



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00402

Date and time of decision: 23 August 2016 11:25:26
Denny Hughes, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

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 Sri Lanka. He applied for a Safe Haven Enterprise Visa (SHEV) [in] September 2015. A delegate of the Minister refused to grant the visa [in] July 2016.
2. The delegate found that there was not a real chance or real risk the applicant would be harmed on return to Sri Lanka for reasons of his ethnicity, due to an imputed LTTE connection, as a failed asylum seeker or as someone who departed Sri Lanka illegally.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

Applicant's claims for protection

4. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - Neither the applicant nor his father have ever been involved with or supporters of the Liberation Tigers of Tamil Eelam (LTTE).
 - His father originates from [Town 1], in the Eastern Province of Sri Lanka. [Town 1] was previously under the control of the LTTE. The Sri Lankan Army (SLA) suspect all Tamils of being involved with the LTTE. They are particularly suspicious of Tamils who originate from areas that were previously under the control of the LTTE, including [Town 1].
 - His mother originates from [Town 2] in [District 1]. After his parents got married, they resided together in [Town 2].
 - He grew up and lived in [Town 2]. The overwhelming majority of residents in [Town 2] are Tamils. When he was about [number] years of age, the SLA set up a large camp in his area, about one kilometre from his home. Shortly after, Tamils began to be targeted by the authorities, including the SLA. This continues until this day.
 - Many Tamils were abducted, tortured, shot and/or killed. Three of their close family friends were victims of such attacks. Two were both dead as they returned home from fishing; this occurred about 300 metres from their home. About 1 to 1.5 months later, another was shot dead in front of his family.
 - In about 2007 or 2008, a number of Tamil MPs began to raise awareness about the atrocities that were taking place in [Town 2]. Shortly thereafter, the government announced it would investigate the claims that had been made. Whilst the government was investigating the matter, they noticed a marked decline in the number of attacks in [Town 2].
 - About one month later, the government announced that they had completed their investigations but had been unable to identify the people who were responsible for the attacks. The investigation was then closed. After this, the number of targeted killings of Tamils in [Town 2] reduced however the number of abductions and attacks on Tamils increased.

- The SLA suspected his father was involved with the LTTE on account of his ethnicity, the fact that he originated from [Town 1], and possibly because of his work as a [occupation]. The SLA also suspected the applicant of being involved with the LTTE because of his ethnicity and the fact that he is his father's son.
- He suspects someone reported to the authorities that his father was involved in the LTTE, and that this is another reason why the authorities are suspicious of his father. On one occasion, there was a bomb blast in the airport and his father was suspected of involvement in it. The SLA questioned and beat him because of this.
- The SLA regularly harassed and beat his father. They also closely monitored his movements. On one particular occasion his father was abducted by SLA officers and tortured. He does not know the exact details of the torture however his father required regular treatment for his eyes after that incident.
- In about 2010, SLA officers began to detain Tamils in their camp. About 200 Tamils were detained in this camp, including the applicant and his father, on suspicion of involvement with the LTTE. The camp was surrounded by barbed wire. They were unable to escape. While detained, the applicant and his father were both subjected to forced labour. They were not paid for this work.
- As he was young, he was permitted to attend school 5 days a week. He was forced to return to the camp after each school day and subjected to forced labour. There was a checkpoint between the camp and school. The school had high fences around it. There was no chance for him to escape. Even if he had been able to escape, he would not have done so because the SLA would have punished his father for his escape; he would certainly have been tortured, and possibly killed.
- They were both subjected to beatings and torture while detained. On one occasion, he was severely beaten all over his body with a belt. On another occasion, the thumb on his left hand was held with a plier, and a razor blade was used to cut across that thumb. The scar on that thumb remains visible until this day. Another time, the toes of both of his feet were twisted using pliers. This was excruciating.
- They were granted permission to leave the camp for 1-2 days every 3 or so months. They would be dropped off at their house and picked up from the house 1-2 days later. During that 1-2 day period, they were not permitted to leave the house. The SLA had many checkpoints in the area. They also had people all over the area that monitored it. They wanted to find a way to escape but knew of no way to do this.
- They eventually managed to escape using a path suggested by his father's friend, via a river that was located behind their family house.
- A few days after he departed Sri Lanka his mother was targeted by the SLA. She told him that the men had sprayed a substance into her eyes and this caused some damage to her eyes. She did not provide him with any further details of the attack as she didn't want to frighten him any further. Since that day, she has been subjected to frequent harassment at the hands of the SLA.
- About 2 or 3 weeks ago before the SHEV application was lodged, a neighbour, who was living in their family home and looking after the family since the applicant and his father escaped, disappeared. They have not seen or heard from him since. They suspect the SLA is responsible for his disappearance.
- The applicant and his father made the decision to leave Sri Lanka as they were in constant fear for their lives, and they knew that it would only be a matter of time before they were seriously harmed and killed.

- His life remains in danger in Sri Lanka. There are no circumstances under which he would voluntarily return to Sri Lanka.
- The applicant and his father were detained in the SLA camp [in] 2012. He departed Sri Lanka 2 days later[in] 2012. He fled to Australia and his father fled to [country 1]. The journey to Australia was quite costly and his family could not afford for the applicant and his father to both undertake the journey. A decision was made that he would come to Australia by boat, and his father flee to Saudi Arabia.
- His mother recently moved to [Town 1] as it is no longer safe for her in [Town 2]. The authorities had continued to harass her and inquire as to his and his father's location.

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. On the basis of the information before me, including some limited identification documents, I accept the applicant is a Tamil from Sri Lanka.
8. The applicant claims to fear harm on return to Sri Lanka for reasons of his ethnicity, and more critically a fear that he and his father are considered by the SLA to be associated with the LTTE. That profile has increased because they escaped from detention in an army camp in the North East of Sri Lanka in 2012. The applicant also fears harm as a person who departed Sri Lanka illegally and he fears returning as a failed asylum seeker.
9. The applicant's perceived association or connection with the LTTE stems from his father. His father is originally from [Town 1], but moved to [Town 2] in the North West of Sri Lanka when his father and mother married.

10. The applicant claims the SLA regularly harassed and beat his father on many occasions. He believes his father was targeted not only because of his ethnicity as a Tamil, but because his father was from [Town 1] and a [occupation]. His family also believe that someone may have told the SLA that his father was associated with the LTTE, possibly because he came from [Town 1]. The applicant has consistently claimed that neither he nor his father have ever supported or had any connection to the LTTE.
11. At the SHEV interview, the applicant detailed some of the harassment his father faced. He claims that when his father returned from [work], he would need to pass a checkpoint. He would need to show his ID to pass the checkpoint. They knew he was from [Town 1] from his ID, and a [occupation], so he would be checked every day. He would be forced to bribe the officials to [go to work] and they would regularly take half of his [products] when he returned through the checkpoint. His father was regularly questioned and harassed, and was questioned and beaten by the SLA after a bombing occurred in their area.
12. In 2010, the applicant and his father were detained in an army camp. They were not allowed to leave the camp, with the exception of short visits to see family members. He was kept in the camp until 2012 when he and his father fled, and the applicant came to Australia. The applicant did not know the name of the camp.
13. He and his father were forced to undertake labour in the camp. The applicant was permitted to go to a nearby school when they were detained, but would also be forced to work in the camp once school had finished at 1:30pm. The applicant was able to describe the situation in the camp in some detail.
14. The delegate asked the applicant whether he or his father were ever questioned about their involvement with the LTTE while they were in camp. He responded that only once they called his father and questioned him, but his father did not tell him what had happened specifically.
15. He was asked why he left Sri Lanka. He said that because of the torture, he decided to leave the camp with his father. He noted that other Tamils did not see this as an option. The delegate raised a concern with his evidence during the interview. She noted that he had said his father was only questioned or harmed on one occasion in the camp, but had then claimed they had been harmed on a number of occasions.
16. The applicant responded that they had tortured him inside and harmed him a lot. The delegate asked him to describe what they did in terms of torture. He responded that they had cut his hand with a razor blade. The applicant also stated that a tool and wire were tied around his fingers/toes. This torture was for no reason. He claimed his father was also tied up and beaten. They had sprayed his father eyes with a substance, which had caused him eye issues. His father would tell him about the torture he endured when the applicant came back from the school. The delegate asked whether he was the only Tamil student at the school who was from the camp. He said he was the only one.
17. I note the delegate's concern about this aspect of his evidence, however on re-listening to the SHEV interview, it appears that there may have been some confusion or conflation on the question as to whether he or his father were questioned about their LTTE involvement, and the question of whether they had been harmed or tortured while in detention in the army camp. I note when asked specifically about the harm he and his father endured in the camp, his evidence was consistent with earlier evidence given in the entry interview, and that detailed in his SHEV application statements. I find this inconsistency was due to a point of confusion in the interview, and I do not place any adverse weight on the perceived inconsistency.

18. A further concern expressed by the delegate in the interview was the fact that the applicant did not raise the issue of his or his father's detention in the camp during the entry interview.
19. I have re-listened to the entry interview and while I accept there are some discrepancies and gaps in the evidence, for the following reasons I find that the applicant has been a credible witness and his account a truthful one.
20. In the interview, the applicant was asked why he left Sri Lanka. He said he could not stay there. He talked about his father's profile because he was from [Town 1], an LTTE area. He talked about his father moving to [Town 2] and marrying his mother. He talked about the existence of the army camp and how he thinks someone from the village told the SLA that his father was associated with the LTTE. He gave evidence about how his father was questioned and the daily harassment his father endured as a [occupation]. He gave evidence about the previous instances of harm his father had endured as a person suspected of being involved with the LTTE and how he had to go the camp 'every time'. He referred to his father being late to the camp one day and that the SLA turned up. His father was restrained and beaten. The applicant was returning from class when this happened. The SLA threw his bike away and injured his mother's leg. The applicant was clearly upset when giving this evidence and began to cry during this portion of the interview. After a pause in questioning, the interviewer asked if his mother was okay after this. He said 'no'. They dragged his father away and he was also taken. He and his father were made to work for the SLA. He explained that this is why he had to stop school. He was asked how long ago this incident happened. He said it was two months before he came to Australia.
21. He was asked about the work he had to do for the army. He said they had to grow vegetables on the land and give them to the army. He said that initially the head person of the army was a good person, but he then went to another area. A new officer came, and this person started to beat everyone. He referred to the incidents with his father eyes and how his father had eye problems after this incident. He claims they started to give them a harder time. He indicated that they tied his hands and twisted his toes and feet. The applicant said he was not sure, but he said this occurred 3 to 4 months before he left. He was asked if there was a specific incident that made him leave – he said his mother said they could not continue to live like this and something might happen to them. The interviewer observed that he was still upset and that he was shaking during the interview.
22. The applicant was about [age] years old during the entry interview. I accept there are a few discrepancies in his evidence about the form of his and his father's detention, and the timing and duration of that detention for the applicant. However, his evidence of the history of his family, the suspicion and treatment his family endured, the specific incidents of harm, the type of work he and his father were forced to undertake for the army, and the circumstances precipitating their departure was highly consistent with his later evidence. The applicant was clearly upset in providing his account. He did not waver when recounting his evidence, and there was no indication to me that his account was not truthful. I consider the weight of the evidence given during the entry interview does not undermine his claims, but in fact strongly supports the genuineness of his claims and later evidence.
23. The applicant's claims are also consistent with country information about the treatment of Tamil males, in particular from the North and East, who are suspected of being associated with the LTTE. This information indicates that Tamil men with these profiles have been systematically and routinely targeted for detention and questioning in the years before and immediately after the end of the civil war. This country information also indicates that those with a higher profile, such as LTTE combatants and members, and those suspected of being

associated, connected or sympathetic to the LTTE have been dealt with harshly, in the form of protracted detention, prosecution, torture, rehabilitation and/or extrajudicial killing.¹

24. DFAT concedes that identifying whether people fall into these profiles or categories can be difficult.² The level and degree of treatment the applicant claims he and his father endured is consistent with country information about those with a higher profile than ordinary Tamils who were considered by the authorities to have been involved, associated with or sympathetic to the LTTE. Given the duration of the detention, the forced labour and the serious mistreatment he and his father experienced during this time, I am satisfied the applicant and/or his father were considered by the authorities to be supporters, sympathisers or cadres of the LTTE. The fact that the applicant himself was the only student in the nearby Tamil school who was detained in the camp, would also appear to support this finding as it indicates that he was singled out for individual treatment above that of other ordinary young Tamil males in the area.
25. In view of the overall credibility in his evidence, and the support for his claims in the country information, I accept the applicant's claims about the treatment he and his family endured. If there is any discrepancy in his evidence, it would relate to the duration of his detention and forced labour. However, even when accounting for those discrepancies, I am satisfied the applicant and his father were detained for a considerable period by the SLA in an army camp, that they were forced to labour during this time and were seriously mistreated during their detention. I also accept that the applicant and his father escaped from the detention and I have no reason to doubt his claims that his mother has been the subject of harassment and questioning about his whereabouts, and this forced her to leave [Town 2] and move to [Town 1].
26. There is considerable country information that indicates the situation for Tamils in Sri Lanka has improved since the end of the civil war in 2009, and even more so with the recent change of government in 2015. The new Sirisena Government campaigned on a platform of democratic reform, good governance and anti-corruption and there is evidence of its initiatives and reforms being implemented.³ On a more practical level, monitoring and harassment of Tamils, particularly in the North and East of Sri Lanka, has decreased under the Sirisena government, as have restrictions on movement in the country. DFAT advises that on a day-to-day basis, the Tamil community feels more confident to refuse or question the motives of monitoring activities undertaken by authorities, if such activities occur.⁴ While certain groups remain at risk, the country information does not indicate that Tamils in the country face a real chance of being seriously harmed on the basis of their Tamil ethnicity or because a person is a Tamil male originating from, or living in, the East or North of the country.⁵

¹ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015,

CISEC96CF14143; US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8.

² DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, at p.13.

³ Shihar Aneez, "U.S. lauds Sri Lanka government on post-war Tamil reconciliation", Thomson Reuters Foundation, 24 November 2015, CXBD6A0DE16447; Agence France Presse (AFP), "Sri Lanka to launch special court to probe war crimes", - France, 1 December 2015, CXBD6A0DE16628; The New Indian Express, "Five Tamils in Lankan Council of Ministers", 9 September 2015, CXBD6A0DE13426; Colombo Page, "Sri Lanka police to recruit 1,500 Tamil youths as PCs", 8 October 2015, CXBD6A0DE14426.

⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, at p.7-10.

⁵ UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

27. There are strong indicators that those like the applicant's father, who are imputed to have an LTTE association, may no longer be a risk of harm simply on the basis of being from a former LTTE controlled area. However, the current UNHCR Guidelines from December 2012, reiterated in the most recent DFAT report of 2015, identify that previous real or perceived links with the LTTE that go beyond residency in an LTTE-controlled area may lead to adverse treatment for persons returning to Sri Lanka. A range of risk profiles are listed, but broadly they relate to combatants, supporters, those that were involved in sheltering or transporting LTTE personal or goods, or those that funded or provided other support or are otherwise sympathetic to the LTTE.⁶ The applicant himself does not appear to know what profile his father had, but this is unsurprising given his age when he left the country. I do note, however, that he has detailed the past harm his father endured in [Town 2], including that he was suspected of being involved in bombings and other activities. He has also consistently claimed that someone in the village had accused his father of being in the LTTE. I have accepted that the applicant and his father experienced significant mistreatment and detention in the months and years before they fled Sri Lanka. I have also accepted that his mother continued to face questioning and harassment about their whereabouts in the months and years that followed. Regardless of whether the applicant or his father had any actual connections with the LTTE, I am satisfied that the applicant and his father had a higher profile than other Tamil males or Tamil males from the East or North, and that they are considered by the Sri Lankan authorities to be supporters, sympathisers or cadres of the LTTE.
28. I accept the applicant fled the country illegally and that to do so would potentially constitute an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act). DFAT provides detailed information about the process a person who departs illegally will encounter on return. They will be processed by the Department of Immigration and Emigration (DOIE), the State Intelligence Service (SIS) and the Sri Lankan CID based at the airport. DOIE officers check travel documents and identity information against the immigration database. SIS checks the returnee against intelligence databases.⁷
29. As he left in breach of the I&E Act, I accept the applicant will be questioned by police and intelligence services on re-entry. I find that there is a more than remote chance that the applicant and/or his father's profile will be identified during these investigations, along with the fact that they were previously detained and escaped from detention at the army base.
30. I have weighed the country information which suggests an improved outlook for Tamils who were considered to have had a past LTTE involvement (whether real or suspected). However, the UK Home Office report also indicates that the Sri Lankan government forces continue to detain suspected LTTE sympathisers and supporters,⁸ and DFAT has indicated the potential for ongoing detention of even low-profile LTTE members or sympathisers who have not previously undertaken rehabilitation, and the arrest and detention of those with family connections to former LTTE members.⁹ Other reports have expressed similar concerns, and noted that those who return from abroad are often suspected of maintaining links with the LTTE and are particularly threatened.¹⁰ Thus, while there have been significant improvements for Tamils and those previously connected to the LTTE, the country information before me also supports

⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.27; DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, CISEC96CF14143.

⁷ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, CISEC96CF14143, at p.29-30.

⁸ UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28, at p.6.

⁹ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, CISEC96CF14143, at p.14-15.

¹⁰ UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28, at p.16, citing Swiss Refugee Council, 'Sri Lanka- current situation', 15 November 2012.

DFAT's assessment that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country, and the risks to Tamils considered to be connected to the LTTE have not been removed altogether.

31. I find that through their investigations, the Sri Lankan authorities will become aware of his and his father's profile and past history, including their detention and escape from the army base, as well as their subsequent departures from Sri Lanka illegally – in addition to his father's continued presence outside Sri Lanka. The Sri Lankan authorities have an extensive intelligence system shared between its security and immigration officials. Those systems monitor not only the Tamil citizenry, but also the Tamil diaspora.¹¹
32. DFAT states that it is aware of but cannot verify the 'small number' of allegations of torture of returned asylum seekers, and assesses the risk to be low. However, the report also acknowledges that it does not routinely monitor the situation of returnees.¹² Other reports suggest that while torture is a criminal offence under Sri Lankan law, it continues to be used by the authorities as a mechanism to extract confessions, including of those in rehabilitation centres.¹³ Although an older report, the UNHCR also refers to evidence of returnees who were allegedly detained and ill-treated or tortured on return to Sri Lanka.¹⁴ The UK Home Office cites a number of sources detailing alleged instances of torture and prolonged detention by the Sri Lankan authorities of those suspected of links to the LTTE.¹⁵
33. The applicant has been imputed with a connection to the LTTE either directly or through his father. I am satisfied that profile would have increased as a result of their escape from detention in 2012. While I accept that the incidence of torture is low, in view of his particular profile, I am satisfied that on re-entry to Sri Lanka there is a more than remote chance that the applicant will be subjected to further detention and possibly significant physical ill-treatment in the course of questioning on the basis of his imputed political opinion.
34. In addition, I am also satisfied that if subsequently released from detention at the airport, the applicant would return home and need to register with the local Grama Niladhari (Village Officer). On the basis of his profile, I find that he would be subjected to monitoring and, given his past detention and escape and concerns about his father's whereabouts, I find there is also a more than remote chance that he would be subjected to rehabilitation.¹⁶ In terms of any rehabilitation, I note there is evidence of torture, harassment and mistreatment by government officials in the country's rehabilitation centres.¹⁷
35. In view of all the information before me, I find there is a real chance that the applicant would be seriously harmed on return to Sri Lanka for the essential and significant reason of an imputed political opinion as a supporter, sympathiser or cadre of the LTTE.

¹¹ UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28, at p.14, citing Yasmin Sooka, "An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009–2014", The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth & Justice Project, 1 March 2014.

¹² DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, CISEC96CF14143, at p.24.

¹³ US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, at p.13-14; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.27; DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, CISEC96CF14143, at p.17-18.

¹⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.8.

¹⁵ UK Home Office, "Country Information and Guidance Sri Lanka Tamil Separatism", 28 August 2014, OG180885B28, at p.14-25.

¹⁶ DFAT, "DFAT Country Information Report, Sri Lanka", 18 December 2015, CISEC96CF14143, at p.14-16.

¹⁷ US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, at p.19-20.

36. As the harm would be perpetrated by the Sri Lankan authorities, I find that he would not be able to obtain their protection, and as such I find that effective protection measures are not available to the applicant anywhere in the country and that the real chance of harm relates to all areas of the receiving country.
37. As the harm arises as a result of the applicant's profile from his past history and his connection to his father, I find that these are immutable characteristics and the applicant could not modify his behaviour to avoid a real chance of harm. In view of everything before me, I find the applicant has a well-founded fear of persecution within the meaning of s.5J

Refugee: conclusion

38. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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