



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06363

Date and time of decision: 9 May 2019 15:51:00
R Adolphe, 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 Sri Lankan Tamil. He arrived in Australia [in] October 2012 as an unauthorised maritime arrival. On 9 March 2017 he made a valid application for a Class XE, Safe Haven Enterprise Visa (SHEV).
2. On 8 February 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate was not satisfied that the applicant faced 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 material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No new information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Hindu Tamil male from Jaffna in the Northern Province of Sri Lanka.
 - His cousin was in the Liberation Tigers of Tamil Eelam (LTTE) and was killed by the Sri Lankan Army (SLA) in 2008.
 - SLA personnel would take food and/or cigarettes from his father's store/café without payment.
 - When he worked delivering food, SLA personnel harassed him regularly and forced him to buy them cigarettes.
 - [In] November 2011, during the celebration of Maaveerar Naal, he was questioned and physically assaulted by SLA personnel.
 - He was targeted by the SLA due to his age and ethnicity.
 - He departed Sri Lanka illegally with the assistance of people smugglers.

Factual findings

6. The applicant has provided a consistent narrative since arriving in Australia with regards to his identity and nationality. He has also provided a Sri Lankan National Identity Card (NIC) which was issued [in] 2012 in support of his claims. I accept that the applicant is a [certain age] Tamil male of Hindu faith who hails from Jaffna in the Northern Province of Sri Lanka. I accept that the applicant is a Sri Lankan national and that Sri Lanka is the receiving country for the purposes of this review.
7. The delegate questioned the applicant at interview about his childhood in Sri Lanka and in particular asked him if he was affected by the civil conflict. The applicant told the delegate that Jaffna had been under government control whilst he was growing up and that he had

experienced the harshness of living in a country engaged in civil war. For example, he described incidents of bombings and gunfire and on one occasion he had seen a dead body on the roadside. He also recalled that school teachers required him and his classmates to hide under their desks at the sound of gunfire nearby his school. The applicant's narrative is consistent with country information that indicates the government took control of Jaffna in December 1995 and that the Sri Lankan military were focussed on maintaining the territory. Despite SLA control, random attacks were reported to have still occurred in Jaffna between LTTE and SLA forces after 1995.¹ I accept that the applicant as a Tamil growing up in Jaffna experienced difficulties related to the civil war and he witnessed incidents of violence and fatalities. I also accept his schooling at times was interrupted by civil conflict related violence.

8. The applicant's evidence is that his father owned and operated a small shop and his family members (including himself) helped in its operation. His mother prepared food that was sold in the store and the applicant would on occasion deliver the food from their home to the store for sale. He claimed that SLA personnel harassed him as he passed by during these deliveries. He claimed that he was forced to buy the SLA officers cigarettes and that they also came into his father's shop demanding cigarettes, food and other items without payment. I do not doubt the applicant's evidence. It was consistent and convincing and the situation that the SLA officers were using their position of power over local Tamil citizens in this way is plausible. At interview the applicant told the delegate that this conduct by the SLA officers continued after the war ended and was ongoing when he departed Sri Lanka in 2012 and that this treatment was the reason his father had to permanently close the store in 2015. There is information before me to indicate that military presence remained in Jaffna after the end of the war and that military involvement in civilian activities including those that affected the operations of local businesses occurred.² I accept that the SLA officers harassed and threatened the applicant when he was delivering goods prior to departing Sri Lanka in 2012. I also accept that the SLA officers stole goods from his father's store. However, I do not accept that the conduct of the SLA was the cause of the shop's closure. The applicant did not mention in his written statement that his father had been forced to close the store on account of any SLA involvement. I note that the applicant indicated in his written statement that it was not an exhaustive statement of his claims and that further information would be provided at interview. This may well be the case. However, the claim that his father only recently in 2015 was forced to close the store for the reasons claimed is not an insignificant matter, and even at interview when the applicant made this claim, his information was vague and brief despite the delegate questioning him about it. While it may be the case that his father no longer operates the store, I am not satisfied with the applicant's evidence and do not accept that his father closed the store in 2015 on account of any interference by the SLA.
9. The delegate discussed at length the applicant's family composition and whether he had any immediate or distant family connections with the LTTE. The applicant has consistently denied that he had any involvement in the LTTE whether that was personally or through any immediate family members (mother, father, [siblings]). He stated that the LTTE were in the Vanni area and he had only ever lived in Jaffna so he had no knowledge of the LTTE or had any connections to them. With regards to his more extended family members, he claimed

¹ Center for International Development and Conflict Management (CIDCM), "Chronology for Sri Lankan Tamils in Sri Lanka", 1 January 2013, CIS26243

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

that he had a [cousin] who was in the LTTE and was shot and killed. He claimed that he had only become aware of his cousin's LTTE involvement after his death in 2008. When questioned at interview, the applicant did not appear to know any particulars about his cousin's LTTE involvement including any details of his role, where he was stationed or what battles he may have been involved in, if any. He claimed his cousin's death occurred in 2008 in Jaffna in a shooting incident. The applicant stated that his cousin was with a friend who fired his weapon at the SLA, who then returned fire, fatally killing the applicant's cousin. The applicant was unable to provide any other meaningful information regarding the context of this incident and his evidence seems to indicate that the SLA were defending an attack on them by his cousin's friend. I am not satisfied that the applicant's description of the event is evidence that his cousin was involved with the LTTE.

10. The applicant stated that he attended his cousin's funeral which was held in Jaffna. The delegate asked the applicant if there were any LTTE members present at the funeral to which he responded that he did not know. He was then asked if there were any persons present who wore uniform to which the applicant responded that there was not. Whilst I accept that the applicant had a [cousin] who was shot by the SLA, he has not provided any meaningful information to support that this cousin was involved with the LTTE or that the applicant as a family member was imputed with any LTTE connection. I am not satisfied that the applicant has any LTTE family connection via a [cousin] or otherwise.
11. The applicant has consistently stated that the main reason he departed Sri Lanka in October 2012 related to an incident with the SLA that occurred [in] November 2011. On this occasion the applicant was celebrating Maaveerrar Naval with five to seven other Tamil friends and were lighting lamps on the street in front of his house in the early hours of the evening. He claimed that three SLA officers stopped him and his companions and falsely accused them of [certain activities] in the street. The applicant recalled specific details of the incident. He told the delegate that the officers forced the applicant and his friends to kneel and physically assaulted them by kicking them in the back with their boots before they were released some forty minutes later. He was not detained or charged. He did not claim that he required any medical assistance although he did state that he experienced back pain for at least one year after the incident. The soldiers had spoken to them in Sinhalese so the applicant said he was unaware of what they had said to him.
12. Country information indicates that at this time freedom of assembly in Jaffna was restricted and Tamil gatherings and meetings risked harassment and physical attacks by the army.³ I also find the applicant's own evidence of his personal experience persuasive. I accept that while in public commemorating the event the applicant and his friends were falsely accused of [certain activities] and were kicked by the soldiers before being released.
13. The applicant's evidence indicates that this was an isolated event. He has not suggested that he had been sought out by the authorities on suspicion of the [activities] or for any other reason after November 2011. When asked at interview, the applicant told the delegate that he had not experienced any other incidents in the ten months prior to his departure from Sri Lanka. He stated that in the subsequent ten months after he had been kicked by the SLA, he worked in his father's store, which on his other evidence was frequented by the SLA. He did not suggest he felt the need to hide from the authorities.

³ Landinfo, "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

14. He stated, and I accept, that he travelled overland from Jaffna to Trincomalee passing through security checkpoints that required him to provide identification before he was security cleared which further indicates to me that he was not a person of adverse interest to the authorities at the time of his departure from Sri Lanka.
15. Based on the evidence before me, I accept that the applicant engaged in people smugglers and departed Sri Lanka illegally in October 2012 by boat and travelled to Australia.
16. At interview, when asked by the delegate if he had attended any Tamil events since arriving in Australia, he mentioned that he assisted a fellow Tamil community member in Australia [for] a Tamil event. He stated that he [helped out] and prayed. I accept that on one occasion he has attended a Tamil event in Australia, [helped out] and prayed and that he did so to provide assistance to his fellow Tamil community member.

Refugee assessment

17. 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

18. 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.
19. I accept that the applicant is a Tamil Hindu male from Jaffna in the Northern Province of Sri Lanka. I accept that he experienced the hardships of living in a country at war and that as a Tamil he and his family experienced some harassment by the SLA personnel during and immediately after the war and on one occasion in 2011 he was kicked by SLA. However, I do not accept that at the time the applicant departed Sri Lanka for Australia in October 2012 that he was a person of concern or held the profile of a person of concern by the SLA or any other arm of the Sri Lankan government authority.

20. Prior to the applicant's SHEV interview he had not indicated in written statements or otherwise during any interactions with the Department that he feared harm in Sri Lanka on the basis of his Hindu faith. During the SHEV interview the applicant was asked if he believes he will be harmed upon return to Sri Lanka because he is Hindu to which he stated "yes". He said that the Sri Lankan government had destroyed Hindu temples and rebuilt Buddhist temples in their place and stated that "there are a lot of issues between the Buddhists and the Hindus".
21. Country information indicates that there is active assertion of Sinhala-Buddhist dominance in Sri Lanka with Buddhists representing almost 70 per cent of the population while Hinduism represents just 13 per cent.⁴ The vast majority of Tamils are Hindu.⁵ Local groups reported in 2016 and 2017 the construction of Buddhist temples and statues in Hindu and Muslim areas in the north and east and disregard shown to existing non-Buddhist structures such as Hindu temples within areas that are majority Tamil and that have no Buddhist population.⁶ Although the Constitution gives special status to Buddhism, Article 12(2) of the Constitution states that no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.⁷ Furthermore, the Sirisena government has publicly committed to religious and ethnic reconciliation and has made a concerted effort to investigate and prosecute those responsible for religious based crimes.⁸ The applicant has not claimed to have faced any prior incidents in Sri Lanka on the basis of his religion. While there are evidence of some occasional religious tensions these are most notably between Muslims and Buddhists. I am not satisfied that there is a real chance the applicant faces harm for reason of religion.
22. I take into account the applicant hails from Jaffna, in the Northern Province. The delegate's decision states that the applicant fears harm as he is a Tamil from a former LTTE controlled area, although the applicant has not claimed that he fears he will be harmed on this basis. Country information suggests that Jaffna has been under the control of the Sri Lankan government since 1995⁹ and it does not support that a person originating from the area will be imputed with any LTTE association on this basis alone.
23. The country information before me indicates that conditions for Tamils in Sri Lanka have improved considerably since the applicant departed in 2012, particularly since the 2015 election.¹⁰ The current Sirisena government was elected in what The Commonwealth Observer Group described as a national election that was credible, met the key criteria for democratic elections, and the outcome reflected the will of the people.¹¹ Since coming into power the Sirisena government have engaged with the United Nations, removed military checkpoints on major roads, established the Office of Missing Persons, returned land to

⁴ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

⁸ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁹ Center for International Development and Conflict Management (CIDCM), "Chronology for Sri Lankan Tamils in Sri Lanka", 1 January 2013, CIS26243

¹⁰ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UN Human Rights Council, "Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka", 23 July 2018, CIS7B839419490; United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

people displaced during the civil war, reviewed some cases of persons detained under the Prevention of Terrorism Act (PTA) and released some Tamil detainees.¹² Recent working groups from the United Nations (UN) have commended the constructive cooperation of the Government of Sri Lanka with the international community, in particular the United Nations human rights mechanisms.¹³

24. Despite these positive developments, the information before me¹⁴ also indicates that progress on implementing the government's commitments has been slow and issues for some Tamils remain. In particular close relatives of former high profile LTTE members or those who have played a significant role in Tamil separatist activities (domestically or abroad) and those that have a criminal history or an outstanding arrest warrant are at risk of being detained or mistreated. However, I am not satisfied that the applicant fits one of these risk profiles. Whilst I have accepted that he participated in a Maardaver Day celebration in 2011 in Jaffna and was kicked by SLA soldiers, he was not subsequently sought after, detained or questioned regarding these activities despite remaining in his home area in Jaffna for at least ten months after this event. His participation in Tamil related events in Australia has been minimal. I am not satisfied the applicant would be regarded as a Tamil activist or a separatist for participating in this celebration, or for the low level assistance and attendance at a Tamil event in Australia or for any other reason. He has not claimed that he has been previously targeted as someone with any real or imputed LTTE connections and the evidence does not suggest that he would now, or in the reasonably foreseeable future, be perceived as having any involvement in the LTTE or Tamil separatist organisations. Furthermore, there is no credible evidence before me to suggest that the applicant has a criminal record or would come to the attention of the authorities for any other reason.
25. The weight of the evidence does not support that the applicant is a person who will be of interest to the authorities (or anyone else) on return to Sri Lanka on the basis of his ethnicity, age, history or origins from the North. I am not satisfied the applicant will face a real chance of any harm in Sri Lanka on this basis.
26. As the applicant does not hold a valid passport, it is very likely he would return to Sri Lanka on temporary travel documents and given his method and manner of returning I accept that the Sri Lankan authorities will either know or infer the applicant is a person who is returning to Sri Lanka after having sought asylum in Australia. I have had regard to country information contained within the review material about the processes he would be subjected to as a returnee at the airport which the material indicates are standard, non-discriminatory procedures which apply to all returnees regardless of ethnicity and religion.¹⁵ DFAT states in its most recent report that it understands that detainees are not subject to mistreatment during their processing at the airport. The process involves some investigation by police to confirm the returnee's identity which may involve interviewing the returnee, contacting the

¹² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

¹³ UN Human Rights Council, "Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka", 23 July 2018, CIS7B839419490

¹⁴ Amnesty International, "Flickering Hope: Truth, Justice Reparation and Guarantees of Non-recurrence in Sri Lanka", 25 January 2019, 20190130105934; US Department of State, "Country Reports on Human Rights Practices for 2017 – Sri Lanka", 20 April 2018, OGD95BE927333; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UN Human Rights Council, "Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka", 23 July 2018, CIS7B839419490; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; International Truth and Justice Project (ITJP) "UNSTOPPED: 2016/17 TORTURE IN SRI LANKA", 14 July 2017, CISED50AD4849; Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881

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

person's claimed hometown police and/or contacting the person's claimed neighbours and family. Once identity is confirmed the authorities carry out criminal and court record checks.¹⁶ There is no credible information to suggest that the authorities will have any concerns relating to the applicant's identity or personal history.

27. Country information indicates that there may be some practical challenges for returnees to Sri Lanka. These include the limited reintegration assistance that is available for returnees which can make it difficult to find suitable housing and employment on return. The applicant's parents and all of his siblings reside in Sri Lanka and he has not suggested that he will face difficulties obtaining employment or housing. The applicant has work experience in [Industry 1] in Australia and [Industry 2] in Sri Lanka and DFAT has noted that those with skills are in high demand in the labour market and are best placed to find well-paid employment.¹⁷
28. The applicant has claimed that he fears he will be beaten and locked up by either the army or police if it is known he is a returning asylum seeker from Australia. DFAT notes that there is anecdotal evidence of returning asylum seekers from the North that reported being subject to regular visits and phone calls from police. It also suggests that as a returning asylum seeker the applicant may experience social stigma from his community members.¹⁸ There have been reports that cite cases of Tamils who report they have been arrested and detained upon returning from abroad after having sought asylum and that in some cases the returnees were beaten and kept under surveillance.¹⁹ The majority of these indicate that those returnees at risk are those who have had a significant role in political demonstrations, association with the LTTE or have committed a serious crime.²⁰ The applicant does not hold a profile of this type and the evidence does not support that there is a real chance he will be detained or mistreated. I accept that the applicant may be subject to some initial monitoring by the authorities and some societal discrimination, however, I am not satisfied that this treatment amounts to serious harm.
29. Departing Sri Lanka irregularly by boat via an unauthorised port is an offence under the Immigration and Emigrants Act (I&E Act).²¹ I accept that when the applicant departed Sri Lanka in 2012 with the assistance of people smugglers he committed an offence under the Act. Those suspected of committing this offence are usually arrested and charged by the police at the airport upon arrival.²² At the earliest opportunity after investigations have been completed, those charged are brought before a Magistrate who then makes a determination as to the next steps for each individual. Those arrested can remain in police custody in an airport holding cell for up to two days until a Magistrate becomes available. The Attorney-General's Department have stated that they distinguish between those suspected of being passengers and those suspected of facilitating or organising the irregular migration of people

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

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

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

¹⁹ UN Human Rights Council, "Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka", 23 July 2018, CIS7B839419490;

²⁰ Country of Origin Information Services Section (COISS), "Situation Update: Sri Lanka Tamil Returnees", 5 September 2017, CRF00C22F109; Canadian IRB: Immigration and Refugee Board of Canada, "Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion", 10 November 2017, OG020B81694; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826;

²¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

²² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

from Sri Lanka. They have further stated that no returnee who was a mere passenger on a people smuggling venture has received a custodial sentence for departing Sri Lanka illegally.²³ Guilty pleas attract a fine which is usually issued on a discretionary basis and act as a deterrent. The fine, which can vary from AUD 25 to AUD 1,760, can be paid in instalments. A person who enters a not guilty plea is usually granted bail on the basis of a personal surety.²⁴

30. I accept that the applicant may be questioned at the airport for processing and it is possible he may be further held in an airport holding cell for several days. I also accept he may be liable to pay a fine, and possibly be subject to further costs associated with processing. Even if the applicant was to plead not guilty, the country information indicates that bail would be granted on the basis of a personal surety or guarantee by a family member. There is no evidence to suggest that the applicant would not be able to pay the fine or any associated court costs if applicable, or not be granted bail if required. In any event, the country information does not support that the enforcement of the I&E Act is discriminatory on its face or in its application or enforcement. I am not satisfied that it amounts to systematic and discriminatory conduct. I am also not satisfied that the questioning, temporary detention and the imposition of a fine or any associated court costs constitute serious harm in this instance. I am not satisfied that the applicant faces a real chance of persecution for his illegal departure.

Refugee: conclusion

31. 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

32. 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

33. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
34. I accept that as an asylum seeker returning to the Northern Province the applicant may face some societal discrimination from local community members and routine checks and

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

²⁴ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

monitoring from authorities upon return. I am not satisfied that the discrimination, checks and monitoring would manifest in any way that would result in a real risk of his facing harm amounting to significant harm as defined for the purposes of s.36(2A).

35. I also accept that as someone who has committed the offence of illegal departure under the I&E Act, the applicant will very likely be investigated and held for several hours at the airport, and possibly detained for some days pending appearance before a Magistrate. I accept he will be subject to the judicial processes related to the charge and the penalties under the I&E Act. I am not satisfied however that this treatment amounts to the death penalty, or arbitrary deprivation of life or torture. The evidence does not suggest that there is an intention to inflict or cause pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation such that it would amount to cruel or inhuman treatment or punishment, or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm in this regard, or when considered in conjunction with the treatment he may face as a returning asylum seeker.
36. I have otherwise concluded that on return to Sri Lanka the applicant does not face a real chance of any harm. Based on the same information, I find the applicant does not have a real risk of suffering significant harm on return to Sri Lanka.

Complementary protection: conclusion

37. 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.