



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07073

Date and time of decision: 3 October 2019 14:52:00
V Price, Reviewer

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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 national of Sri Lanka of Sinhalese ethnicity. He lodged an application for a protection visa with the Department on 25 November 2016.
2. On 27 August 2019 a delegate of the Minister for the Department (the delegate) refused to grant the visa to the applicant.

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. The applicant's representative provided a submission to the IAA on 4 September 2019 which made legal arguments regarding the findings of the delegate. It did not include new information for the purpose of s.473DC(1) of the Act.
5. The delegate did not accept that the applicant would be charged or convicted with any offences for facilitating or organising a people smuggling venture. As such there was limited information cited in the decision record regarding relevant to this claim. I have reached a different conclusion on this matter. I have obtained recent reports from authoritative sources on the treatment of individuals subject to criminal investigation and detention in Sri Lanka.¹ Given the relevance of this material to the applicant's claims and the limited information cited by the delegate, I am satisfied there are exceptional circumstances to justify considering this information for the purpose of the Act.
6. The material referred by the Secretary included the applicant's Biodata interview conducted shortly after his arrival in Australia. However, this was not referenced in the delegate's decision or otherwise referred to during the interview. It is not entirely clear whether this was before the delegate at the time of the decision, and therefore whether it is new information as defined. However, in the event that it does constitute new information, I accept that it contains information relevant to assessing the credibility of the applicant's claims to have been a crew member aboard the boat to Australia and is therefore material to assessing his claims for protection. I am satisfied that there are exceptional circumstances to justify considering this information.
7. The applicant's representative requested the IAA to obtain information from the applicant, either in writing or at an interview if the IAA makes findings: different to those of the delegate, including on the applicant's credibility; not to consider new information provided

¹ Amnesty International, 'Annual Report 2017-18', 22 February 2018, pp.342-344, NGED867A612 (2018 Amnesty International Report); United States Department of State (USDOS), 'Country Reports on Human Rights Practices for 2018 – Sri Lanka', 13 March 2019, 20190314103240 (2018 USDOS Report); Office of the High Commissioner for Human Rights (OHCHR), 'Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka', 23 July 2018, CIS7B839411830 (2018 OHCHR Report); Chaminda Jayasinghe, 'Returned to Danger? The evaluation of the safety of the rejected asylum seekers returned to Sri Lanka by Australia', 16 December 2016, CIS38A80123554 (Chaminda Jayasinghe Report 2016); and United Nations Committee Against Torture, "Concluding observations on the fifth periodic report of Sri Lanka", 27 January 2017, CISED50AD413 (2017 CAT Report).

by the applicant to the IAA; and to consider new country information not before the delegate. Under the relevant provisions of the Act, the IAA is to conduct its review on the material provided by the Department, without interviewing the applicant or getting additional information. There is no right to a hearing and no statutory right for an applicant to present his or her case on review. Nor is there any obligation on the IAA to conduct an interview, if adverse credibility findings are to be made. The IAA has discretion under s.473DC of the Act to obtain new information from the applicant but can only consider new information then obtained subject to s.473DD of the Act.

8. In this case, the delegate did not accept as credible any of the applicant's claimed threats of harm in relation to his political activities in Sri Lanka and nor did she accept that he would be considered to be a crew member on the boat to Australia. To the extent that I have made different findings in relation to those matters, they are not adverse to the applicant. The applicant has not provided any new country information to the IAA, and the new information I have obtained is not adverse to the applicant's claims. Moreover, the applicant has been represented throughout the visa application process and has provided extensive written submissions to the Department which are now before me. I am satisfied that I have enough material before me to make a decision in this matter, and in all the circumstances of the case, am not satisfied that an interview or letter to obtain further information is warranted in this case.

Applicant's claims for protection

9. The applicant's claims as set out in the statement accompanying his protection visa application can be summarised as follows:
 - The applicant is from a village [in] Sri Lanka's north western province. In early 2011 his cousin, W, assisted him to obtain a job working for the local UNP candidate in the forthcoming electoral campaign. He and W were involved in several altercations with a number of SLFP supports, including S and his gang, who were campaigning for Mr N. It was known that S was a violent person, having recently been released from prison after serving a [sentence] for murder.
 - The first two altercations occurred during the course of the election campaign when the applicant was harassed and beaten by S and his gang while [undertaking tasks]. The applicant's mother advised him to report it to the authorities but they refused to assist him.
 - The third incident took place almost a year after the election, in about April 2012 when the applicant was harassed and hit by a group of former SLFP campaigners while listening to a band in a neighbouring village. S was not present on that occasion. The fourth incident occurred in August 2012, when the applicant and W confront S and his gang over an alleged attack against W's uncle. The applicant and W were assaulted with various weapons during the attack. After this incident the applicant went to reside with an uncle in Negombo. The applicant and W lodged a complaint with the authorities in relation to the August 2012 attack. However, they withdrew the complaint several days later after the authorities advised them to do so.
 - The applicant decided to travel to Australia, and departed Sri Lanka with his uncle in September 2012. In December 2012, Mr S and his gang attacked his mother at their family home. His [sibling] was also present, but was not hurt. His mother and [sibling] moved to [a village] to live with his mother's brother. His mother then moved to [Country 1] and his [sibling] went to live in Negombo with his uncle.

10. The applicant claimed to fear harm from Mr S who has political connections to the SLFP including to Mr N. The police in the applicant's area take orders from Mr N. The applicant claimed that some of his personal information was inadvertently released on the Department's website and that Mr S and his gang will know about his protection application and believe that he has talked about Mr S and his illegal activities.
11. In a submission dated 11 December 2018, it was asserted that the applicant faced harm as a failed asylum seeker and due to his illegal departure from the country. Further, the local police will inform S and his gang of his return and they will be waiting to harm him.
12. In a further submission and statutory declaration, both dated, 21 December, it was submitted that: the applicant was one of [a number of] crew-members aboard the boat to Australia; he will be considered a facilitator and organiser of a people smuggling venture; he will be charged with people smuggling under the Sri Lankan Immigrants and Emigrants Act (I&E Act); and he will not be released on bail but will be kept on remand in Negombo prison where he faces conditions that do not meet international standards and a risk of torture. It was also submitted that even if he is not thought to be deeply involved in the organisation of the operation, he will become a source of information for the authorities and will be subjected to harassment, torture and a cruel and inhuman treatment in the process of any investigation. The applicant's statutory declaration provided additional details about the boat trip to Australia and his level of involvement in the trip. He also stated that Australian authorities had advised him that the skipper of the boat had identified him as a member of the crew.
13. At the protection visa interview it was submitted that the Sri Lankan Navy provided permission for the boat to leave the harbour (under pretext they were a fishing boat) and as such have the applicant's identity on record as one of the boat's crew members.

Refugee assessment

14. 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

15. 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.

Country of reference, identity and background.

16. I accept on the documentary and oral evidence before me that the applicant is a national of Sri Lanka and that he is of Sinhalese ethnicity. The applicant was born in the North Western province of Sri Lanka. I accept that his mother currently resides in [Country 1], and his [sibling] is in Negombo with their uncle. The applicant briefly resided in the Northern Province between 1994 and 1997 and in the Western Province between 2007 and 2008. However, his longest period of residence was in the North Western Provinces where he completed most of his schooling [and] where he lived until his departure for Australia. I consider this is the area to which he would return.

Voluntary return to Sri Lanka

17. In this case the applicant initially requested to be returned to Sri Lanka voluntarily then subsequently revoked his request. However, he plausibly explained during the interview that he was desperate to leave the offshore detention centre and mistakenly believed that if he volunteered to return home, he would first be taken to Australia where he would have the opportunity to make a protection visa application: when he learned this was not the case, he revoked the request to return. I accept this explanation and do not consider it adversely affects his credibility.

Applicant's political activities

18. The applicant has claimed to fear harm on return to Sri Lanka, in part, due to a dispute arising between himself and a number of SLFP supporters, including S and his gang, during the 2011 local elections. The applicant provided a plausible account of how and why he came to work for the local UNP candidate and was able to describe in some detail his role in a manner suggestive of lived experience. I accept that his cousin assisted the applicant to obtain some paid employment with the local UNP candidate in 2011 and that his duties involved [undertaking certain tasks]. The applicant stated that he attended a few meetings but that he was not a member of the party and I accept this evidence. The applicant's evidence regarding S was largely consistent and I accept that S was known in the local community as a violent criminal offender and that he had recently been released from prison for murder. I also accept that S and his 'gang' were supporters of the SLFP and had connections to the local candidate, Mr N.
19. In his written statement, the applicant described two incidents in which he was involved with altercations with S and his gang while [undertaking a certain task] during the campaign period. The accounts of these incidents were detailed, consistent and plausible when considered against independent information supporting that there were some isolated incidents of violence in pre-election periods, including in 2011.² I accept that these incidents occurred as claimed and that the applicant was harassed and assaulted by S and his gang and they forced him to [undertake a certain task]. I accept the applicant attempted unsuccessfully to report the incidents to the police and that he then decided not to continue his work with the UNP and that he left the campaign. I also accept that the applicant decided to leave the campaign and had no further involvement in political activities in Sri Lanka after the July 2011 election.

² Australian Department of Foreign Affairs and Trade (DFAT), "Country Report Sri Lanka 3 October 2014", 3 October 2014, CIS2F827D91259.

20. However, I have some concerns in relation to the applicant's claims and evidence regarding the third and fourth incidents as described above. In relation to the third incident, the applicant contended that S was not present at that event and he did not claim that those who harassed him were part his gang. This is relevant as his evidence was that his UNP work became known to S and his gang because they came across him in the act of [undertaking a certain task]. I consider it to be implausible that the applicant, who on his own evidence, only worked for the UNP for a brief period and left the campaign, would be known more broadly among other SLFP campaigners (from whom he had not previously faced any harm) and would be singled out and assaulted almost a year after the election. As noted above the independent information supports instances of violence between opposing parties in pre-election periods, however it does not indicate that such violence occurs in the aftermath of the election.³
21. In respect of the August 2012 incidents, I consider it to be highly implausible that S and his gang would wait over a year to target W's uncle. This is particularly so having regard to the above independent information and noting that: they made no threats or otherwise harmed or harassed either the applicant or W in the intervening period despite residing in the same village and having the opportunity to do so; the applicant's involvement in the election campaign ceased after the second incident and he had no further engagement in political activities; and on the applicant's own evidence, the SLFP had been successful in the 2011 election and had won the most seats. Nor is it clear why they would target W's uncle when their dispute was with the applicant and W and I don't consider this aspect of his claims plausible.
22. Further to the above matters, I also have some concerns in relation to evidence provided by the applicant at interview. The applicant raised for the first time that in the wake of the August 2012 incidents, S and his gang had come to 'the house', shouted at them (he and W) to get out of the house, made death threats against them, and had shouted from the road 'in front of our house and W's house' that they would kill them. The timing of this evidence raises some doubts in my mind as it was provided only after the delegate appeared concerned as to how the applicant knew that S and his gang wanted to kill him. Further, the applicant's written account of the claimed events was very detailed and given the seriousness of these threats, I would have expected them to be included therein, had they genuinely occurred. His evidence of this incident also does not appear to fit with the narrative set out in his written statement that immediately after the incident both he and his cousin hid with (different) family members. On this scenario it is not clear when S and his gang had the opportunity to seek them at their family homes to make these threats. A minor point, but nonetheless relevant, is that the applicant also stated that W lived three streets away, so it is not clear how S and his gang stood on the road outside his house and W's house to make these threats.
23. I also share the delegate's concerns (noted in the decision record) regarding the applicant's oral evidence about W's circumstances after the applicant left the country. The applicant's evidence was that W remains in Sri Lanka. However, he was evasive about where W was residing and whether he had received further threats from S and his gang, eventually claiming that he did not know. I found his claims that he has not spoken to W since 2013, did not know where he is living and did not know if he had received additional threats, to be implausible both in the context of their previously close relationship and given their purported shared history of threats from S and his gang. His evidence on these matters leads me to consider it is likely that W remains in their home area and has not been further threatened or harmed,

³ Ibid.

and contributes to my doubts as to the applicant's claims that he and W were of ongoing interest to S and his gang.

24. The above concerns, taken cumulatively, lead me not to be satisfied that the April and August 2012 incidents occurred as claimed. I am not satisfied that; the applicant was harassed or assaulted by SLFP supporters in April 2012; W's uncle was attacked by S and his gang; the applicant and W confronted S and his gang and were harmed in doing so; S and his gang made any death threats against the applicant or W; or that they lodged a complaint with the police which was later withdrawn. While I accept the applicant and his cousin were involved in altercations with S and his gang in the lead up to the 2011 elections, I am not satisfied they remained of interest to them after that period. I accept that the applicant's mother has moved to [Country 1], and his [sibling] has moved to Negombo, but I am not satisfied that this is due to any threats of harm against them or the applicant from S and his gang. On the totality of the claims and evidence before me, I am not satisfied that S and/or his gang have any interest in the applicant, am not satisfied that the police (or anyone else) would alert S and his gang of the applicant's return to Australia, and am not satisfied he faces a real chance of any harm from them, from Mr N, or the authorities, if he returns to Sri Lanka now or in the reasonably foreseeable future.
25. The applicant has not claimed that he will be politically active on return to Sri Lanka. On the applicant's own evidence he was not a member of the UNP and his political activities were limited to that brief period of employment in the lead up to the July 2011 elections. He did not engage in any further political activities in the period leading up to his August 2012 departure from Sri Lanka and his evidence did not reveal that he holds political views or that he supports any particular political party. Nor does his evidence disclose that he has been politically active in the six years he has been in Australia, despite having the opportunity to do so. In all of these circumstances, I am not satisfied that the applicant has any interest in engaging in any future political activities and I am not satisfied that he would do so return to Sri Lanka now or in the reasonably foreseeable future. In any event, even if he does, I consider it would be of a similar level as his previous involvement and current information from the Australian Department of Foreign Affairs and Trade (DFAT) indicates that the political situation has changed, specifically: the UNP and SLFP are currently in a coalition; large scale violence has not been a feature of elections; and the recent 2015 elections were credible.⁴ On this information I consider the chance of the applicant facing any future harm to be so remote so as not to be real.
26. On the totality of the evidence before me, including the applicant's profile and the independent information, I am not satisfied that he faces a real chance of any harm on return to Sri Lanka now or in the reasonably foreseeable future for any reason associated with his past political activities or any future political activities.

Crew on the boat to Australia, returnee and failed asylum seeker

27. In this case, the delegate noted that the applicant was in detention at the time of the so called Department 'data breach.' I therefore accept as plausible that some of his personal information was inadvertently made available for a short period of time on the Department's website. The information released included his name, date of birth and nationality.⁵ It did not include information related to his asylum application or claims, and I am not satisfied that the

⁴ DFAT, 'Country Information Report – Sri Lanka', 23 May 2018, CIS7B839411064 (2018 DFAT Report).

⁵ KPMG 2014, "Management initiated review. Privacy breach - Data management. Abridged Report", Department of Immigration and Border Protection, 20 May 2014, CIS2F827D92025.

authorities will come to know of these matters as a result of the 'data breach' or that the release of this information of itself leads to a real chance of any harm to the applicant on return to Sri Lanka.

28. The applicant claimed that he was one of [a number of] crew-members aboard the boat to Australia and was identified as such with the Sri Lankan Navy. He stated that he was questioned numerous times by the Australian authorities regarding his role as a crew member, and asserted that the Australian police informed him the skipper had identified him as a member of the crew. He claimed that during these interviews he denied his role due to fear of potential consequences. The delegate accepted the applicant undertook certain activities but did not consider his claims to have been identified with the Navy as crew, and found he would not be regarded as a crew member on return to Sri Lanka. I have reached a different conclusion.
29. I note that these claims were not included in the detailed written submission accompanying his protection visa application. There is also no evidence before me to support that he was interviewed by the Australian authorities as they believed him to be crew. However, his oral evidence on this and related matter was presented in a manner indicative of lived experience. Further, it was entirely consistent with information he provided at his Biodata interview shortly after his arrival in Australia (September 2012) when he stated that he was one of [a number of] people who waited on the boat for a day before it sailed and who were given permission from the Sri Lankan Navy to sail as fishermen. Overall, I accept he was named as one of the [crew] members of the boat and that records of this were taken by the Sri Lankan Navy. I also accept that he undertook additional tasks including: [details deleted].
30. DFAT advises that on arrival at the airport in Sri Lanka an investigation will be undertaken by the Sri Lankan Police Airport Criminal Investigation Unit.⁶ The applicant's travel documents and identity information will be checked against immigration databases, intelligence databases and records of outstanding criminal matters. Part of the investigation would be to ascertain the circumstances under which the applicant left Sri Lanka and whether there are any applicable offences under the Sri Lankan Immigrants and Emigrants Act 1948 (I&E Act).⁷
31. It is an offence to illegally depart Sri Lanka under the I&E Act and DFAT advises that returnees who have illegally departed have been charged with an offence.⁸ Further information is that a returnee suspected of involvement in the facilitation or organisation of irregular migration of people from Sri Lanka can be charged with an offence under s.45C of the I&E Act.⁹ This provides that any person who organises one or more persons to leave Sri Lanka in contravention of the provisions of the Act, or, does any act preparatory to or aids or abets any other person to so organise, shall be guilty of an offence, the term for which is either imprisonment for not less than one and not more than five years.¹⁰ 'Organise' is defined to include the transportation of persons by sea without obtaining valid travel documents.¹¹ DFAT is aware that several returnees have been charged and convicted with such offences but could not obtain information of the exact number of persons convicted.¹²

⁶ 2018 DFAT Report.

⁷ Immigrants and Emigrants Act, No. 20 of 1948 ", Parliament of the Democratic Socialist Republic of Sri Lanka, (Amended to Act No.31 of 2006), 1 November 1949, CISBE8E6BE638 (I&E Act).

⁸ 2018 DFAT Report.

⁹ I&E Act; and 2018 DFAT Report.

¹⁰ I&E Act.

¹¹ Ibid.

¹² 2018 DFAT Report.

32. DFAT advises that at the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services.¹³ Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell. The magistrate will make a determination as to the next steps for each individual. The Sri Lankan authorities distinguish between those suspected of being passengers and those suspected of facilitating or organising the irregular migration of people from Sri Lanka.¹⁴ Passengers on a people smuggling venture are generally issued with a fine, which can be paid by instalments, rather than a custodial sentence. If they plead guilty to a charge, they are fined and are free to go. If they plead not guilty, they are generally granted bail on personal surety or a family member may be required to act as guarantor, and they may be subject to discretionary bail conditions such as reporting. However, information is that the authorities are more likely to pursue cases against facilitators and organisers of smuggling ventures.¹⁵ DFAT advises that crew and facilitators or organisers of people smuggling ventures are usually held in custody. Pursuant to the I&E Act, bail is not available for persons accused of offences under s.45C, except by a High Court upon proof of exceptional circumstances, and DFAT confirms that those charged under s.45C are not usually granted bail.¹⁶ Sri Lankan authorities have advised that as at September 2017, all facilitators, organisers and skippers convicted under section 45C had received prison sentences of one year.¹⁷
33. In this case, I accept that the Sri Lankan Navy will have the applicant's identity on record as one of the boat's crew and that this will either already be known, or will become known, to the authorities at the airport during this investigation process. Having regard to this, and given the manner in which he will be returned to Sri Lanka, I accept that he will be identified as having departed Sri Lanka illegally in contravention of I&E Act, that he will be identified as a facilitator or organiser of a people smuggling venture, and that he will be identified as a failed asylum seeker.
34. Information indicates, and I find, that being a failed asylum seeker does not of itself result in a real chance of serious harm during any investigation at the airport.¹⁸ I accept on advice from DFAT that returnees can be subject to some checking and monitoring on return to their home areas, but this alone does not amount to serious harm of the kind contemplated by the Act. DFAT assesses that returnees may face some societal discrimination upon return to their communities, which could also affect their ability to secure housing and employment.¹⁹ However, noting that the applicant is part of the Sinhalese majority, that he has family who continue to reside in Sri Lanka and that he has been employed in both Sri Lanka and Australia, I am not satisfied that he will face social stigma at a level such that he will be unable to find accommodation and employment on return to Sri Lanka and nor am I satisfied that he will not be able to access basic necessities and services such that he faces serious harm on return to Sri Lanka for any reason associated with his asylum application in Australia. I am not satisfied he faces any chance of serious harm for reasons of having sought asylum.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid and s.47A(1) of the I&E Act.

¹⁷ 2018 DFAT Report.

¹⁸ 2018 DFAT Report.

¹⁹ Ibid.

35. The above information also indicates, and I find, that being a passenger on a boat that has illegally departed will not of itself result in a real chance of any mistreatment or harm during any investigation or brief period of detention, and nor am I satisfied that being issued a small fine for departing the country illegally constitutes serious harm of the kind intended by the Act. However, in this case, the applicant was recorded as a crew member of the boat. In these circumstances, and having regard to the above information, I accept that on return to Sri Lanka, he will likely be charged with an offence under s.45C of the I&E Act. In these circumstances, I accept he will not be granted bail. Information is that the Sri Lankan judicial system is generally overburdened and there can be lengthy delays before a case is brought to trial, including due to the limited availability of qualified police, prosecutors and judges.²⁰ I accept that he may remain in detention for some time before being brought to trial. Even if he is not ultimately charged or sentenced to a period of imprisonment, I am satisfied that on his return to Sri Lanka there is real chance he would be subject to more intensive investigation than the routine one discussed above for the purpose of establishing his own involvement, or knowledge about the involvement of others, in people smuggling ventures and that this will involve a lengthy period of detention.
36. There is differing information before me regarding the treatment of those being investigated or detained in relation to a criminal offence. DFAT advised in 2017 that they had not received any reports of ill-treatment of people smuggling crews upon return to Sri Lanka,²¹ and in the 2018 report concluded that, in general, the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict, is no longer state-sponsored and if it does occur, is usually in cases where the individual is considered a risk to national security.²² DFAT assessed that overall Sri Lankans face a low risk of mistreatment that can amount to torture, irrespective of religion, ethnicity, geographic location, or other identity. However, against that, the 2018 DFAT report referenced material from the International Truth and Justice Project (ITJP) citing at least 24 cases of torture in 2016 and 2017, and to credible reports of 52 incidents of torture as at November 2017.²³ The DFAT report also referred to information submitted by the Human Rights Commission of Sri Lanka (HRCSL) to the UN Committee Against Torture (CAT) claiming ‘torture to be of routine nature... practiced all over the country, mainly in relation to police detentions’ and that police use torture during interrogation and arrest regardless of the nature of the suspected offence.²⁴ This was confirmed in the UN report, wherein the CAT expressed their concern that torture is a common practice carried out in relation to regular criminal investigations in a large majority of cases in Sri Lanka and that there is a practice of detaining persons conducting investigations as a means to obtain information under duress.²⁵
37. The use of torture in Sri Lanka’s criminal system was also considered by several United Nations Special Rapporteurs following visits to the country. The first rapporteur concluded in 2016 that torture (and other ill-treatment) is a common practice carried out in regular criminal investigations in large majority by the Criminal Investigation Division (CID).²⁶ It was

²⁰ Ibid.

²¹ DFAT, ‘CL614632L DFAT cable response Persons associated with people smuggling’, 14 September 2017, CISED50AD5727.

²² 2018 DFAT Report.

²³ Ibid.

²⁴ Ibid.

²⁵ 2017 CAT Report.

²⁶ Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez, Juan E. Mendez, United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 7 May 2016, CIS38A8012799.

noted that the practice of interrogation under physical and mental coercion still exists and severe forms of torture, albeit probably in less frequent instances, continues to be used, particularly in the early stages of arrest and interrogation, often for the purpose of eliciting confessions. Notably, the risk and severity of ill-treatment was said to increase when there was a real or perceived risk to national security, but the report did not suggest that the use of torture or ill treatment was limited only to those cases. Rather, it indicated that police resort to forceful extraction of information or coerced confessions rather than carrying out thorough investigations. In a 2018 report, the second rapporteur emphasised that the use of torture and other ill-treatment has been and remains endemic and widespread.²⁷ This report considered the treatment of individuals (usually Tamils) held under the Prevention of Terrorism Act (PTA). I do not consider that the applicant in this case will be held under that Act, and is not entirely clear whether the second rapporteur's assessment applies to police investigations more broadly.

38. A 2016 report on the treatment of returnees to Sri Lanka, indicated that at least two suspected people smugglers had been extensively questioned by the CID and experienced psychological harassment.²⁸ The United Kingdom Home Office (UKHO) assessed in 2017 that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.²⁹ More recent 2018 reports from Amnesty International and the United States Department of State (USDOS) support the practice of torture and other ill-treatment against detainees continues.³⁰ Notably, the USDOS report does not appear to limit this to those detained under the PTA but, consistently with the information above from the HRCSL and the CAT, states that police resort to this practice to extract confessions for alleged crimes.³¹ Overall, on the weight of the information before me, I consider that there is more than a remote chance (and indeed a strong likelihood) that persons detained and investigated in Sri Lanka's criminal justice system, including in relation to people smuggling offences, will be subjected to serious physical and/or psychological mistreatment.
39. In this case, I have accepted the applicant will be investigated, detained and charged with people smuggling offences on return to Sri Lanka now or in the reasonably foreseeable future, and having regard to the above information, I consider that he will face a real chance of treatment amounting to serious harm (significant physical harassment or ill-treatment) in this process. I also accept that in general, prison conditions in Sri Lanka do not meet international standards due to poor sanitary and other basic facilities, and overcrowding³² and the applicant will face such conditions while in detention, and during any period of imprisonment. Even if he is not ultimately charged or imprisoned, as noted above, I nevertheless accept that there is real chance that he would be subject to more intensive investigation involving a lengthy period of detention, during which time there is a real chance he would face treatment amounting to serious harm.
40. However, the information before me does not indicate, and I am not satisfied that any serious harm inflicted on the applicant in the course of being investigated or detained, or the poor prison conditions he faces during any period of detention or imprisonment, would be

²⁷ 2018 OHCHR Report.

²⁸ Chaminda Jayasinghe Report 2016.

²⁹ United Kingdom Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)', 15 June 2017, OG6E7028826.

³⁰ 2018 Amnesty International Report; and 2018 USDOS Report.

³¹ 2018 USDOS Report.

³² 2018 DFAT Report.

for any of the reasons specified in s.5J(1)(a) of the Act, including his Sinhalese ethnicity, his religion, his membership of any particular social group or his political opinion. The information above confirms that the risk of mistreatment during investigation and detention arises due to poor policing methods and that criminal investigators are motivated to inflict harm in order to extract information or confessions. It also indicates that the conditions he faces in prison do not arise from any intentional conduct on the part of the authorities to harm him for a s.5J(1)(a) reason. Therefore I am not satisfied that a risk of harm while being investigated or detained or the poor prison conditions he faces arise for the reasons of any attribute prescribed in s.5J(1)(a). I am not satisfied that the harm feared is for the essential and significant reason of a s.5J(1)(a) reason, as such s.5J(4)(a) is also not satisfied.

41. In any event, the evidence before me does not indicate that the terms of the I&E Act are discriminatory on its terms and/or in its intent or application. Rather, DFAT advises that all returnees are treated according to these standard procedures, regardless of their ethnicity and religion.³³ I find that this is a law of general application. Case law confirms that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.³⁴ The information before me does not support that the law is selectively enforced or that it is applied in a discriminatory manner. Accordingly, even having regard to the applicant's profile, I find that the investigation, prosecution and punishment he faces under the I&E Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
42. On the totality of the information before me, including the applicant's profile and accepted circumstances, I find that he does not have a well-founded fear of persecution on return to Sri Lanka arising from his illegal departure and his role as a crew member on the boat to Australia. Nor does he have a real chance of serious harm for any reason associated with being a passenger on a boat that departed illegally or his asylum application in Australia. I have otherwise found that he does not have a real chance of harm for the reasons he has claimed.

Refugee: conclusion

43. 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

44. 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

45. Under s.36(2A), a person will suffer 'significant harm' if:

³³ Ibid.

³⁴ *Applicant A v MIEA* (1997) 190 CLR 225; *Chen Shi Hai v MIMA* (2000) 201 CLR 293.

- 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.

46. I have found above that the applicant does not face a real chance of any future harm on return to Sri Lanka for any reason associated with his past political activities or any future political activities. As 'real chance' and 'real risk' involve the same standard,³⁵ I similarly find that this matter does not give rise to a real risk of harm for the purpose of s.36(2)(aa). I have also found above that the applicant does not face a real chance of serious harm for having sought asylum in Australia. I find that any monitoring of returnees does not amount to significant harm as defined in ss.36(2A) and 5 of the Act. Nor am I satisfied that he will be unable to access basic necessities services or that he will be unable to find accommodation or employment on return to Sri Lanka. I have also found that being a mere passenger on a boat that has departed illegally of itself would not give rise to a real chance of serious harm. I find on the same information set out above that this would also not give rise to significant harm as defined under the Act. I am not satisfied that his asylum application in Australia, or the illegal departure of itself, gives rise to a real risk of significant harm for the purpose of s.36(2)(aa) of the Act.
47. However, I have found above that on return to Sri Lanka there is a real chance the applicant will be investigated and charged with an offence under s.45C the I&E Act for his involvement in facilitating or organising an unlawful boat journey to Australia. There is a real chance he will be detained for a period while under investigation and awaiting trial, during which there is a real chance he will be subjected to harm. Even if he is not ultimately charged or subject to a term of imprisonment, I accept that there is a real chance that he would be subject to more intensive investigation than the routine one discussed above for the purpose of establishing his own involvement or his knowledge about the involvement of others in people smuggling ventures and that this would involve a lengthy period of detention, during which time there is a real chance he would face harm. As 'real chance' and 'real risk' involve the same standard, I am satisfied there is a real risk of the applicant experiencing such treatment for the purpose of s.36(2)(aa) of the Act.
48. Relevantly, torture is defined in s.5(1) of the Act as an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for one or more of a number of specified reasons, including for the purpose of obtaining information or a confession, 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 International Covenant on Civil and Political Rights. Independent information above indicates that mistreatment in the nature of torture would be inflicted on the applicant for the purpose of obtaining information or a confession relating to a criminal investigation. I am satisfied that while the risk of harm arises in the context of the criminal justice system, torture is prohibited under Sri Lankan law³⁶ and therefore does not arise from and is not inherent in or incidental to a lawful sanction, and irrespective is inconsistent with Article 7 of the Covenant. I find that there is a real risk of the applicant suffering harm which amounts to torture within

³⁵ *MIAC v SZQRB* (2013) 210 FCR 505.

³⁶ 2018 DFAT Report.

the meaning of s.5(1) of the Act and that it is significant harm as defined in s.36(2A)(c) of the Act.

Qualifications to the real risk threshold

49. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:
- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
 - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
 - the real risk is one faced by the population of the country generally and is not faced by the person personally.
50. I have found there is a real risk that the applicant will be held in detention on arrival in Sri Lanka and while he is subject of criminal investigation and/or awaiting any trial and that he faces a real risk of significant harm in that period. As the state is the agent of harm, I am not satisfied that relocation is either possible or reasonable and I am also not satisfied that he could obtain protection from an authority of the country such that there would not be a real risk of harm. I am satisfied that the real risk arises due to the applicant's particular role in the boat journey to Australia and is faced by him personally. The qualifications to real risk do not apply to the applicant.
51. I am satisfied that there are 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 in the form of torture by the Sri Lankan security forces.

Complementary protection: conclusion

52. There are 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.

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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.