



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/10214

Date and time of decision: 24 February 2022 14:30:00
J Jennings, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Mannar District, Sri Lanka. On 15 June 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm in Sri Lanka from the authorities because of his familial Liberation Tigers of Tamil Eelam (LTTE) connections.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 17 December 2017. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. I have also obtained the Department of Foreign Affairs and Trade (DFAT), Country Report for Sri Lanka, dated 23 December 2021. This report was published after the delegate's decision and the delegate relied on the then current 2019 DFAT report for Sri Lanka which the 2021 report has updated. It has been prepared specifically for the purpose of protection status determinations. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil born in Mannar District, Sri Lanka.
 - The applicant grew up in an LTTE controlled area during the civil war. His family were LTTE supporters.
 - His family was displaced from the family home for a period due to the conflict.
 - Around 2000 two of his uncles were killed by the navy/army because of suspected LTTE association.
 - A cousin was a high ranking LTTE member. In 2009 the Criminal Investigation Department (CID) shot and killed two of the applicant's other cousins and he believes this was because of that LTTE connection. The applicant witnessed these deaths. The family are unsure if the LTTE member cousin is still alive, but the authorities have targeted the family because of this connection.
 - Another cousin was a member of the LTTE political unit, and she left Sri Lanka for India in 2009.
 - The applicant has been questioned by the CID on up to 20 occasions. He was asked about his activities and his family and the CID threatened to torture him. As a young male he was suspected of being involved with the LTTE. His family continue to be questioned and harassed by the authorities.

- The applicant worked as a fisherman and was subject to harassment by the authorities. On an occasion in 2012 he was beaten by the navy for not having the correct paperwork/permission.
- The applicant was concerned for his safety and decided to leave Sri Lanka. He engaged an agent who assisted him to obtain his passport and travel to Australia in May 2013 via [Country 1].
- At the airport the applicant was stopped by the CID and held for three hours during which time he was questioned before being allowed to depart after an associate bribed an official.
- Since his departure the authorities have questioned his family about his whereabouts.
- The applicant fears that should he return to Sri Lanka he will be imputed as an LTTE member/supporter. He fears the authorities will be suspicious of him because he is Tamil, because of his familial LTTE links and because he escaped to Australia and is a failed asylum seeker from a western country.

Refugee assessment

6. 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

7. 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.
8. The applicant has consistently claimed to be a Tamil from Mannar, Sri Lanka and has provided identity documents in support of his claimed identity. I accept the applicant’s identity and nationality as determined by the delegate and that Sri Lanka is the receiving country for the purpose of this review.
9. I accept that the applicant is a Tamil.

10. I accept that the family was displaced from their home for a period due to the conflict.
11. The applicant declared familial links to the LTTE and also gave information about the experience of family members in accounts given by him to immigration officers on his arrival in Australia. The referred materials included a tranche of documents clearly provided by the applicant to the Department. These included letters from the [Church Group 1] and the Grama Niladhari office both of which in part support his claims.¹ The country information before the delegate and the information laid out in the ASRC Country Information Package which accompanied the protection visa application advises of the breadth of LTTE control and influence in the north of Sri Lanka, the engagement of the civilian Tamil population with the LTTE, and the general suspicions cast on Tamils by the authorities throughout the civil war, and the applicant's account is largely consistent with this information.
12. I accept that the applicant had a cousin who was an LTTE member and who has been missing since the civil war and another who went to India in 2009; the country information advises that thousands of Tamils/LTTE members went missing in the last months of the civil war and that some escaped to India.²
13. I accept that two of his uncles were killed by the authorities in or around 2000. I accept that two of his cousins were killed by the authorities in 2009 and that the applicant was in the vicinity of the attack and witnessed their deaths. The ASRC Country Information Package sets out the impunity with which the authorities acted at times during the civil war conflict in their attempts to quash the LTTE.
14. While I have accepted these claims I am not persuaded that the applicant and his family were targeted by the authorities because of these links or that they and/or the applicant were considered to be a security concern. I note that there is no indication the applicant come to attention because of the death of his uncles or because he witnessed the death of his cousins in 2009. Throughout the war and in the immediate period following the conflict the Tamil population was subject to scrutiny, monitoring, harassment, and ongoing checks for links with the LTTE.³ It was in this environment that the applicant was questioned by the authorities and subject to the stringent regulations controlling the fishing industry. But for the reasons discussed below I am not satisfied that such points to a finding the applicant and his family were targeted or considered to be a security concern, despite the stated strong LTTE allegiance.
15. The Emergency Regulations in place at this time provided the military, the CID, and the security authorities broad powers to arrest and detain suspects for extended periods on mere suspicion, yet the applicant was not detained under such powers. From his account he was questioned about his activities, his family, and if he knew any LTTE members living in the area, but after such questioning he was allowed to continue on his way. The applicant was not detained under the Emergency Regulations; he was able to continue living, studying, and working in the community. He was able to travel into government-controlled Jaffna to study for several months. These factors indicate the authorities did consider him to be a security

¹ Although not evident in the decision record it is clear these documents were before the delegate as he discussed the Grama Niladhari letter with the applicant at the protection visa interview.

² Joanne Richards - Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, CCDP Working Papers, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", 1 November 2014, CISA447F082828

³ UK Home Office, "Sri Lanka June 2009", 26 June 2009, 908; Joanne Richards - Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, CCDP Working Papers, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", 1 November 2014, CISA447F082828

concern, despite him being a young Tamil male from an LTTE controlled area and with familial LTTE links. He explained at the protection visa interview that this questioning generally occurred when he was on the street and such questioning is indicative of the monitoring system then in place and of the presence of security checkpoints where the civilian population were generally required to provide their identity documents and may have been asked about their activities.⁴

16. He claims he was taken twice by the authorities to a camp for questioning, but from his account at the protection visa interview it is apparent he was held for a brief period and was released when his father came to the camp. While he claims he was released because his father bribed the officials with alcohol, I do not accept that a simple bribe of alcohol would have been sufficient to secure his release had he been of a security concern to the authorities. His account of the circumstances and of his release are indicative of the security check common for young Tamil men at the time. As already noted, the authorities were able to detain suspects for extended periods for questioning or while undergoing investigations; that he was not so detained indicates he was not of further interest after the initial questioning/security check.
17. Nor am I persuaded the authorities questioned the applicant because they had an ongoing interest in the applicant's LTTE cousin/s; if such was the case it is not apparent why they seemingly only questioned the applicant in this manner and not other family members. There is no indication that the authorities questioned his father about the cousin/s when he came to the camp on the two occasions; if the authorities had an ongoing interest as the applicant claims then I consider they would have made similar enquiries of his father on those occasions.
18. Considered overall, while I accept the applicant was questioned by the authorities, including being taken to a camp, I find this was part of the general monitoring of the civilian Tamil population at the time and I am not satisfied that the authorities targeted the applicant, or his family, because of the familial LTTE connections, or that after initial security checks were conducted that he was considered to be a security concern.
19. The applicant's account of his experience working as a fisherman are plausible as is his account of being beaten by the navy in 2012 for a paperwork infringement. In the aftermath of the civil war the administration of then President Mahinda Rajapaksa was focussed on any resurgence of the LTTE and such abuses of the Tamil population have been widely reported.⁵ I accept that this would have been a distressing incident and in part led to his decision to leave Sri Lanka, but as discussed further below, the security situation has changed in the country and DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer state-sponsored. The election of the coalition Sirisena government in 2015, which removed the repressive Mahinda Rajapaksa administration, saw a significant shift in respect for human rights for Tamils and the change of government in 2015 provided Sri Lanka the opportunity to

⁴ UK Home Office, "Sri Lanka June 2009", 26 June 2009, 908; International Crisis Group (ICG), "Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure", 18 November 2019, 20191119144914; The Economist, "Sri Lanka's new president has a worrying past" 23 November 2019, 20191122115223; Joanne Richards - Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, CCDP Working Papers, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", 1 November 2014, CISA447F082828; ASRC Country Information Package

⁵ UK Home Office, "Sri Lanka June 2009", 26 June 2009, 908

break from the repressive policies of the past and the cloud of suspicion of Tamils instilled by the protracted civil war.⁶

20. In his 2017 statement of claims the applicant outlined the arrangements for him to leave Sri Lanka and come to Australia. In this statement he recounted a friend who was planning to travel to [Country 2] and was abducted when he went to Colombo in 2012 and another person planning to travel to [Country 3] who was tortured by the CID; the applicant explained he was too scared to go the passport office and that he stayed with an acquaintance who helped him get the passport. The applicant described the passport as “genuine” but that he paid 60,000 rupees for it, which was six times the standard amount. This account is largely consistent with the account he gave in his Arrival Entry interview in which he stated he applied for his own passport with the assistance of a people smuggler and that the passport was genuine and issued in his name.
21. When asked about the passport at the protection visa interview the applicant was equivocal about the status of the passport, stating that he did not know if it was genuine or not. When asked if the passport included the number from his National Identity Card, he stated he was not sure. When asked if he provided any documents to the agent/smuggler assisting him he stated that he had only given him his photograph; yet country information advises that the primary identity document needed for obtaining a passport is the National Identity Card.⁷
22. It is not apparent why in earlier accounts the applicant declared the passport as being genuine but was uncertain of its status at the protection visa interview. From his account the passport was issued in his bio-data details and with his photograph. Country information advises that at the airport passports were swiped into the IED Border Control System which contained immigration, citizenship and passport records and was networked to the IED office in Colombo;⁸ yet there is no indication that in the processing of the applicant’s passport at departure any anomalies were detected that may give rise to a finding the passport was not a genuinely issued one. I note his claim he was stopped by the CID at the airport and questioned (discussed further below) but there is no indication that the CID officers had any concerns with passport that may indicate it was not a genuinely issued one. In his 2017 statement of claims and in the protection visa interview the applicant stated a friend of his brother-in-law paid a bribe at the airport to assist his departure, yet in his Arrival Entry interview, which was conducted only two months after his departure, he stated that at the airport he received no assistance from the agents/smugglers assisting him.
23. Considered overall I have concerns with the applicant’s account of his departure from Sri Lanka and the status of his passport. I am willing to accept he was questioned by the CID at the airport, but I consider this was part of security checks in place and noting he was able to depart I do not accept the applicant was of concern to the authorities. If he had been suspected of having LTTE links of concern or to be otherwise of a security concern I do not accept he would have been able to depart. I am not satisfied an associate paid a bribe to secure his departure. I am satisfied the applicant departed Sri Lanka legally using a genuinely issued passport.
24. It plausible he was shown photographs of LTTE members at the airport and asked if he could identify any of them, although I think it is a remarkable coincidence that out of the many LTTE fighters missing or killed during the civil war the CID just happened to show him a

⁶ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818

⁷ UK Home Office, "Sri Lanka June 2009", 26 June 2009, 908

⁸ *ibid*

photograph of his cousin. However, noting the country information discussed further below, even I were to accept this claim regarding the photograph I am not satisfied it would lead to a finding he would face a real chance of harm on return to Sri Lanka.

25. I note the concerns for the applicant's safety as outlined in the [Church Group 1] letter but even considering his familial links to the LTTE and profile as a young Tamil male from an LTTE controlled areas and a fisherman I do not accept the applicant was considered a security concern by the authorities or that he was of ongoing interest to them. I do not accept that the applicant was of adverse interest to the authorities at time he left Sri Lanka. I do not accept that the authorities have visited his family to ask about him since his departure. I accept that from his experience during the civil war and post conflict environment, and as a result of the beating in 2012, he was concerned for his safety and decided to leave. I accept he is concerned about accounts of asylum seekers who have returned and been harmed or mistreated and that he is concerned that as a Tamil with familial LTTE links he may be harmed should he return.
26. The ASRC Country Information package drew attention to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka which provided guidance on the profiles of people at risk of harm and likely to be in need of protection. According to those guidelines family members of LTTE members may be at risk on return to Sri Lanka. I have accepted that the applicant had familial LTTE links, but I am not satisfied that this connection would be of adverse interest to the authorities should he return to Sri Lanka. The UNHCR Guidelines were released in 2012 and in the passage of time the security situation in Sri Lanka has eased and reporting more recently the UK Home Office noted that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The UK Home Office has commented on the profile of Tamils or returning asylum seekers who are of interest to the authorities. The indications are that being of Tamil ethnicity in itself would not warrant international protection, nor would being from a former LTTE controlled area. Those of concern are past members of the LTTE or those with a connection to the LTTE who are active in post-conflict Tamil separatism. Specifically the UK Home Office report identified those of interest to the authorities and indicates that this is "individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka".⁹ Indicative of such interest was the 2020 arrest at the airport in Colombo of Nadaraja Sethuparan, an activist with a high profile usually resident in Norway who was questioned about his activities and then released and the report in 2019 of the arrest of a former LTTE fighter and his family members in possession of firearms and explosive.¹⁰
27. At his protection visa interview the applicant expressed concerns about the high military presence in his area and I note reports of ongoing torture carried out by Sri Lankan military.¹¹ The UK Home Office in regard to International Truth & Justice Project reporting commented that a representative from the northern province community was not aware of any such incidents and had not received information on this from contacts in the north and east. Additionally, reporting by a UK non-government organisation, the Human Rights Commission

⁹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

¹⁰ Asian Tribune, "Key LTTE activist in Norway - Nadaraja Sethuparan arrested at BIA", 23 June 2020, 20200624105850; Colombo Page, "Ex-LTTE cadre, wife and sister arrested with firearms, explosives", 13 October 2019, 20191014130858

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818

advised they had not seen any evidence of the torture reported and no such cases had been brought to their attention in Sri Lanka.¹²

28. The UK Home Office spoke with a range of agencies and informed sources about conditions and the security situation in Sri Lanka, particularly for Tamils, in its fact-finding mission in September and October 2019. These agencies included the UNHCR, the International Organization for Migration, the Human Rights Commission of Sri Lanka and journalists, human right activists and non-government organisations and importantly Tamil politicians, including from the Tamil National Alliance. In regard to the treatment of Tamils the report comments that “most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil”. The report noted that since the end of the civil war the focus of the Sri Lankan government has changed and most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being Tamil but that “certain Tamils may be subject to closer scrutiny” indicating that these would be political activists and journalists.¹³
29. The recent report of the Office of the High Commissioner for Human Rights highlights concerns relating to the militarisation of civilian government functions, reversal of constitution safeguards and threats to reconciliation and accountability, and the report particularly noted the appointment to senior posts of former military personnel accused of war crimes. But despite these concerns the human rights concerns highlighted in this report relate largely to the Muslim population following the 2019 Easter bombings, journalists and human rights activists.¹⁴ In its recent report the US Department of State noted arbitrary killings during 2020 and cited the example of the killing of a number of suspected drug dealers and the deaths of prisoners in a riot following an attempted prison escape. The US Department of State report noted no reports of disappearances by or on behalf of the government authorities in 2020.¹⁵
30. In his decision the delegate noted the rise to power of President Gotabaya Rajapaksa and his Sri Lanka Podujana Peramuna party (SLPP) in the 2019 and 2020 elections and Tamil opposition to the incoming government because of concerns about its treatment of Tamils and minority groups. President Rajapaksa served in the war time administration of his brother former President Mahinda Rajapaksa, who has now been appointed as Prime Minister in the current government. The delegate noted general Tamil opposition to the Rajapaksas, and country information reports the claims of human rights abuses under the Mahinda Rajapaksa administration at the end of the civil war and current concerns as to their commitment to reconciliation advances made following the 2015 election in which Mahinda Rajapaksa was replaced by the coalition Sirisena government.¹⁶ But it was in context of the civil war environment that the excesses of human rights abuse were committed and continued to be committed in the aftermath of the war in attempts to quash any resurgence

¹² UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928

¹³ *ibid*

¹⁴ Report of the Office of the High Commissioner for Human Rights, “Promotion reconciliation, accountability and human rights in Sri Lanka”, 27 January 2021, 20210203162131

¹⁵ US Department of State, Country Reports on Human Rights Practices for 2020 - Sri Lanka”, 29 March 2021, 20210401122412

¹⁶ International Crisis Group, “Sri Lanka’s Presidential Election Brings Back a Polarising Wartime Figure”, 18 November 2019, 20191119144914; The Economist, “Sri Lanka’s new president has a worrying past”, 23 November 2019, 20191122115223, 'Rajapaksa Rule', Foreign Policy, 14 August 2020, 20200817165533; Aljazeera, “Sri Lanka: Economy, human rights key challenges facing Rajapaksas”, 19 August 2020, 20200819205836

of the LTTE.¹⁷ I note the concern about the incoming Rajapaksa government and their supporters in the light of the past, but Gotabaya and Mahinda Rajapaksa and their supporters are returning to government in a very different environment from that in place at the time of the Mahinda Rajapaksa government.

31. I have noted reports of incidents since the election of the Rajapaksa government and the indications are that since the election of President Gotabaya Rajapaksa in 2019 and the success of the SLPP in the 2020 elections those of interest to the incoming government are Tamils with certain profiles such as political activists and journalists, particularly those critical of alleged war crimes.¹⁸ The Office of the United Nations High Commissioner for Human Rights reports monitoring of Tamils following the election of President Gotabaya Rajapaksa but that those of interest are Tamils with certain profiles such as political activists and journalists, particularly those critical of alleged war crimes. Similarly, the Human Rights Documentation Centre noted reports of harm to Tamil civilians in May 2020 the victims of which were largely journalists, activists and those involved in politics.¹⁹
32. Noting the circumstances and profiles of those who have come to attention in these reports I am not satisfied that they give rise to a real chance the applicant would be harmed or arrested should he return to Sri Lanka. Nor am I satisfied that the country information before me gives rise to a finding there is a real chance the applicant would be harmed for being an asylum seeker returning from the west.²⁰
33. I accept the applicant no longer has a passport and would need to be issued a travel document to return to Sri Lanka. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT assesses that returnees are treated according to standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.²¹ I do not consider any likely questioning of the applicant by the authorities at the airport on arrival or any brief period held by the authorities to conduct such investigations would amount to serious harm for the applicant for the purposes of s.5J of the Act.
34. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka. I am not satisfied that the applicant would experience persecution on return to Sri Lanka.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; Aljazeera, "Sri Lankan parliamentary elections: Five key takeaways", 7 August 2020, 20200810133022; DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818

¹⁸ Human Rights Watch (HRW), "World Report 2021. Events of 2020", 13 January 2021, 20210114072851; Office of the United Nations High Commissioner for Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; INFORM Human Rights Documentation Centre, "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", 29 June 2020, 20200702160949; International Truth and Justice Project, Journalists for Democracy in Sri Lanka, "Sri Lanka: And the Crackdown Begins", January 2020, 20200114142534; The Economist, "Sri Lanka is becoming a one-family state", 15 August 2020, 20200814111514

¹⁹ Office of the United Nations High Commissioner for Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; INFORM Human Rights Documentation Centre, "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", 29 June 2020

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818; US Department of State, Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412

²¹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818

Refugee: conclusion

35. 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

36. 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

37. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
38. 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.
39. As noted above I have accepted that the applicant would be subject to an investigative process to confirm identity on arrival but that this would not amount to serious harm. Nor do I accept it would amount to significant harm. This process does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation.
40. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test, and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

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.