



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09187

Date and time of decision: 23 June 2021 10:14:00
M Currie, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan citizen of Tamil ethnicity and an adherent of the Hindu faith. He arrived in Australia in October 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in June 2017. In May 2021, a delegate of the Minister for Immigration decided under s.65 of the *Migration Act 1958* (the Act) to refuse the visa, finding that Australia did not owe protection obligations to the Applicant. On 18 May 2021, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
2. This is a *de novo* decision; my task is to consider the applicant's claims for protection and the materials before me afresh. I am not bound by any earlier findings by the delegate, or the IAA.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Act. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan citizen of Tamil ethnicity and an adherent of the Hindu faith. He was born in [Year] in Batticaloa and lived with his family.
 - The applicant's brother (B1) went missing in 1992.
 - In Batticaloa, the applicant owned and operated a several shops which sold [Product]. In 2011,
 - The applicant's business partner was abducted and killed in 2011.
 - The applicant's other brother was detained and questioned about him
 - The applicant fears that if returned to Sri Lanka, he would face similar problems to those he faced in the past, including further harassment and extortion. He also fears that he might be abducted or killed, as he believes happened to his brother (B1) and his business partner.
 - He fears that if returned he would be unable to pay the further extortion and would be killed.
 - He fears that as person of Tamil ethnicity he would not be same in Sri Lanka.

Factual findings

5. As part of his SHEV Application, the applicant has provided copies of several identity documents in order to establish his identity. These were a certified copy of Sri Lankan passport issued in his name; a copy of his Sri Lankan National Identity Card and an accredited English translation, and a copy of his Sri Lankan Birth Certificate, with translation. These documents provide consistent identity information, which is also consistent with the applicant's verbal claims.

6. I have reviewed all of this material. The applicant has established his identity to my satisfaction. I accept that he is a Sri Lankan citizen, of Tamil ethnicity as he claims. I accept that he was born on [Date] in Batticaloa District of the Eastern Province of Sri Lanka. For the purposes of this decision, I find that Sri Lanka is his receiving country.

Protection Visa Interview

7. This applicant did not attend a Protection Visa Interview with the Department. The s.65 decision was made based on material he had provided to the Department as part of his SHEV Application in 2017. I have considered whether I should invite him to an interview in order to provide further evidence in support of his claims.
8. Information and documents before me indicate that sometime after he had submitted his June 2017 SHEV Application the applicant ceased to engage with the Department. Correspondence before me indicates that though the applicant's application had been prepared with assistance from a registered migration agent, that agent had ceased to have contact with the applicant by 2019 and wrote to the Department to advise that he was no longer representing the applicant. There is no evidence before me to indicate that the applicant sought to engage another migration agent.
9. The Department invited the applicant to a Protection Visa Interview on 3 February 2021, but the applicant did not attend. To date, he has not provided any reason to the department for his failure to attend. The Department scheduled a second Protection Visa Interview with this applicant on 7 May 2021. The applicant was invited to attend the second Protection Visa Interview but did not respond to the Department's invitation. Internal Departmental correspondence before me indicates that in light of the applicant's failure to respond to the second invitation, and the failure of other attempts to establish contact with him, the delegate formed the view that the applicant was unlikely to attend the second Protection Visa Interview. On 6 May 2021, the second Protection Visa Interview was cancelled. The s.65 decision was made on 13 May 2021 without further input from the applicant.
10. The matter was referred to the IAA on 18 May 2021. Following the referral, the IAA attempted to contact the applicant using the contact information the applicant had provided to the Department but was unable to do so. In correspondence between the Department and the applicant's former migration agent, the agent had provided an alternative phone number for the applicant. On 19 June 2021, the IAA also attempted to establish contact with the applicant on the alternative phone number, but this was unsuccessful. On the same date, a further unsuccessful attempt to contact the applicant was made on the phone number he had provided to the Department.
11. On 18 June 2021, the IAA requested that the Department provide the most recent contact details that this applicant had provided to the Department. The Department responded to the IAA but provided the same contact details which had already been provided to the IAA.
12. The IAA made a further attempt to contact the applicant on 22 June 2021, and final attempt on 23 June 2021. These attempts were unsuccessful. Given the failure of multiple attempts to establish contact with the Applicant, I have decided to proceed to make this decision without inviting him to an interview, and without further input from him.

Harassment and extortion in Sri Lanka

13. According to this applicant's SHEV Application he and a business partner (P1) operated five [shops] in Batticaloa. The applicant had leased the shops. Around June 2011, he started to come under pressure to hand over one of the shops to the brother of a Government Minister. After he refused, five shops were closed down. In November 2011, he was interviewed by an Assistant Superintendent of the Sri Lankan Police. He was asked questions about where he had obtained the money to lease the Shops (around eight million Sri Lankan Rupees). Despite providing documents to show how he had obtained the money, thereafter he came under harassment from the Sri Lankan Police.
14. Sometime later, he was detained by the Sri Lankan Police Criminal Investigation Division (CID) for a period of four days. In order to secure his release, the applicant had to pay a bribe, and promise to pay regular financial instalments to the Police thereafter. Despite making payments, the applicant says that the Sri Lankan authorities continued to harass him and demand further payments. He says he sought legal assistance in Sri Lanka, but that the lawyer he approached did not want to act against the Police or the Government. In light of the ongoing harassment, the applicant decided to flee from Batticaloa. He travelled to Colombo and stayed in various hotels between February and October 2012. While the applicant was in Colombo, he says that the CID took his brother (B2) into custody twice, and on both occasions B2 was questioned his whereabouts. From Colombo, he made his way to Australia by boat. Sometime after he arrived in Australia, he heard that his brother (B2) had died of a [medical condition]. He says that B2's death is suspicious because he was young and healthy.
15. As I have already noted, this applicant did not attend a Protection Visa Interview and the IAA has been unable to establish contact with him. As a consequence, I have not been able to obtain or consider any other information from him. I have taken into account the applicant's SHEV Application and the Submission and country information which accompanied it. Overall, I observe that the applicant's account omits many key details and I have not found the applicant's principal claims to be persuasive.
 - Turning first to his assertions about the [Shops] I observe he has not provided any independent supporting evidence for any of his claims including that he leased or operated shops, that there was an attempt to coerce ownership of a shop from him, that he was detained or that he paid bribes to secure his release. His explanations of these events are very brief and are merely assertions. He does provide evidence about the locations of the businesses. Nevertheless, his account omits many key details, such as the name of the Government Minister who extorted him; the name of the Minister's brother; which shop was the subject of the extortion attempt and what, if anything led to his being targeted. Though the applicant's account emphasises that he had documents to prove his ownership of the shops in Sri Lanka, he has not provided any of these documents to the Department or the IAA.
 - The applicant's account that he was detained by the CID for a period of four days also omits what I consider to be key details. He does not say when he was taken by the CID, or where he was taken, or any other relevant detail. In fact, in relation to this incident, he has not provided any further particulars about this period of detention. The applicant's account of the abduction and death of his business partner is also very sparse. The applicant does not indicate why or how or when his business partner was taken, or how he died, or even, how the applicant knows about these events.
 - Though the applicant implies that death of his brother was is the fault of the Sri Lankan security forces he has not provided any independent supporting evidence which might

support this assertion. The applicant has provided a copy of a Death Certificate in B2's name, which indicates he died in 2013, but this document does not indicate that B2's death was suspicious. The applicant's implied claim about the cause of B2's death is speculative since he himself says that his brother died of a [medical condition].

- The applicant's very brief account about the disappearance of B1 says little more than that he went missing in 1992. It does not indicate where, or why, or what led to B1 being a person of interest, or any other relevant detail. He does not indicate who was responsible for the disappearance of B1. The applicant has not claimed that B1's disappearance is linked to his own profile now.
16. Overall, the applicant's account does not contain many of the relevant details which I would expect, if the account were true. After careful consideration, I am not satisfied that he applicant's account is true. I do not accept the applicant's principal claims; I do not accept that a Government Minister or his brother attempted to extort one of his shops from him; I do not accept that he was forced to pay bribes, or that he was detained by the CID for four days, or that his business partner was killed, or that his brother was detained twice, or that died in suspicious circumstances as claimed. I do not accept that the applicant was ever of any interest to the Sri Lankan authorities.

Refugee assessment

17. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

18. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
19. I have found that Sri Lanka is this applicant's receiving country. Except for the period between February and October 2012, when he says he was in Colombo, this applicant lived his entire life in Batticaloa in the Eastern Province of Sri Lanka. I have not accepted his principal claims or that he faced problems in the Batticaloa area. According to his SHEV Application, his father,

mother, siblings, wife and children all continue to reside in Batticaloa. If returned to Sri Lanka, I conclude that he would return and reside in Batticaloa, as he did previously.

20. Having found that this applicant's principal claims were untrue, I am only left to consider his residual claims and profile; that he is a person of Tamil ethnicity, and because of his illegal departure from Sri Lanka.

Tamil ethnicity, illegal departure from Sri Lanka

21. He says he would not be safe in Sri Lanka due to his ethnicity and his illegal departure.
22. Ethnicity does continue to be a source of tension in Sri Lanka¹. This is unsurprising given the long running civil war in Sri Lanka was fought along ethnic lines with the minority Tamil community seeking to establish a separate state. According to a recent census in Sri Lanka, there are 3.1 million Tamils in the country, up from 2.7 million in 1981. Tamils are the second largest ethnic group in Sri Lanka constituting approximately 15% of the Sri Lankan population². Most Sri Lankans tend to live within their own ethnic communities, although different ethnic groups live within close proximity in major urban areas. Tamils live throughout Sri Lanka but are concentrated in the Northern and Eastern Provinces. In the Eastern Province, Tamils comprise around 40% percent of the population³. The Government of Sri Lanka has committed to ethnic reconciliation⁴.
23. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds⁵. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA). Tamils faced less harassment during the 2015 presidential and parliamentary elections than in earlier elections conducted soon after the end of the war⁶. There has been a trend towards election of more hard-line candidates, but no return to the violence and intimidation of the past⁷. DFAT understands Tamils do not receive unwarranted attention from authorities because of their political involvement, including with the TNA. DFAT assesses there are no barriers to Tamil political participation⁸. Even former LTTE members are actively engaged in the Sri Lankan political process. Nevertheless, DFAT reporting indicates that many Tamils in Sri Lanka report that the authorities continue to monitor public gatherings in Sri Lanka and conduct surveillance on persons of interest; usually people involved in politically sensitive issues such as land rights, missing persons and memorial events⁹. These complaints are most commonly voiced in the north of Sri Lanka where a military presence remains¹⁰. I have found this applicant would return to Batticaloa, located in the Eastern Province.

¹ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Office of the High Commissioner and the Secretary-General (OHCHR), 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 18 February 2020, p.7, 20200221140652; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 20200527172009

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

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

⁴ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

⁵ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

⁷ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

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

¹⁰ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

24. According to his SHEV Application this applicant maintains regular contact with his family in his home country. I note that the applicant has not claimed that any person he knows, including his parents, or his siblings or his wife or his children who continue to reside in Sri Lanka, suffers from any ongoing harm merely for being Tamil, or for residing in the Eastern Province.
25. There is a substantial body of historic information that indicates that in the years after the war, having family members who had LTTE links could be a factor in being imputed with pro-LTTE links¹¹. Sri Lankan authorities continue to be concerned about Tamil separatism¹². DFAT reporting suggests that former LTTE members may still come under some suspicion¹³, but this applicant has never claimed he was a member of the LTTE, or that he had any links to the LTTE, or that he was ever suspected of having sympathy for the LTTE.
26. The applicant departed Sri Lanka by boat in 2012. I accept that the applicant departed Sri Lanka in breach of the provisions of the *Immigrants and Emigrants Act* which governs legal entry and exit from Sri Lanka. DFAT reports that are before me indicate that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, the US, Canada, the UK and other European countries with more than 2400 Sri Lankans coming to Australia alone since 2008¹⁴.
27. Upon return to Sri Lanka, different agencies, including the Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department and, at times, the Terrorism Investigation Department, process returnees, including those on charter flights from Australia. These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. Australian officials based in Colombo may meet charter flights carrying voluntary and involuntary returnees. IOM meets assisted voluntary returnees after immigration clearance at the airport. Processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths, and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed¹⁵.
28. 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. The magistrate then makes a determination as to the next steps for each individual; crew and facilitators or organisers of people smuggling ventures are usually held in custody. Apprehended individuals can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. Should

¹¹Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 20200527172009; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; US Department of State, 'Country Reports on Human Rights Practices for 2019 – Sri Lanka', 11 March 2020, 20200312151418; Office of the High Commissioner and the Secretary-General (OHCHR), 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 18 February 2020, p.7, 20200221140652

¹² UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 20200527172009; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

¹³ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

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

¹⁵DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 20200527172009

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 cell¹⁶.

29. The Sri Lankan Attorney-General's Department has directed that all passengers of people smuggling ventures be charged under the *Immigrants and Emigrants Act* and appear in court¹⁷. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine of but in practice, penalties are applied on a discretionary basis and most cases result in the issuance of a fine and not imprisonment¹⁸. No bail or fines are imposed for children under 14¹⁹. The Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future. Fine amounts vary from LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,670). A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine²⁰.
30. I accept that as an involuntary returnee, the applicant would undergo questioning by the Sri Lankan authorities in order to determine his identity and whether they had outstanding criminal matters in Sri Lanka. I have found that the primary applicant was not of any interest to the Sri Lankan authorities at the time of his departure. I am not persuaded that any of the applicant would be of any interest now, almost 8 years after his departure from Sri Lanka. I accept that the applicant would be charged for breaches of the *Immigrants and Emigrants Act*; but noting my finding of a lack of official interest in him when he resided in Sri Lanka, I am satisfied that the applicant would not suffer a custodial sentence if returned now.
31. I have accepted that upon return to Sri Lanka, the applicant will likely be fined for his illegal departure. I also accept that he may face a short period of detention in an airport holding cell. However, having considered all the evidence, I am not persuaded that any fine or short period of detention would amount to serious harm. I am not satisfied that the applicant would face a real chance of harm arising from his illegal departure if returned to Sri Lanka.
32. On the evidence before me, the *Immigrants and Emigrants Act* is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. I am satisfied that the provisions and penalties of the *Immigrants and Emigrants Act* are laws of general application that apply to all Sri Lankans equally. Accordingly, I am satisfied that any process the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act.
33. DFAT assesses that refugees and failed asylum seekers face many practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official

¹⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

¹⁷ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

¹⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

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

²⁰ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

documentation²¹. DFAT assesses that returnees may also face some societal discrimination upon return to their communities, which could also affect their ability to secure housing and employment²². These issues are practical difficulties which could be faced by any people seeking to re-establish themselves after being away from their country for an extended period of time. I have found that the applicant would return to Batticaloa District where he lived previously and where his family remains.

34. As noted above, Government surveillance of returnees has reportedly decreased though there is still evidence which suggests that there is a chance the applicant will be monitored for a period of time²³. DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017²⁴. DFAT further assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities²⁵. These reports make no reference to monitoring in other parts of Sri Lanka, such as Trincomalee. DFAT notes that some refugees and failed asylum seekers also reported social stigma from their communities upon returning to some communities as people resent the financial support provided to refugee returnees²⁶.
35. I accept that if the applicant returned to Batticaloa he may be the subject of monitoring for a period by the authorities, but I do not accept that this would constitute harm. I also accept that he may experience some social stigma within his community as a failed asylum seeker and as a person who have not lived in Sri Lanka some time. However, I am not satisfied that this, if it does occur, amounts to serious harm. I do not accept that any practical difficulties that the applicant may face in terms re-establishing himself, or any social stigma he may face as a returning asylum seeker from Australia constitutes serious harm. Overall, I do not accept that the applicant has a well-founded fear of persecution on these bases.

Refugee: conclusion

36. 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

37. 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

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

²¹ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

²² DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

²³ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

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

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

²⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

- the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
39. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
40. I have not accepted that this applicant would face a real chance of any harm arising from any of his claims for protection. As 'real chance' and 'real risk' have been found to meet the same standard, it follows that the applicant would not face a real risk of significant harm for any of these reasons. I am not satisfied that the applicant would face a real risk of significant harm for any other reason.

Complementary protection: conclusion

41. 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.