



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06965

Date and time of decision: 25 September 2019 14:17:00
M Simmons, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu and a Sri Lankan citizen. On 9 March 2017 he lodged an application for a safe haven enterprise visa. A delegate of the Minister for Immigration refused to grant that visa on 7 August 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been received.
3. I have obtained information regarding the Tamil Makkal Viduthalai Pulikal (TMVP), also known as the Karuna group.¹ The delegate did not consider information regarding the TMVP as she did not accept that the applicant previously came to their adverse attention. I have reached a different conclusion on this matter. In these circumstances I am satisfied there are exceptional circumstances that justify my consideration of this new information.
4. On 9 September 2019 I invited the applicant to comment on information concerning the TMVP. The applicant did not respond to this invitation. The invitation advised that if a response was not received within the specified period, the IAA may proceed to make a decision within consulting the applicant further. The applicant has communicated with the IAA a number of times and was forwarded an information sheet in Tamil explaining the IAA process. He has not sought to provide the IAA with either new information or submissions, and has now not responded to my invitation in time. I am satisfied he has had ample opportunity to provide information support of his matter and I can see no reason why further delay is justified.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He was born in Kalmunai, but grew up and resided in [Town 1] in the Eastern Province.
 - As a student, he occasionally assisted raising the Liberation tigers of Tamil Eelam (LTTE) flag for commemoration day. When they did this the police approached the group of students and shouted at them to take the flag down.
 - From 2012 he became involved with the United Socialist Party (USP). He would put up banners and distribute information. He was in favour of their youth focussed policies, and for a period considered running as a USP candidate but decided not to in the end. The TMVP told the applicant to support them, and not the USP, otherwise his life would be in danger. He did not stand for election, deciding not to pursue candidacy due to these threats.
 - The applicant worked as a [driver]. The [vehicle] was owned by his friend. During 2012 a group of men from the TMVP's [Town 1] office asked to use his [vehicle] for their

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report: Sri Lanka", 18 December 2015 CISEC96CF14143; Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka COI Compilation", 31 December 2016, CIS38A80123251; The Sunday Leader, "Karuna's Waterloo", 4 December 2016, CX6A26A6E16769.

election campaign. He checked with the [vehicle] owner, who informed him it would be the applicant's responsibility if he gave the [vehicle] to the TMVP. He decided not to permit their use of the [vehicle]. He left on a job [to] [a location] for a number of weeks.

- While he was away his mother telephoned him and told him not to come back. Some men had visited her home looking for the applicant, and told her that they would kill him and burn his [vehicle] because he refused their request to use the [vehicle].
- The applicant made arrangements to depart Sri Lanka. He could not relocate as he feared the TMVP would inform the Criminal Investigation Department (CID) they were looking for him and that he was opposed to the government. The applicant has no networks outside [Town 1], and as a Tamil he would face discrimination and would find it difficult to survive. On the day he returned home to say goodbye to his mother he was too afraid to stay longer than a day in case he was seen. He left Sri Lanka in October 2012.
- If returned to Sri Lanka, he will be subjected to serious harm by TMVP members and from the CID as the TMVP may have told the CID he was anti-government. The authorities will not protect him as they are aligned with the groups that will harm him.
- As he left Sri Lanka illegally he will be questioned, harmed or tortured by the authorities on return and he will be perceived as being anti-government. The Sri Lankan authorities will also seek to harm him because he is a Tamil.
- He also indicated that one of the 2019 Easter Sunday bomb blasts occurred neared to his home.

Factual findings

Identity and background

6. The applicant has provided evidence in support of his claimed identity and nationality including a Sri Lankan national identity card and passport. The details of these documents generally align with the evidence in his visa application and provided at the delegate's interview. I am satisfied that the applicant's claimed identity is as claimed and I accept he is a Sri Lankan national, a Tamil Hindu and that he was previously resident in [Town 1]. I find that Sri Lanka is the receiving country for the purpose of this assessment.
7. The applicant was asked at the interview with the delegate whether he ever had involvement with LTTE or whether his family had. He responded no to both questions. He gave the same responses in his entry interview in 2013. In his visa application and at his entry interview he indicated that when he was a student he assisted to raise the LTTE flag for commemoration day but that the police required them to take the flag down. The education history set out in his visa application indicates he finished his at studies in 2008. There is no indication that any adverse consequences ever flowed from this flag raising or that it caused him to have any profile of interest in Sri Lanka. The applicant did not mention this matter when asked directly about any LTTE links by the delegate. I accept that the applicant did on occasion assist to raise the LTTE flag when he was a student; however I find that he was never of any ongoing adverse interest to any group or the authorities in Sri Lanka because of this.

Threats from Tamil Makkal Viduthalai Pulikal (TMVP)

8. The applicant claimed to fear harm from the TMVP, but occasionally referred to this group as the Karuna group and suggested the entity was affiliated to the Sri Lanka authorities. Country information indicates TMVP and Karuna group were closely related and I draw no adverse inference from the applicant's occasional interchangeable use of these terms. Karuna broke away from the LTTE in 2004 and formed the paramilitary Karuna group and a political party, the TMVP. The party was officially registered in 2007. Karuna subsequently left the TMVP, joined the Sri Lanka Freedom Party (SLFP), and became a Deputy Minister for Resettlement in the government of former President Rajapaksa.²
9. The applicant claimed he was threatened by the TMVP because he was involved with the USP. He has consistently indicated he was never an electoral candidate. Contrary to the delegate, I do not consider the applicant has been inconsistent in respect of his considered candidacy for the USP. In his application he stated that he thought about running as a candidate for the party but did not in the end. The delegate invited him to provide further information in support of his claims at the interview, which he did. He indicated that he had nominated himself to be considered to stand for that party in the 2012 provincial election, but that ultimately he decided not to proceed and withdrew from the party shortly prior to the election. He indicated that this was due to threats from the TMVP.
10. The applicant claims he did not proceed to stand as a candidate because members of the TMVP threatened him not to stand for the USP. DFAT reports that in previous years, elections have historically been volatile periods in Sri Lanka, with instances of violent incidents spiking in the lead up to some elections.³ Two years prior to the 2012 provincial elections, the Danish Immigration Service assessed that the TMVP generally will not target the political opponents directly prefer to work through the government structure. During election campaigns it was reported that political opponents including their family members were at times threatened and warned by the TMVP in the East.⁴
11. At the interview with the delegate the applicant discussed some of the USP policies that he supported. He described his involvement in party activities including distributing pamphlets and attending meetings. I found his evidence regarding this involvement generally credible. He seemed at ease answering the delegate's questions, and he was generally circumspect in his responses. It was not my impression that he was seeking to embellish or overstate his political involvement. He consistently indicated his involvement was at a lower level and referred to 'senior people' in the party passing on messages and given direction to himself and others. He also produced some documentation at the delegate's interview corroborating his nomination as a potential USP candidate. I accept that the applicant was involved with the USP for a period in 2012 and that he took some steps to run as a candidate for that party never contested the an election. I am satisfied that the applicant's decision not proceed to stand as a USP candidate was motivated at least in part due to threats from members of the TMVP.
12. The applicant has provided a reasonably detailed and consistent account of the being threatened by members of the TMVP who sought to use the [vehicle] he drove. The claim was been reiterated and variously elaborated upon in his 2013 entry interview, his 2017 visa application and in 2019 at the interview with the delegate. He provided generally spontaneous

² The Sunday Leader, "Karuna's Waterloo", 4 December 2016, CX6A26A6E16769.

³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

⁴ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345.

responses to the delegate's questioning on the matter and his answers mostly addressed the substance of the questions put to him.

13. The applicant claims the TMVP pressured himself and others to provide access to their vehicles because they needed them for election canvassing, and that they would force people to permit use of their vehicles without financially compensating them. Country information before me refers to the actions of the TMVP around that time, including resorting to threats, violence and extortion to exert political influence. In 2010, the Danish Immigration Service reported that the TMVP had a presence in the Provincial Council at the time but as the group has no funds they often resorted to extortion activities.⁵ The TMVP were described as doing dirty work for the government including by identifying and abducting opponents, as well as engaging in criminal activities like extorting business people.⁶
14. I found the applicant's account of the TMVP threats to be generally persuasive and plausible in light of country information. I accept that the applicant was subjected to threats from members of the TMVP who sought access to the [vehicle] he drove in 2012.

Easter Bombings

15. On 21 April 2019 a series of bombings targeted churches, hotels and other sites at eight locations throughout Sri Lanka, killing 257 people, and wounding around 500 more.⁷ I accept that one of these bombings occurred in [Town 1] as stated by the applicant at interview.

Returning asylum seeker

16. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including the Immigrants and Emigrants Act 1949 (I&E Act). I am satisfied that the Sri Lankan government may assume that, due to his mode of departure, the applicant sought asylum from Sri Lanka in Australia.

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

⁵ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345.

⁶ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345.

⁷ The New York Times, "What We Know and Don't Know About the Sri Lanka Attacks", 22 April 2019, 2090423102213.

- 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 was threatened by the TMVP in 2012 in the lead up to an election, because they sought to access a [vehicle] and to dissuade him from supporting the USP. There is no suggestion that the TMVP have sought to contact either the applicant or his family since his departure from Sri Lanka over six years ago. The TMVP is no longer operating as an active paramilitary group and has not been for a number of years.⁸ In December 2015 DFAT reported the group had renounced paramilitary activities although there were credible yet difficult to verify reports the group continued to engage in criminal activity.⁹ In more recent assessments, neither DFAT nor the UK Home Office suggested that the TMVP remains active as a paramilitary group in Sri Lanka or that the group poses any threat.¹⁰ DFAT only briefly refers to the TMVP's political activities, observing they contested and won some seats in the February 2018 local government elections, but does not indicate they continue to engage in criminal activities.¹¹

20. In December 2016 a senior analyst at the International Crisis Group reported that there were no longer any paramilitary groups or paramilitary wings of parties still active in Sri Lanka. They asserted there are ex-LTTE and ex-Tamil militants from other parties who are reportedly working with the Sri Lanka military as informants and/or intelligence operatives. Some of these, according to some reports, may be involved in criminal activities, however, there is little hard evidence and such activities do not appear to be the work of clearly identifiable groups.¹² In December 2016 a former military intelligence officer of the Indian army advised that Austrian Centre for Country of Origin & Asylum Research and Documentation that paramilitary wings have lost much of their influence and relevance to pressurize people following the end of the Rajapaksa government. The former military intelligence officer also noted that Sri Lanka's military intelligence, which during the Rajapaksa regime regularly used paramilitaries as coercive instrument of power outside the pale of law, is at present under a lot of pressure from the government".¹³ The country information before me supports a conclusion that the TMVP is no longer engaged in paramilitary activities or criminal activities as an organised entity and has not done so for an extended period. I am satisfied that is the case.

21. The applicant claimed to fear harm from the authorities and specifically the CID because the TMVP were closely aligned with them. The applicant has not suggested that the CID or any other government authority ever contacted his family following his departure over six years

⁸ The Sunday Leader, "Karuna's Waterloo", 4 December 2016, CX6A26A6E16769; ACCORD, "Sri Lanka COI Compilation", 31 December 2016, CIS38A80123251.

⁹ DFAT, 'DFAT Country Information Report: Sri Lanka', 18 December 2015 CISEC96CF14143.

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

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

¹² ACCORD, "Sri Lanka COI Compilation", 31 December 2016, CIS38A80123251.

¹³ ACCORD, "Sri Lanka COI Compilation", 31 December 2016, CIS38A80123251.

ago, indicating he is not of any interest to the CID because of the [vehicle] incident or his USP involvement. I am not persuaded that his previous denial of the [vehicle] to the TMVP or his USP involvement, both of which occurred a number of years ago, would cause him to be of any interest to the Sri Lankan authorities. There is no suggestion they have ever sought to contact or locate him regarding these matters since he left Sri Lanka. Furthermore, country information does not support that paramilitary groups remain active in Sri Lanka or that they continue to work with the Sri Lankan authorities.¹⁴ In its assessment of the security situation generally, and the situation for Tamils specifically, DFAT does not suggest there is presently a risk of harm from paramilitaries in Sri Lanka.

22. Reports before me do not suggest that Tamils are currently at risk of harm in Sri Lanka purely on account of their race, religion or language. It does not support a finding that in recent times Tamil ethnicity or identity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age, occupation, or place of origin.¹⁵ I am not satisfied the applicant's involvement in raising the LTTE flag while still a student ever attracted any ongoing official interest. He has never suggested that this caused him any problems after the students complied with the police request to take the flag down. It has now been at least 10 years since the flag raising occurred, with no apparent consequences. The applicant has consistently stated he has no LTTE links or affiliation and that his family never had any LTTE involvement and I accept that is correct.
23. The applicant claims that outside [Town 1] as he will face discrimination as a Tamil and struggle to survive. I find that were he to return to Sri Lanka he would return to [Town 1], where he lived for the entirety of his life in Sri Lanka and where his family continues to reside. I note that the applicant has obtained a number of qualifications in Sri Lanka and has employment experience in Australia and Sri Lanka. Moreover, DFAT assesses that there is no official discrimination on the basis of ethnicity in public sector employment.¹⁶ More generally, DFAT reports that the security situation in Sri Lanka, particularly in the north and east, has significantly improved since the conflict ended in May 2009. While government monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues for those associated with politically sensitive issues relating to the war such as missing persons and land occupation.¹⁷ The applicant has not claimed to have any involvement in such issues.
24. The applicant had some involvement with the USP in 2012 which ended the same year. Since he left Sri Lanka he has not been in contact with anyone from that party. The applicant has not suggested he has had any political involvement in Australia at all, and has given no indication he would seek to become politically active where he to return to Sri Lanka. There is no suggestion that any of his family members, who continue to reside in [Town 1], have been contacted by anyone regarding the applicant's previous political activities. DFAT understands presently Tamils do not receive unwarranted attention from the authorities because of their political involvement and there are no barriers to Tamil political participation.¹⁸

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; ACCORD, "Sri Lanka COI Compilation", 31 December 2016, CIS38A80123251; The Sunday Leader, "Karuna's Waterloo", 4 December 2016, CX6A26A6E16769.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

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.

25. The applicant is a Tamil from [Town 1] with previous historical USP involvement, who previously attracted adverse interest from the TMVP. He has had no LTTE involvement apart from the flag raising as a school child and has not been politically active since leaving Sri Lanka. Considered collectively and separately, I am not satisfied that he faces a real chance of any harm because of any of these reasons in the foreseeable future were he to return to Sri Lanka, including for any reason related to his ethnicity or past political activities. I take into account the country information I have referred to above, that the TMVP is no longer a paramilitary, the passage of time since the flag raising and the events involving the TMVP and the USP, and that the applicant has not been politically active while in Australia. I find the applicant faces does not face a real chance of any harm from the TMVP or the CID in the foreseeable future for these reasons.
26. The applicant referred to the Easter 2019 bombings in his interview with the delegate and suggested it was a racial attack. Reports before me indicate these attacks were carried out by Islamic extremists and generally targeted Christians. Christian communities in Sri Lanka include both Sinhalese and Tamils.¹⁹ The applicant has not provided any information to support his assertion that these attacks were racially motivated, nor is such a conclusion support by the reports before me. The applicant is a Hindu; he does belong to the religious group that was targeted by these attacks. Nor does not share a religion with the perpetrators and therefore would not be at risk of any collective reprisal measures. These attacks did not suggest any systematic or discriminatory conduct towards any persons who share attributes to the applicant. In the five months since the attacks there has been no reoccurrence of such violence. I am not satisfied that the Easter bombings are indicative of any real chance of future harm to the applicant for any reason.
27. The material before me does not indicate that a person with the applicant's background has a real chance of harm on return to Sri Lanka because they requested asylum in another country. DFAT reports that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka, including persons returned from the Australian community and immigration detention centres. Many others returned from the US, Canada, the UK and European countries, and most returnees are Tamil.²⁰ A UNHCR survey in 2015 reported that 49 per cent of refugee returnees surveyed had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. However, only 0.3 per cent of refugee returnees interviewed by UNHCR (including UNHCR-facilitated and voluntary returns) in 2016 indicated that they had security concerns following their return, and reports before me do it suggest returnees are routinely harmed during such visits.²¹ More recent information does not indicate that such visits continue to be prevalent in the East.²²
28. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face.²³ Some asylum seekers also reported social stigma from their communities upon return including resentment of the financial support provided to returnees.²⁴ However I note that the applicant continues to have familial contacts in Sri Lanka and there is no indication they would be unable to support or accommodate him, or assist him in re-establishing himself within the community. He is

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

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

²² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

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

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

educated and has demonstrated a sound ability to obtain employment both in Sri Lanka and Australia, as such I am satisfied he would be able to do the same on return to Sri Lanka.

29. I accept there is a chance as a returning asylum seeker the applicant may experience some stigma, some challenges obtaining employment and may be visited by the authorities. However taken together, noting he continues to enjoy familial support, is educated and has shown a propensity to secure employment, that country information I have referred to does not indicated returnees who are visited by the authorities are routinely harmed, and considering I have found he does not otherwise has a profile of interest with the Sri Lanka authorities, I do not consider there is a real chance of such treatment amounting to serious harm. Even when considering the applicant's ethnicity and past political activities, there is no real chance of serious harm to him in the foreseeable future for being a returning asylum seeker.
30. Given his illegal departure, I accept the applicant may be arrested and charged, and enquiries may be made about his departure and his activities while abroad. DFAT assesses that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during this processing. Notably, the most recent information from DFAT does not indicate the applicant would be detained in a prison while awaiting any court appearance. According to DFAT, returnees will be brought before the Magistrate's Court at the earliest opportunity but subject to magistrate availability, he or she may be detained for up to two days in an airport holding cell.²⁵ I have found the applicant would not be returning with an adverse profile that would be of interest to the authorities. There is nothing to suggest there would be extant criminal charges or proceedings against him.
31. Should the applicant plead guilty to departing illegally, he may be fined a penalty of up to LKR 200 000 and may then be free to go. There is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger on the boat journey; according to the Sri Lankan Attorney-General's Department no custodial sentences have ever been issued to such persons.²⁶ If a not-guilty plea is entered usually a magistrate would grant bail either on the basis of personal surety or guarantee by a family member. I am not satisfied there is any reason the applicant would not be granted bail in the event he does plead not guilty (although he has not suggested as much). DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances, if required, over protracted lengths of time can be high. The applicant indicated at the interview with the delegate that until recently he was employed in Australia and he is providing support to his family. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment and manage arrangements for court appearances if further ones are required. I do not consider that questioning, any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with the applicant's court appearances and possible short term detention would constitute serious harm in the present case, or that there is a real chance he will face serious harm during returnee processing.
32. There is not a real chance of the applicant being subjected to serious harm for any reason on return to Sri Lanka.
33. The applicant does not have a well-founded fear of persecution.

²⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

²⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

Refugee: conclusion

34. 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

35. 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

36. 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.

37. I accept that because of his illegal departure from Sri Lanka, the applicant may be subject to treatment including questioning, possibly detention of up to two days in an airport holding cell and a monetary fine, and possibly associated court costs. I am not satisfied that these processes, or the potential penalties, amount to significant harm in the relevant sense, in that they do not involve being arbitrarily deprived of life, subjected to the death penalty or tortured. Nor would they involve pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or amount to intentionally inflicted severe pain or suffering, or be intended to cause extreme humiliation, or otherwise amount to significant harm as defined.

38. I have accepted he may experience some stigma within his community as a returnee, some challenges obtaining employment and may be visited by the authorities. I am not satisfied that any visits or stigma he may face, together with any difficulties he may experience re-establishing himself, would involve the applicant being arbitrarily deprived of life, subjected to the death penalty or tortured. Nor would they involve pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or amount to intentionally inflicted severe pain or suffering, or be intended to cause extreme humiliation, or otherwise amount to significant harm as defined in the Act.

39. I have found above that the applicant does not otherwise face a real chance of any harm for any reason, including for reasons related to his ethnicity or past political activities. The requirement for there to be a "real risk" of significant harm applies the same standard as the "real chance" test.²⁷ For the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary consequence of the applicant's removal to Sri Lanka, he will face a real risk of significant harm.

²⁷ *MIAC v SZQRB* (2013) 210 FCR 505.

Complementary protection: conclusion

40. 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.