



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09387

Date and time of decision: 20 July 2021 12:37:00
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 Tamil from the Eastern Province, Sri Lanka. He arrived in Australia in April 2013 as an unauthorised maritime arrival. In September 2017 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV). He primarily claimed to fear harm in Sri Lanka on account of his past links to the LTTE (Liberation Tigers of Tamil Eelam).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 17 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 Sri Lanka.

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). No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He is a Tamil from the Eastern Province;
 - In 2005, he was forcibly recruited by the LTTE. He was released after one to one and a half months following the intervention of his school and a [charity];
 - In about 2006, he was arrested as part of a roundup and accused of links to the LTTE;
 - In the years leading up to his departure from Sri Lanka, he came to the adverse attention of the Karuna Group. He and his family were threatened, and he was forced to live in hiding for seven months;
 - In around 2015, after he arrived in Australia, the Karuna Group, together with the Sri Lankan security forces, came to his house looking for him. They believed he knew the location of hidden weapons, money, and jewels;
 - If returned to Sri Lanka, he fears harm from the Sri Lankan authorities due to:
 - his ethnicity
 - his previous involvement with the LTTE
 - his asylum application abroad
 - his illegal departure from Sri Lanka
 - his time spent in Australia.

Refugee assessment

5. 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

6. 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.

7. Since his arrival in Australia, the applicant has consistently claimed to be a Tamil from the Eastern Province of Sri Lanka. He has provided some evidence of his identity in the form of a copy of his Sri Lankan national identity card. On the basis of his evidence, I find that Sri Lanka is the receiving country, and I accept that the applicant is a Tamil male from this part of Sri Lanka.

8. The applicant's written claims and evidence about events in Sri Lanka was initially set out in a written statement, dated 8 September 2017, accompanying his SHEV application (SHEV statement). He claimed that in 2005 he was forcibly recruited by the LTTE. He was with the group for one and a half months and undertook fitness, weapons, two-way radio, and compass training. His parents secured his release from the LTTE following intervention by his school and [an Organisation]. He continued his studies. The Sri Lankan security forces did regular roundups and, in about 2006, he was arrested and accused of being previously connected with the LTTE. He was beaten severely over a period of two days. After 15 days he was taken to court, before being released following the intervention of his school and [an] organisation. The applicant also indicated in his SHEV statement that he had problems with the Karuna group in around 2008-09. He initially indicated that the Karuna Group sought him out in around 2008 after he completed a [course]. He later stated that it was after the LTTE was defeated in 2009 that he began to have problems with the group. He stated that his name and details were on a list held by the Karuna Group and that, because they were short of people, they came looking for him. He said his family were tortured. He was warned that if he didn't join the Karuna Group he would be imprisoned or shot. His father was also threatened that he would be shot if his son (the applicant) did not join the group. The applicant indicated that because of these problems he lived in different parts of the country for a seven-month period, including in Jaffna, Kilinochchi, Vavuniya, and Mannar. He stated that after he arrived in Australia the Karuna Group joined with the Sri Lankan security forces and, that two years earlier (approximately 2015), they came to his house in Sri Lanka looking for him.

9. The delegate questioned the applicant about his experiences in Sri Lanka and his claims for protection on 2 June 2021 (SHEV interview). In the interview, the applicant indicated that not all his relevant experiences in Sri Lanka had been provided in his SHEV statement. He said that he didn't feel like sharing certain information with his lawyer who had assisted him to prepare his application. I note in his SHEV statement, the applicant stated that he had given his protection claims during his 'arrival interview' and that the statement was only a summary. He indicated the same in the SHEV interview. I infer he was referring to his 'Irregular Maritime Arrival & Induction Interview' conducted on 5 July 2013, by the then Department of Immigration and Citizenship.
10. I accept the applicant's broadly consistent evidence since his arrival in Australia that he was forcibly recruited and trained by the LTTE in 2005 for a period of around one to one and half months. I accept he was released from the LTTE following the intervention of his parents, his school, and a [charity]. Country information confirms that prior to the end of the civil war the LTTE supported its administration through the forced recruitment of Tamils.¹
11. I also accept the applicant's broadly consistent evidence that he was taken in a roundup of Tamils in 2006. Country information confirms LTTE support was at times imputed on the basis of ethnicity and that many Tamils, particularly in the north and east, reported being monitored, mistreated, and detained by security forces during the conflict.² I accept the applicant was held for a period of 15 days and harmed during this time. In the SHEV interview, he said he sustained a split to his lip.
12. The applicant's evidence as to the circumstances of his release from the Sri Lankan authorities in 2006 varied. In the SHEV interview, he said he was identified as a person with a previous connection to the LTTE. He said he was initially transferred into police custody and released. He said he was never charged with an offence and nor did he have to attend court. However, this differed from his evidence both in his arrival interview and his SHEV statement that he faced court following 15 days in detention. Although I have some concerns in respect of his changing evidence, I am prepared to accept the applicant was released without charge. The applicant's evidence in the SHEV interview, and consistent with his earlier evidence, was that following his release he was able to return to school and finish his education.
13. While the applicant has consistently claimed since his arrival in Australia that he came to the adverse attention of the Karuna Group in Sri Lanka, I considered aspects of his evidence in this regard problematic.
14. Firstly, his evidence as to when he came to the attention of the Karuna Group appeared inconsistent. In his SHEV statement, he indicated the group sought to recruit him in 2008, after he completed a [course]. According to his education history recorded in his written application, he completed the [Course] in 2007. However, later in the SHEV statement, he indicated his problems with the group commenced '[a]fter the LTTE was defeated in 2009'. Country information indicates the LTTE was defeated in mid-2009.³ In the SHEV interview, he advised the delegate that his problems with the Karuna Group started after the war. He first advised the delegate that these problems began in 2011 or 2012. Later in the interview, he indicated his problems with the group began when he was aged [Number 1] years (approximately 2008-09) and during the period when the war was ending. He advised the

¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; South Asia Terrorism Portal, "Liberation Tigers of Tamil Eelam (LTTE)", 1 January 2009, CX230222; Human Rights Watch, "Trapped and Mistreated: LTTE Abuses Against Civilians in the Vanni", 1 December 2008, CIS16832

² DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

delegate that the Karuna Group were unable to take him because was “underage” and had “support from the school”. In his SHEV statement, he recorded that he finished school in [Year].

15. Secondly, the applicant’s evidence as to why he was a person of interest to the Karuna Group appeared to vary. In his SHEV statement, he indicated the group sought to recruit him because they were ‘short of people’. He said he was threatened that if he did not join that he or his father would face problems. However, in the SHEV interview, he gave no indication that the group were seeking to recruit him. Rather, he claimed that he faced harassment and mistreatment from them. He said he was threatened at gunpoint to give them information about the location of LTTE weapons and other property. He also claimed that he was beaten by the group when they saw him on the street. He claimed those after him in the Karuna Group were the same persons who had been in the LTTE during his brief time with that group in 2005.
16. Thirdly, his evidence as to when he went into hiding also appeared to vary. In his SHEV statement, he claimed that he hid in places like Jaffna, Kilinochchi and Vavuniya for a period of seven months. He also claimed that before leaving Sri Lanka for Australia he spent time in Mannar and that the group was still looking for him then. It was consistent with his evidence in his arrival interview that he lived in these places in 2012 and 2013. However, as noted above, his evidence in the SHEV interview was that he faced problems with the group much earlier. The delegate asked him about his period living in different parts of Sri Lanka and asked if anything happened to him in his home area of Trincomalee during the three years leading up to his departure in 2013. In response, he said that the group continued to search for him so he just went to work.
17. Fourthly, I found aspects of the applicant’s evidence that the Karuna Group continued to search for him after he arrived in Australia unconvincing. In his SHEV statement, he indicated that his parents had told him two years earlier (approximately 2015) that the group, along with the Sri Lankan security forces, visited his home looking for him to find the location of LTTE money, jewels, and weapons. However, in the SHEV interview, he advised the delegate that he had not spoken to his parents or siblings for eight years (since approximately 2013).
18. Karuna, as Vinayagamurthi Muralitharan is known, was the eastern commander of the LTTE in the Batticaloa and Ampara districts. He split from the LTTE in 2004 and formed the Tamil Makkal Viduthalai Pulikal (TMVP), commonly known as the Karuna faction.⁴ Country information indicates that a number former Tamil paramilitary groups, including the Karuna Group, aligned with the government during the civil war.⁵ Reports indicate that in the post-war era the TMVP were involved in extortion of those operating businesses. Reports also indicate that during this period major Tamil towns, including Trincomalee, were policed by non-LTTE paramilitary groups such as the TMVP.⁶
19. Although I have concerns, in the context of the post-war environment in the east of Sri Lanka, I am prepared to accept the applicant may have faced some harassment and intimidation

⁴ Immigration and Refugee Board of Canada, “LKA103950.E: Sri Lanka: The Tamil Makkal Viduthalai Pulikal (TMVP) and Karuna factions”, 17 February 2012, LKA103950.E

⁵ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244; Immigration and Refugee Board of Canada, “LKA103950.E: Sri Lanka: The Tamil Makkal Viduthalai Pulikal (TMVP) and Karuna factions”, 17 February 2012, LKA103950.E

⁶ Immigration and Refugee Board of Canada, “LKA103950.E: Sri Lanka: The Tamil Makkal Viduthalai Pulikal (TMVP) and Karuna factions”, 17 February 2012, LKA103950.E

from the TMVP in around 2009. I accept he may have been questioned about any links to the LTTE. As noted above, LTTE support was at times imputed on the basis of ethnicity.

20. In his SHEV statement, the applicant recorded that he had never held a travel document. It was consistent with his earlier evidence in the arrival interview that he has never held a passport. However, in the SHEV interview, he said he previously held a Sri Lankan passport and used that document to travel to [Country] for a religious pilgrimage in 2011. I note this travel was not declared in his written application and nor did he mention it in his arrival interview.
21. The delegate noted in his decision that the applicant's evidence about being pursued by the TMVP was unconvincing. Having considered the evidence discussed, I also found his evidence about events following the end of the war, including purportedly being pursued and threatened by the Karuna Group/TMVP unpersuasive, and I am not satisfied he was recalling a genuinely lived experience. On the information, I am not satisfied the TMVP were attempting to recruit the applicant. Nor am I satisfied he went into hiding, that his family were threatened, or that he has been pursued by the Karuna Group, or any arm of the Sri Lankan security forces, since he has been in Australia.
22. On the evidence, I am not satisfied the applicant was a person of adverse interest to the Sri Lankan authorities, including the Karuna Group/TMVP, when he departed the country in 2013. While I have accepted his brief time with the LTTE, due to forced recruitment, became known to the Sri Lankan authorities in 2006, I give weight to the applicant's evidence that he was released, without charge, and able to return to school.
23. Although not raised throughout the SHEV process, I note the applicant's earlier evidence in his arrival interview that his father was once detained by the CID (Criminal Investigation Department). He couldn't remember when it was, but knew his father was accused of being involved with the LTTE. Although the applicant claimed in the SHEV interview that he had not spoken to his father since 2013, he knew his father was working as a three-wheeler driver. He did not indicate his father faced any ongoing adverse attention in Sri Lanka in connection with this past accusation or interaction with the CID.
24. As noted above, country information indicates that during the conflict LTTE support was at times imputed on the basis of Tamil ethnicity. However, the information also indicates that the overall situation for Tamils in Sri Lanka has improved considerably since that time.
25. Reporting from the UK Home Office in 2020 assessed that in its opinion, those Tamils most at risk are persons who are, or are perceived to be, a threat because they are, or are perceived to have a 'significant role' in relation to post-conflict Tamil separatism. The UK Home Office is of the view that returnees who have a previous connection with the LTTE but not a significant role in the group and/or post conflict separatism, are able to return to their communities without suffering ill-treatment, although they may be questioned on return at the airport and may be monitored once they return to their communities. The UK Home Office also noted there is no evidence to suggest that all returning Tamils are at risk of being perceived to have links to the LTTE, or if they do have links that this is a problem for them on return, as the LTTE is viewed as a spent force with previous combatants having been rehabilitated and absorbed into society with some, for example, being employed by the security forces or civil defence force or given government employment as bus drivers and conductors.⁷

⁷ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 6.0", May 2020, 20200527172009

26. DFAT assessed in 2019 that 'high-profile' individuals with links to the LTTE would continue to be of interest to the Sri Lankan authorities, and indicated that aside from the LTTE leadership former members who have committed terrorist or serious criminal acts during the conflict, or who provided weapons or explosives to the LTTE, may be considered high-profile. DFAT also assessed that even former 'low-profile' LTTE members who have since come to the attention of the Sri Lankan authorities would still be detained and may be sent to a rehabilitation centre. DFAT described low profile former LTTE members to include former combatants, those employed in administrative or other roles, and those who may have provided a high level of non-military support to the LTTE during the war. DFAT also reported that Tamils, including those with imputed links to the LTTE, are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links, and that under the previous government even Tamils with links to the LTTE are generally able to lead their lives without concerns for their security as a result of past LTTE associations.⁸
27. In relation to family members of former LTTE members, DFAT reported in 2019 that the Sri Lankan Government acknowledged that former LTTE members and their families may continue to face discrimination both within their communities and from government officials. DFAT reported it could not verify claims that people had been arrested and detained because of their family connections with former LTTE members, but understood that close relatives of high-profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring.⁹
28. In its 2020 Sri Lankan Human Rights Report, the United States Department of State reported that Tamils, especially in the north and east, reported that security forces regularly monitored and harassed suspected former LTTE members.¹⁰
29. In the applicant's circumstances, I am not satisfied he is, or would be perceived as, a former high or low level LTTE member or a family member of such a person. While I have accepted he came to the adverse attention of the Sri Lankan authorities due to his forced recruitment by the LTTE at the age of around [Number 2] years, I am not satisfied he undertook activities that amount to being part of the LTTE leadership, committing terrorist or serious criminal acts during the conflict, or providing weapons or explosives to the LTTE. Nor am I satisfied he is perceived by the Sri Lankan authorities to have done so. The applicant confirmed in the SHEV interview that none of his family had ever been involved in the LTTE, including distant relatives. Even accepting his father had come to the adverse attention of the CID due to suspected LTTE links, I am not satisfied that the applicant or his family were (or were perceived to be) LTTE members who were former combatants, employed in any role, or that they provided high level non-military support to the LTTE during the war. There is no claim the applicant or his family were, or are perceived as having been, involved in post-conflict Tamil separatism. While I have accepted the applicant had interactions with the Sri Lankan authorities during the conflict and the TMVP/Karuna Group in its aftermath, even when considered cumulatively, the country information before me does not support a claim that persons with a profile like his are of adverse interest to the Sri Lankan government authorities on the basis of LTTE links. I am not satisfied the applicant faces a real chance of harm in Sri Lanka due to past events, including his or his father's past adverse interactions with the Sri Lankan authorities or the TMVP/Karuna Group. On the evidence, I am not satisfied the applicant faces a real chance of harm in Sri Lanka on account of actual or imputed LTTE links, including familial links, now, or in the reasonably foreseeable future.

⁸ DFAT, "DFAT Country Information Report Sri Lanka", 3 November 2019, 20191104135244

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹⁰ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412

While I have accepted the applicant faced some harassment and intimidation from the TMVP/Karuna Group at the end of the civil war, the country information indicates that the TMVP/Karuna Group have since disarmed and are now engaged in politics.¹¹ I consider the chance he would come to the adverse attention of the group, for any reason, on return to Sri Lanka, remote.

30. In his SHEV statement, the applicant claimed that he had '[brothers] in Australia'. It differed from another part of his written application that his [brothers] all resided in Sri Lanka. Although he had claimed to have had no contact with his siblings since 2013, he was able to confirm in the SHEV interview that his brothers all remained living in Trincomalee. He gave no indication they had travelled to Australia at any time. The applicant did not advance any claims in respect of his siblings, including in connection with their place of residence, and no claims arise on the material before me. I have not considered this aspect of the applicant's evidence further.
31. In its 2020 Sri Lankan Human Rights Report, the United States Department of State reported that Tamils, especially in the north and east, reported that security forces regularly monitored and harassed members of their community, especially activists and journalists.¹² Several sources told a 2019 UK Home Office fact-finding mission that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil, but they do suffer discrimination along with other minorities.¹³ As noted above, DFAT assessed in 2019 that Tamils are no longer considered vulnerable to mistreatment by virtue of their ethnicity (including those with imputed links to the LTTE). DFAT also assessed that all Sri Lankans face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment, and housing. DFAT defines 'low risk' as meaning it is aware of incidents but has insufficient evidence to conclude they form a pattern. DFAT assessed that some Tamils report discrimination in employment, particularly in relation to government jobs. DFAT also assessed that there is no official discrimination on the basis of ethnicity in public sector employment, rather the limited Tamil appointments are a consequence of factors such as disrupted education due to conflict and language constraints. DFAT assessed that, while monitoring of Tamils in day-to-day life has decreased significantly under the previous Sirisena government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Physical violence against those being monitored is not common.¹⁴
32. DFAT also reported that the government no longer restricts travel to the north and east of the county, removing security checkpoints on major roads in 2015, and that military involvement in civilian life has decreased. DFAT indicate that in the Northern Province the military occupy some land and remain involved in some aspects of civilian life, particularly the economy. DFAT also report there was a heightened security posture in the north following the April 2019 Easter Sunday attacks which has subsequently eased.¹⁵ Reporting does not indicate that Tamils are at risk of harm based on their prior place of residence.¹⁶

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244;

¹² US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412

¹³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

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

¹⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 6.0", May 2020, 20200527172009; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412

33. DFAT further reported that Tamils have a substantial level of political influence and their inclusion in political dialogue increased since the previous change of government in 2015.¹⁷ The US Department of State reported in 2019 that the previous government had implemented a variety of ministries and presidentially appointed bodies designed to address the social and development needs of the Tamil minority, as well as a number of confidence-building measures to address grievances of the Tamil community.¹⁸
34. Country information before the delegate reports that in November 2019, Gotabaya Rajapaksa, who served as defence secretary during the final phase of Sri Lanka's civil war, won Sri Lanka's presidential election. Later, his brother and former President, Mahinda, was appointed Prime Minister. In 2019, prior to the election, DFAT reported that local sources, both Tamil and non-Tamil, expressed concern that the human rights improvements achieved since 2015, including in relation to freedom of expression, could be reversed if Mahinda Rajapaksa, or an individual close to him, returned to power.¹⁹ The International Crisis Group reported that Gotabaya Rajapaksa campaigned on a Sinhala nationalist platform and won thanks to unprecedented levels of support from ethnic majority Sinhalese voters, while Tamil and Muslim voters overwhelmingly rejected him.²⁰ The Office of the United Nations High Commissioner for Human Rights reported that President Rajapaksa campaigned on a manifesto that highlighted the 2030 Sustainable Development Agenda, which is underpinned by a commitment to human rights, justice, accountability and transparency, and part of the Agenda is to "promote peaceful and inclusive societies, provide justice for all and build effective, accountable and inclusive institutions at all levels".²¹ On 21 November 2019 BBC news reported that minority groups were worried about the return of the Rajapaksa brothers, with the report further adding that Gotabaya Rajapaksa wasted little time in releasing a statement saying he would be a leader for all those who voted for him as well as those who did not.²² I consider the situation in Sri Lanka is significantly different from when the Rajapaksas were previously in power (Mahinda as President and Gotabaya as Defence Secretary). The country information from DFAT and other sources indicates that Sri Lanka is no longer in the midst or aftermath of a civil war, the LTTE has been eradicated, and while the authorities remain sensitive to its potential re-emergence there is no indication of such a resurgence or the emergence of a similar group. When I consider this in conjunction with reporting from DFAT and other sources which consistently indicates significant reforms and improvements for Tamils in recent years, I consider it speculative to conclude that the election of Gotabaya Rajapaksa and/or his brother as Prime Minister will lead to a reversal of reforms or a deterioration of conditions for Tamils in Sri Lanka and/or increase the risk for people in Sri Lanka with a profiles like the applicant. On the evidence, I am not satisfied that the 2019 change of government changes or undermines the assessments in the country information before me. Nor am I satisfied the applicant faces a real chance of harm due to the change of government and/or the Rajapaksas' return to power.
35. Overall, the weight of the country information before me does not support that being Tamil or being Tamil from a certain part of Sri Lanka in itself gives rise to a real chance of persecution, or that persons with a profile like the applicant's face any real chance of adverse

¹⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹⁸ United States Department of State, "Sri Lanka 2019 Human Rights Report", 11 March 2020, 20200312151418

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

²⁰ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 6.0", May 2020, 20200527172009; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

²¹ Office of the United Nations High Commissioner for Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652

²² UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 6.0", May 2020, 20200527172009

attention from the state on this basis. Nor am I satisfied that the political developments in Sri Lanka over the past 20 months indicate that Tamils, like the applicant, will face a real chance of harm on return to Sri Lanka now, or in the reasonably foreseeable future. While I acknowledge there have been reports of mistreatment of Tamils, particularly in the north of Sri Lanka and against those suspected of links to the LTTE and other politically sensitive issues, the weight of the country information before me, including from DFAT, indicates that Tamils are not being systematically targeted and subjected to serious harm because of their race. I am not satisfied the applicant faces a real chance of harm in Sri Lanka due to his ethnicity as a Tamil, his prior place of residence, as a Tamil from the east, or any combination of these factors now, or in the reasonably foreseeable future. Considering the information as a whole, while I accept that the applicant as a Tamil may experience a level of official or societal discrimination, I am not satisfied that any such treatment he may face would constitute serious harm.

36. In his SHEV statement, the applicant claimed that on return to Sri Lanka he would face harm as a 'failed (Tamil) asylum seeker'. He stated that he would be detained at Colombo airport and that the airport CID would contact his home area and check his past records. He said his LTTE involvement would come to light resulting in interrogation. He stated he will be harmed due to his 'LTTE profile', his ethnicity, his long absence from Sri Lanka, his departure 'by boat', and as 'a failed asylum seeker from Australia'. He said he feared imprisonment and, as a consequence, mistreatment whilst imprisoned on arrival and/or if forced to return to his birthplace.
37. I accept that if the applicant returned to Sri Lanka he would do so as a failed asylum seeker returned from Australia. I also accept that as he departed Sri Lanka in an irregular manner he would be identified by the Sri Lankan authorities as someone who departed Sri Lanka illegally.
38. Having regard to the country information before me, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities by virtue of him being a Tamil returnee or returnee asylum seeker. DFAT assess that all returnees are subject to the same standard procedures on return, regardless of ethnicity, and are not subjected to mistreatment during processing at the airport.²³
39. DFAT indicate that returnees will be processed by the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times, the TID (Terrorist Investigation Division) who check travel documents and identity information of returnees against the immigration and intelligence databases, as well as determining whether a returnee has any outstanding criminal matters. DFAT note that all returnees travelling on a temporary travel document are subject to a standard procedure to confirm their identity which often includes interviewing the returnee, contacting the police in their home area, contacting family and neighbours, and checking criminal and court records. Processing arrivals at the airport can take several hours, primarily due to the administrative processes and staffing constraints at the airport. DFAT also note that returnees are processed in groups and cannot leave the airport until the group has been processed, although returnees are free to go to the bathroom and to talk to one another during this time.²⁴ I accept the applicant may return to Sri Lanka on a temporary travel document. I am satisfied on the information before me that he has no identification concerns and I am not satisfied that he is a person with a criminal or security record that would raise the concern of these authorities. Further, I

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

²⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

am not satisfied that any processing delays or investigative processes to which the applicant may be subject would constitute serious harm.

40. DFAT report that some returnees, including those in the north and east suspected of LTTE links, have been subjected to monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT also states it is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits. DFAT assess that surveillance of returnees contributed to a sense of mistrust of returnees within their community. DFAT also report that some returnees reported social stigma from within their communities on return, and that in some communities people resent the financial support returnees are provided. DFAT also notes that limited job availability in the north and east further contributes to reintegration issues for returnees securing employment and housing. Overall, DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.²⁵
41. While I accept that on return the applicant may face social stigma or societal discrimination within his local community due to his profile as a returnee asylum seeker, or reintegration issues, I am not satisfied that he would face treatment that would constitute serious harm. I accept there is indication from DFAT that authorities visit or telephone some returnees. However, even accepting that this may occur, on the information before me, I am not satisfied it would constitute harm, or that this, in combination with any societal discrimination together would constitute serious harm.
42. I accept on the information before me that returnees with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport or on their return home.²⁶ However, as noted above, I am not satisfied the applicant is a person who holds an adverse profile with the Sri Lankan authorities due to any actual or perceived links to the LTTE.
43. For these reasons, and considering the applicant's individual circumstances, I am not satisfied he faces a real chance of serious harm due to his asylum application in Australia, his time spent in Australia/abroad, or due to being a failed or returning Tamil asylum seeker from Australia now, or in the reasonably foreseeable future, if he returns to Sri Lanka.
44. As noted in the delegate's decision, there are penalties under the Immigrants and Emigrants Act (IAEA) for departing Sri Lanka illegally.
45. DFAT report as part of this process, most returnees will provide a statement, be fingerprinted and photographed by the Police Airport Criminal Investigations Unit, and transported to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each returnee. DFAT advises that bail is normally granted to fare-paying passengers of a people smuggling

²⁵ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

²⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 6.0", May 2020, 20200527172009

venture whereas facilitators or organisers of people smuggling ventures, including the captain and crew of the boat, are usually held in custody. Bail conditions are imposed on a discretionary basis and according to DFAT, this can involve monthly reporting to police at the returnee's own expense. Apprehended individuals can remain in police custody at the CID Airport Office for up to 24 hours after arrival. Should a Magistrate not be available before this time – for example, because of a weekend or public holiday – returnees who are charged may be held in an airport cell for up to two days. DFAT is not aware of mistreatment of returnees during this process.²⁷

46. I accept that as the applicant departed Sri Lanka irregularly by boat, he will be considered to have committed an offence under the IAEA. DFAT indicate that persons who have departed Sri Lanka illegally may face penalties that can include up to five years imprisonment and a fine. A fine varies from LKR 3,000 (approximately AUD 25) and up to LKR 200,000 (approximately AUD 1,633). Well-placed sources told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163). In practice, penalties are applied to such persons on a discretionary basis and, if the departee pleads guilty, in the form of a fine.²⁸
47. On return to Sri Lanka, I find if the applicant pleads guilty to his illegal departure he would be charged and fined under the IAEA and then released. In the event that he elected to plead not guilty to the offence under the IAEA, he would either be granted bail on a personal surety or have a family member act as guarantor.²⁹ There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face a real chance of imprisonment, but it is highly likely that he will be found guilty and fined. As noted above, DFAT report that returnees are not subjected to mistreatment during processing at the airport. While the applicant may be briefly detained in an airport holding cell, I am not satisfied that this would constitute serious harm.
48. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. DFAT also report that some returnees charged under the IAEA report having to travel long distances to attend court hearings and have found this disruptive to their livelihoods. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the IAEA appear in court every three to six months and that they, in addition to their own court hearings, may be summoned as witnesses in cases against the facilitators or organisers of people smuggling ventures.³⁰
49. On the evidence before me, I find the imposition of any fine (which can be paid in instalments³¹), surety or guarantee would not of itself constitute serious harm. Nor am I satisfied that any lifestyle disruption or costs associated with any reporting conditions or court appearance/s would constitute serious harm to the applicant. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being applied to illegal departees with a profile such as the applicant. Further, DFAT has been advised by the Sri Lankan government that no fare-paying passenger on a boat has been given a custodial sentence and I also note DFAT's advice

²⁷ DFAT, "DFAT Country Information Report Sri Lanka", 3 November 2019, 20191104135244

²⁸ DFAT, "DFAT Country Information Report Sri Lanka", 3 November 2019, 20191104135244

²⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

³⁰ DFAT, "DFAT Country Information Report Sri Lanka", 3 November 2019, 20191104135244

³¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

that fare-paying passengers, like the applicant, generally receive only a fine for breaking the IAEA.³² I am not satisfied there is a real chance that the applicant would face imprisonment.

50. Additionally, I am satisfied that the application of the provisions and penalties of the IAEA do not amount to discriminatory treatment. The law is not discriminatory on its terms, nor does the country information before me indicate that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process the applicant may face on return to Sri Lanka, and any penalty he may face because of his illegal departure, would not constitute persecution for the purpose of the Act. In light of this I find that the applicant does not face a real chance of persecution from the Sri Lankan authorities due to his illegal departure or travel to Australia.
51. In his SHEV statement, the applicant claimed that he faced a real chance of serious harm for a combination of reasons: his Tamil ethnicity, as a failed (Tamil) asylum seeker, and his real/imputed political opinion due to his past involvement with the LTTE.
52. I have accepted that if returned to Sri Lanka the applicant, due to his ethnicity, may experience a level of official or societal discrimination. I have also found he may face some level of societal discrimination, social stigma, or monitoring as a returnee asylum seeker and that he will be subjected to a number of administrative procedures, and may be detained for several hours at the airport and potentially detained in a holding cell for a number of days. Having regard to the applicant's evidence in its entirety, including the country information, even when considered cumulatively, I am not satisfied he faces a real chance of treatment that would constitute serious harm now, or in the reasonably foreseeable future. I am not satisfied that he faces a real chance of harm in Sri Lanka due to past events in Sri Lanka, due to the profile of family members, due to an actual or imputed LTTE political opinion, due to his ethnicity, due to his prior place of residence, as a Tamil from the east, as a returnee or failed asylum seeker, due to his illegal departure from Sri Lanka, or a combination of these factors. I am not satisfied the applicant faces a real chance of imprisonment on arrival in Sri Lanka, or in his home area.

Refugee: conclusion

53. 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

54. 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

55. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life

³² DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

- 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.
56. 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.
57. I have accepted the applicant may face some level of societal discrimination, social stigma, or monitoring as a returnee asylum seeker. I also accept there will be a period of adjustment as he reintegrates into the community and life in Sri Lanka. He may also face some level of official or societal discrimination due to his ethnicity. The country information confirms that the trend of monitoring Tamil civilians in day-to-day life has eased since the end of the conflict. Having considered the applicant's own circumstances, and evidence discussed above, I am not satisfied that any monitoring, social stigma, discrimination, or reintegration issues he may face amounts to significant harm as defined in the Act. I am not otherwise satisfied he faces a real risk of harm as a Tamil or a Tamil from the east.
58. I have also accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally, that he will be subjected to a number of administrative procedures, and that he may be detained for several hours at the airport and potentially detained in a holding cell for a number of days. On the country information, I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport. While I accept that that he may be subjected to a brief period of detention in an airport holding cell, it does not amount to the death penalty, an arbitrary deprivation of life, or torture. Further, there is no intention to inflict pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention. While I accept he may be subjected to questioning and may be required to pay a fine or provide a surety on return to Sri Lanka, I am not satisfied that this amounts to significant harm. I find that the questioning, imposition of a fine and the potential of being held in detention, individually or cumulatively not to amount to the death penalty, arbitrary deprivation of life, torture or that there is an intention to inflict pain or suffering, severe pain or suffering or cause extreme humiliation. I am not satisfied this, or any other process the applicant may be subjected to in connection his illegal departure, amounts to significant harm as defined by the Act.
59. I have otherwise found that the applicant does not face a real chance of any harm in Sri Lanka for the reasons claimed. 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 Sri Lanka.
60. 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

61. 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.