party. He said he got information about the NC from online sources. He claimed that the Maoists were still asking his family in [Village 1] about him.
13. The applicant's evidence in respect of the killing of his brother by Maoists was also unconvincing. The delegate asked him about his written claim that the Maoists had kidnapped and killed his brother, in a case of mistaken identity. She asked how this was possible when the Maoists purportedly knew who the applicant was, having targeted him for several years, including in Kathmandu where he was in hiding. In response, he indicated he knew very little about the incident involving his brother. He said that his father had told him that Maoists had come looking for him (the applicant) around that time and speculated Maoist involvement in his brother's death. He said he reported the incident to the police, but they couldn't find any evidence of Maoist involvement. Later in the interview, he said he didn't know why his brother was killed.
14. I also found other aspects of the applicant's evidence in the SHEV interview difficult to reconcile with his SHEV statement. For example, he claimed that he had been kidnapped by the Maoists on two occasions (in around 2001-02 and 2005-06) but did not indicate as such in his written claims. His claim in the SHEV interview that he was released on both occasions when his friends advised the kidnappers that he had no money was also unconvincing. He

also indicated that following approaches from the Maoists in [Village 1] he reported these interactions to the police; however, in his written claims he indicated it was futile to report such matters due to the Maoists' connection to the authorities. He also indicated that he went into hiding in [District 1] in around 2002-03, which was nearly 10 years earlier than he had indicated he went to [District 1] in his SHEV statement. The applicant also indicated in the SHEV interview that the Maoists' threats and requests for money were issues faced by all taxi drivers in Kathmandu, which appeared to differ from his written claims that he was specifically targeted due to his political affiliation with the Tarun Dal / NC. He also advised the delegate in the SHEV interview that since he had arrived in Australia his wife had received a number of telephone calls. He indicated the calls were of such a nature that she was forced to change her telephone number. There was no mention of such calls in his written claims. He also indicated that even now the Maoists approached his family in Nepal once or twice a month to ask about him.

15. Although she had significant concerns with the applicant's evidence, the delegate accepted it 'plausible' he was an ordinary and low-level member of the NC. She also accepted it 'plausible' that he was a member of the Tarun Dal and held the position of [Position 1]. However, the delegate was not satisfied this amounted to anything more than participating in low-level village based social and sporting activities. On the information, I have come to a different conclusion. I am not satisfied the applicant was involved with the NC or the Tarun Dal in any capacity. In coming to this conclusion, I have considered his evidence in the SHEV interview which indicated he knew very little about the NC and its goals. This leads me to conclude he was not involved with the NC or its youth fraternity as claimed. I also considered his evidence that his brother came to the adverse attention of Maoists as a result of the applicant's profile unconvincing. Further, I considered his claims to have been kidnapped on two occasions, first raised in the SHEV interview, unpersuasive.
16. I acknowledge the applicant's evidence in Part 1 of his Irregular Maritime Arrival & Induction Interview that he was involved with the NC. According to the written record, he indicated that he left Nepal due to his work for the party. I also acknowledge that he indicated in that interview that he had difficulties with a group named 'maywardi' who would come to his village and slaughter cows. In his SHEV statement, he claimed that in Nepal the Maoist party is often called 'maywardi'. According to the written record, he also indicated in Part 1 of his Irregular Maritime Arrival & Induction Interview that his brother was killed by persons affiliated with a political party. In Part 2 of the interview, he indicated that he travelled to [Country 1] and [Country 2] due to security concerns in Nepal. While the applicant's evidence soon after he arrived in Australia may be generally supportive of his protection claims first lodged in 2017, it does not outweigh my concerns with his later evidence throughout the SHEV process about purported events in Nepal.
17. Having considered the applicant's evidence in its entirety, I am not satisfied he was a person of adverse interest to the Maoists, or any other person or group, in Nepal. Nor am I satisfied his travel to [Country 2] and [Country 1] was motivated by threats he received in Nepal. Like the delegate, I am not satisfied the applicant was kidnapped or that he faced death threats. I am not satisfied he is genuinely opposed to Maoist party ideology or that his family came to the adverse attention of Maoists, or any other person or group, for any reason. I am not satisfied that Maoists have been asking the applicant's family about his whereabouts.
18. In considering the applicant's evidence and coming to the above conclusions, I have noted the applicant's evidence in his SHEV statement that there was a fire in his apartment in December 2016. He indicated that as a result of this incident he was hospitalised overnight. He claimed that his memory had been affected since the fire, and that he sometimes finds it

difficult to remember past events. On the information before me, I am not satisfied the problems with the applicant's evidence is due to the fire or his brief hospitalisation in 2016. I also note that at the beginning of the SHEV interview he advised the delegate that he was feeling well and not suffering from any health condition that would impair him during the interview.

19. In light of the evidence discussed, I am not satisfied the applicant faces a real chance of harm in connection with his life in Nepal prior to his departure in 2013 now, or in the reasonably foreseeable future. Nor am I satisfied he faces a real chance of harm due to his political opinion now, or in the reasonably foreseeable future.
20. Although not raised a claim for protection, the delegate considered the treatment faced by failed asylum seekers returning to Nepal. In 2019, DFAT reported that a large number of failed asylum seekers had returned to Nepal from various countries with host-government or international organisation assistance. DFAT stated it was not aware of any difficulties being experienced by these failed asylum seekers on the basis of their asylum-seeking history or otherwise. DFAT assessed that returnees were unlikely to suffer any social stigma upon their return to Nepal or adverse treatment by the Nepalese Government.¹ The applicant has not claimed to fear harm in Nepal on account of his asylum application abroad or as a failed asylum seeker and, on the evidence, I consider the chance he would face a real chance of harm on this basis remote.
21. I find that the applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

22. 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

23. 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

24. 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

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report: Nepal", 1 March 2019, 20190301094546

- the person will be subjected to degrading treatment or punishment.
25. 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.
 26. I have found that the applicant does not face a real chance of any harm in Nepal for the reasons claimed or considered. Based on the same information, and for the reasons set out above, I find he does not have a real risk of suffering significant harm in Nepal.
 27. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

28. 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.