



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00342

Date and time of decision: 19 July 2016 10:44:59
Fraser Syme, 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 473ED(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 Northern Province, Sri Lanka. The applicant previously applied for a protection visa class XA [in] August 2013. [In] May 2014, the department found that application was invalid. [In] September 2015 the applicant lodged a valid application for a temporary protection visa ("TPV"). In both the valid and invalid applications, the applicant relied on the same claims for protection.
2. The delegate accepted most of the applicant's claims as credible. On the basis of country information though, the delegate was not satisfied the applicant was owed protection obligations due to his family connections to the Liberation Tigers of Tamil Eelam ("LTTE"), Eelam People's Democratic Party ("EPDP"), because he drove a [certain vehicle], was the [senior official] of a [certain] society, nor because he is a Tamil or because he was a failed asylum seeker or his illegal departure from Sri Lanka.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. I received no new information from the applicant.

Applicant's claims for protection

5. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - The applicant was born in [town], but after 1995 moved around many different parts of Northern province in search of safety. He eventually settled in [another town] in about 1998.
 - His father supported the LTTE. In 1987 the Eelam People's Revolutionary Liberation Front ("EPRLF"), assaulted in his father for that reason. The applicant successfully begged for his father's release.
 - The applicant was born a Tamil, but on marriage, became Catholic. He did not claim any fear of harm arising from his religion.
 - In 1989, he was assaulted by members of the Indian Army Peace Keeping Force ("IPKF"). He sustained a [certain] injury and suffered a [particular] illness. He was hospitalised and experienced occasional difficulties in the past in obtaining medical treatment in Sri Lanka. He is still on medication for the [injury] injury but is not receiving treatment for [the particular] health condition. He has difficulties with his memory but had no medical records about that.
 - After being attacked by the IPKF, his parents sent him to work in [Country 1] in 1989. He worked there on an assumed name until the outbreak of the [Country 2] war in [year], whereupon he returned to Sri Lanka via [Country 2], [and other countries]. He was hospitalised on return to Sri Lanka due to his [particular health condition].

- Also in about 1989, the applicant's brother, Mr B was forcibly recruited by the EPDP. He suspects Mr B was a soldier. Mr B escaped from EPDP about a year later when on a visit home. The applicant's parents then arranged for Mr B to join him in [Country 1]. Mr B also left [Country 1] on the outbreak of the [Country 2] war and obtained asylum in [a European country], where he still lives.
- In 1999, the applicant went to [Country 3]. He has said this was to escape problems in Sri Lanka, but during the TPV interview said he went to [Country 3] to attend the wedding of his [sibling] who was living in a refugee camp there. He remained in [Country 3] until 2001 when he returned to Sri Lanka during a ceasefire.
- Upon return, the applicant began a business operating a '[certain vehicle]' in [another town]. He continued this business until he left Sri Lanka in 2012. He [transported] items using his [vehicle] both for the LTTE and the Sri Lankan army. He felt unable to refuse to assist either group and was worried if either group discovered he helped the other, they would harm him. He knew of other drivers shot by the army for assisting the LTTE.
- In his written statement accompanying his TPV ("the TPV statement"), he claimed in 2006 he was accused of [working] for the LTTE and detained, but was acquitted by the court. During his TPV interview, he claimed he was never caught by the army, and if he was caught, he would have been shot.
- He ceased assisting the LTTE to [transport] goods a few months before the end of the Sri Lankan civil war in 2009, after the army made him [transport] a corpse of [a similar vehicle] driver.
- In 2005, he became the [senior official] of [a] society established by the LTTE. He remained in that role too until 2012. The society represented [workers], organised functions and raised money. It gave money both to the Sri Lankan army and to the LTTE. As [senior official], he was in possession of LTTE supporter banners which were used during peacetime to celebrate LTTE events. He experienced no problems as the [senior official], but knew of other society [senior officials] who had problems, which made him afraid something may happen to him too.
- In 2007/08, his brother Mr T joined the LTTE. He assumes Mr T was a soldier. Mr T escaped from the LTTE in the beginning of 2009 and then worked with the applicant. In early 2009, Mr T was suspected of shooting at the police and army because he was seen running away from the scene. The applicant saw his brother being beaten in the street and begged for his release. The applicant lied to say Mr T was not involved in the LTTE. The applicant's family arranged for Mr T to go to [a European country] too, where he still lives.
- In 2008, the applicant was beaten by [number of] Muslim men when driving his [vehicle]. In his TPV statement, he stated he did not know who the men were or why they attacked him. He assumed it was because he had refused to [transport] goods for Muslims in the past. During his TPV interview he stated he had a problem with a Muslim youth, Mr A with whom he argued over a [hire] fee. Other unknown people threatened the applicant. Mr A was a troublemaker and had connections to the police and army. After that argument, [number of] Muslim men beat the applicant, the applicant and his friend retaliated. The applicant was hospitalised and then detained by the police. Mr A was also detained. He and Mr A shared a cell and Mr A threatened the applicant. The applicant feared Mr A would harm him.
- In 2012, the applicant was beaten again by [number of] Muslim men. In his TPV statement, he again says he does not know who the men were. They accused him of assisting the LTTE. During his TPV interview, the applicant stated he had a fight with a

Muslim man in 2011 following a dispute over a [hire] fee. The applicant's [vehicle part] was broken. The applicant's friends took him home. He told the delegate that dispute was not with the same people who beat him after his argument with Mr A, but they mentioned Mr A.

- On an undisclosed date, when he was drinking at a bar, a Muslim man accused the applicant of being a member of the LTTE. The Muslim man may be a newspaper reporter.
- The applicant departed Sri Lanka illegally via boat in August 2012.

6. The applicant claims he fears to return to Sri Lanka because:

- He is Tamil;
- His family connections to the LTTE and EPDP;
- His own connections assisting the LTTE;
- His being the [senior official] of the [society];
- His disputes with Muslim men;
- He would return to Sri Lanka as a failed asylum seeker; and/or
- He departed Sri Lanka illegally.

Refugee assessment

7. 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

8. 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.

Imputed political opinion

9. The applicant claims he fears harm from the Sri Lankan authorities because they will impute him with a pro-LTTE or anti-Sri Lankan government political opinion for several reasons: he is a Tamil; he had close family members suspected of being in the LTTE and or EPDP. I discuss claims arising from his driving a [certain vehicle], being a failed asylum seeker and his illegal departure from Sri Lanka below in more detail below.
10. The applicant provided generally consistent evidence between his entry interview, his TPV statement and his TPV interview regarding his past experiences. His claims are generally consistent with available country information set out in the DFAT country report and thematic report.¹ The exception being my concerns regarding the credibility of his claims related to disputes he experienced as a [certain vehicle] driver, which I discuss separately below.
11. I accept the applicant is a Tamil, born in [town] and that he eventually settled in [another town]. I accept the applicant was never a member of the LTTE. I accept his father was supportive of the LTTE and was beaten by the EPRLF. I accept the applicant was assaulted by the IPKF and suffered a [certain] injury and [a particular] health condition. I accept the applicant continues to receive medical treatment for that [certain] injury but no longer has a diagnosed [particular] health condition and is receiving no ongoing treatment for that. In reaching this decision though, I am mindful his having that [particular] health condition in the past may affect his memory.
12. I accept the applicant used an assumed name and went to [Country 1] in 1998 after his brother Mr B was forcibly recruited into the EPDP. I accept too Mr B joined the applicant in [Country 1] after Mr B escaped from the EPDP and they both left that country in 1990 due to the outbreak of the [Country 2] war. The applicant provided travel documents and a [Country 1] ID card regarding those events. I further accept the applicant went to [Country 3] in 2000 and did so primarily to attend his [sibling]'s wedding, but also because of the prevailing insecurity in Northern province at that time due to the Sri Lankan civil war. I accept too the applicant returned to Sri Lanka in 2001 during a ceasefire. Again, the applicant has provided travel documents and an [Country 3] ID card supporting those claims. I further accept Mr T was forcibly recruited into the LTTE and later escaped, that Mr T was accused of being involved in a shooting incident, but released from further investigation after the applicant 'lied' to the authorities stating Mr T was not involved with the LTTE.
13. During the TPV interview the applicant claimed Tamils are unable to live freely in Sri Lanka and gave the examples it is prohibited to sing the national anthem in Tamil and that the Tamil National Alliance is now the official opposition in the national parliament. DFAT country report indicates that the overall situation for Tamils in Sri Lanka has improved since the end of the civil conflict in 2009. There have been improvements in the security situation in the North and the East since the end of the conflict, however military and security forces continue to have presences in these regions. DFAT advises that the monitoring and harassment of Tamils in these areas has decreased under the new government. Politically, the new government has taken a more proactive approach to human rights and the issue of reconciliation than previous governments. The DFAT country report further states there is a moderate level of societal discrimination against Tamils still present in Sri Lanka, but there is no evidence of official laws or policies that discriminate based on ethnicity or language, including in the context of access to education, employment and housing. Both DFAT and the UNHCR assess that Tamil civilians

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Thematic Report People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014

who live in former LTTE areas in the North and East, including Tamils that provided low level support to the LTTE, may be monitored by Sri Lankan authorities, but are at a low risk of being detained or prosecuted.

14. While I have accepted all of the applicant's claims regarding his past links to the LTTE through his father and Mr T (I discuss his own links below), I consider those links to be remote in time and minor. His father was a supporter only. Mr T was a forced recruit, held a low rank and escaped from the LTTE after only a relatively short period of service. I am not satisfied such remote and minor links to the LTTE would be sufficient to cause him to be a person of concern to the Sri Lankan authorities. I reach that conclusion having regard to the information in the DFAT reports and UNHCR Guidelines ² in the referred material regarding the Sri Lankan authorities not imputing every Tamil with a pro-LTTE political opinion and that the Sri Lankan authorities have sophisticated intelligence gathering techniques. I am mindful too of the information that people with significant personal or family links to the LTTE may still face a real chance of harm, if returned to Sri Lanka. Supporting my finding is that although many of his claims related to events prior to his going to [Country 3], the applicant voluntarily returned to Sri Lanka from [Country 3] in 2001. Further supporting my finding is there is no credible claim of any harm to the applicant for reason of his being a Tamil or his family's connection to the LTTE or the EPDP while he lived in Sri Lanka between 2001 and his departure in 2012.
15. For the above reasons, I am not satisfied the applicant faces a real chance of serious harm from the Sri Lankan authorities due to an imputed pro-LTTE or anti-Sri Lankan government political opinion due to his being he is a Tamil; he had close family members in the LTTE and or EPDP, now or in the reasonably foreseeable future, if he returns to Sri Lanka.

[Certain vehicle] driver

16. The applicant has claimed he fears harm because he drove a [certain vehicle] for two reasons. Firstly, because he assisted the LTTE in the past and was the [senior official] of the [society]. Secondly, because of disputes he had with Muslim men. Although he did not make the claim directly, to give all benefit to the applicant, for the purpose of this decision, I accept if he returns to Sri Lanka, he will resume his [vehicle] business.
17. I accept the applicant drove a [certain vehicle] between 2001 and 2012. I accept he [transported] goods both for the Sri Lankan army and the LTTE. I accept he sometimes assisted the LTTE digging bunkers too. I accept he was the [senior official] of the [society] and that society was established by the LTTE. I further accept the applicant has possession of LTTE supporter materials, which he displayed during LTTE events during peacetimes. I accept the society raised money for the LTTE and for the Sri Lankan army. I do not accept the applicant was accused of supporting the LTTE, detained and acquitted by the court. That evidence in his TPV statement is inconsistent with his evidence in the TPV interview that he was never caught by the army [transporting] goods for the LTTE, and if he was caught, the army would have shot him. I consider it reasonable if the applicant genuinely was detained and acquitted, that would be something he would tell the delegate during the TPV interview. I find it implausible though that the applicant could [transport] goods both for the LTTE and the army between 2001 and 2009 without one side knowing he was assisting the other side, that implausibility is heightened by his also being the [senior official] of the [society] – a society established by the LTTE. I am mindful the UNHCR guidelines specifically refer to people who [transported] goods for the LTTE as potentially being at risk, but the evidence before me does not suggest whatever

² UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

it was he [transported] for the LTTE in the past was of a nature that would bring him to the attention of the Sri Lankan authorities at that time, or would bring him to the attention of the Sri Lankan authorities now. I consider the applicant has greatly exaggerated the risk of harm he faced in the past because he was drove a [certain vehicle]. Supporting that finding is the lack of any credible claims the applicant has been harmed in the past by the Sri Lankan authorities because he drove a [certain vehicle]. On the contrary, the evidence before me is the applicant had seemingly good relations with the Sri Lankan army because they too hired him to [transport] goods and he provided funds to the Sri Lankan army through the [society].

18. For those reasons, I am not satisfied the applicant faces a real chance of serious harm due to an imputed pro-LTTE or anti-Sri Lankan government political opinion due to his assisting the LTTE as a [certain vehicle] driver and/or his being the [senior official] of the [society], now or in the reasonably foreseeable future, if he returns to Sri Lanka.
19. In relation to his claims regarding disputes with Muslim men in 2008/09 and 2010/11, I prefer the applicant's evidence during the TPV interview rather than the claims in his TPV statement. His evidence in his TPV statement that he did not know who the Muslim men were on either occasion, or why they attacked him is vague. His evidence during the TPV interview contained more detail, naming Mr A in relation to the first incident and describing both arguments as being sparked by disputes over [hire] fees. I accept the variance in the dates to be within a tolerable range for both incidents and reasonable given the passage of time, the applicant's prior [particular] health issues and in my view, the relatively minor nature of the two incidents. I found above the applicant exaggerated the risk of harm to him from the Sri Lankan authorities due to his driving a [certain vehicle]. I am willing though to give the applicant the benefit of the doubt and accept he was assaulted in the past twice by Muslim men.
20. I accept the applicant had two disputes with two separate groups Muslim men and was assaulted in the past over [hire] fees. I accept too the applicant fears he may be harmed again by Muslim men due to those disputes. However, I consider any harm arising from disputes over [hire] fees is not related to any of the reasons in s.5J(1)(a) and therefore would not meet the meaning of refugee in s.5H. I consider the applicant's claims regarding harm from Muslim men further below in relation to complementary protection.

Failed asylum seeker

21. The applicant claims to fear harm if he returns to Sri Lanka because he would do so as a failed asylum seeker he provided little other detail in his claims other than he would be arrested on return to Sri Lanka and would be harmed by the Sri Lankan authorities.
22. I accept that if he returned to Sri Lanka, the applicant would do so as a failed asylum seeker. However, having regard to the country information in the referred material and in particular in the DFAT reports, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities for this reason. In particular, I note the information in the DFAT reports that 1000s of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants. The information before me does not suggest the applicant is a person with that kind of profile.
23. For these reasons I am not satisfied the applicant faces a real chance of serious harm due to being a failed asylum seeker, now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Illegal departure

24. The applicant claims he fears harm if he returns to Sri Lanka because he departed Sri Lanka illegally. He provided little other detail in his claims. He told the delegate during the TPV interview the Sri Lankan authorities could use powers under the Prevention of Terrorism Act ("PTA") and accuse him of being a terrorist because he is a Tamil.
25. I accept the applicant departed Sri Lanka without a passport. For that reason, he has committed an offence under Immigrants and Emigrants Act ("IAEA").³
26. The DFAT reports in the referred material indicate that returnees will be processed by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the CID based at the airport. Immigration officers check travel documents and identity information against the immigration database. SIS checks the returnee against intelligence databases. The CID verifies a person's identity to determine whether the person has any outstanding criminal matters. I am satisfied on the information before me that the applicant has no identification concerns, or criminal or security records that would raise the concern of these authorities.
27. If the authorities suspect the applicant has departed Sri Lanka illegally, he may be charged under the IAEA. As part of this process, most returnees will have their fingerprints taken and be photographed. They will then be transported by police to the closest Magistrates Court at the first available opportunity after investigations are completed. The Court will then make a determination as to the next steps or each individual. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. In the event that a magistrate is not available before this time, due to weekends or public holidays for example, those charged may be held at a nearby prison.
28. Penalties can include up to five years imprisonment and fines of up to SLR200,000. DFAT advises that in practice, penalties are applied on a discretionary basis and usually in the form of a fine. Advice from Sri Lanka's Attorney General's Department to DFAT is that no returnee who left Sri Lanka unlawfully as a simple passenger has been given a custodial sentence for their breach of IAEA. Fines are common, but the amounts vary depending on the circumstances of the case and are typically on the lower end.
29. On return to Sri Lanka, I find the applicant would likely be charged and fined under the IAEA and then released. In the event that the applicant elected to plead not guilty to the offence under the IAEA, he would either be granted bail on personal surety or a family member. There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face any chance of imprisonment, but it is likely that he will be fined. On the evidence before me, I find the imposition of any fine, surety or guarantee would not of itself constitute serious harm. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being levelled against low profile illegal departees. In the context of a significant number of Sri Lankan nationals being returned to Sri Lanka, and the absence of any profile that would elevate the penalty the applicant would face, I find there is not a real chance that the applicant would face such a period of detention or imprisonment.
30. I note the country information indicates that while custodial sentences are not levelled against returnees, a person charged under the IAEA may, in some instances, be detained for several days pending an opportunity to appear before a magistrate. I note the Australian courts⁴ have

³ Immigrants and Emigrants Act 1949 (Sri Lanka)

⁴ *MIBP v WZAPN, WZARV v MIBP* [2015] HCA 22, see also, *SZTEQ v MIBP* [2015] FCAFC 39

confirmed that whether a loss of liberty amounts to serious harm involves a qualitative judgment, involving the assessment of matters of fact and degree – including an evaluation of the nature and gravity of that loss of liberty. I have considered whether a detention of several days would constitute serious harm. While I accept that conditions in Sri Lankan prisons are poor due to a lack of resources, overcrowding and poor sanitation, I find that any questioning and detention the applicant may experience would be brief and would not constitute serious harm as inexhaustibly defined in the Act.

31. I am also satisfied that the provisions and penalties of the IAEA are laws of general application that apply to all Sri Lankans equally. The law 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. Considered singularly or cumulatively, I am also not satisfied that any processes or penalties that the applicant may face as person who left Sri Lanka illegally and returning to Sri Lanka would amount to serious harm. Accordingly, I am satisfied that any process or penalty the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act. The evidence before me does not suggest there is a real chance the Sri Lankan authorities would invoke powers under the PTA against the applicant because he departed Sri Lanka illegally or because he is a Tamil.
32. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution for reason or combination of reasons of his race, religion, nationality, membership of a particular social group and/or political opinion now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Refugee: conclusion

33. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet the requirements of s.36(2)(a).

Complementary protection assessment

34. 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

35. 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.

[Certain vehicle] driver

36. Giving the applicant the benefit of the doubt, I accepted above the applicant was assaulted on two occasions in the past by Muslim men sparked by disputes of [hire] fees of his [vehicle]. To give every benefit to the applicant, I accept too that if he returns to Sri Lanka, he will resume driving [that vehicle].
37. I have considered the risk of future harm to the applicant both from the two groups of Muslim men who attacked him in the past, including Mr A, and other Muslim men. The evidence before me is the applicant operated the [vehicle] for more than a decade. During that time, he identified two instances of past harm, the first led to his suffering injuries requiring hospital treatment and the second resulted in a broken [vehicle part]. I am further willing to give the applicant the benefit of the doubt he and Mr A were detained by the police following the first incident and that Mr A threatened the applicant. However, on the basis that incident occurred in 2008/09, given the passage of time and that the evidence before me does not suggest Mr A or persons on behalf of Mr A harmed the applicant after that incident, I am not satisfied there is a real risk Mr A or persons on behalf of Mr A will cause significant harm to the applicant if the applicant is removed to Sri Lanka. For the same reasons, that there has been a passage of time and no subsequent instances of harm since 2010/11, I am not satisfied there is a real risk the group of Muslim men who assaulted the applicant in the second instance will cause significant harm to the applicant if he is removed to Sri Lanka.
38. I have accepted the applicant was assaulted twice in the past. Although he has not directly claimed so, to give every benefit to the applicant I am willing to accept too the applicant may encounter disputes with Muslim men or other hirers of his [vehicle] in the future over hire fees. I am willing to accept those disputes may lead to the applicant being physically assaulted, verbally abused and threatened. I am not satisfied however that any harm the applicant may suffer arising from those disputes would be significant harm as defined in the Act. I consider the only relevant forms of significant harm are torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. On the evidence before me, I am not satisfied disputes will result in severe physical or mental pain or suffering, therefore it does not meet the definition of torture in s.5(1). Similarly, the harm arising from the disputes would not meet limb (a) in the definition in s.5(1) of cruel or inhuman treatment or punishment, nor could the harm arising from the disputes be reasonably regarded in all the circumstances as cruel or inhuman in nature for the purpose of limb (b) of that definition. I accept disputes of that nature may cause some humiliation to the applicant, but I am not satisfied that would cause extreme humiliation which is unreasonable. Therefore, I am not satisfied any harm arising to the applicant from dispute over [hire] fees will amount to significant harm.

Illegal departure

39. I found above that any questioning process, brief detention, fine or penalty the applicant would face on return to Sri Lanka due to his illegal departure would not be persecution. I found too the provisions and penalties of the IAEA are laws of general application that are not discriminatory in their terms or applied in a discriminatory way or selectively enforced. I have had regard to whether any harm the applicant may face arising for his committing an offence under the IAEA amounts to significant harm.
40. I am not satisfied that any brief detention, questioning, fine or other penalty would amount to significant harm as defined under the Act. I accept that the applicant may be remanded in custody for a short period either at the airport or at a prison, while waiting to be brought before a magistrate. I have found the applicant has no specific profile that would result in a

longer detention, custodial sentence or additional interrogation. DFAT advises that the risk of torture or mistreatment for people suspected of an offence under the IAEA is low. I find that the likelihood that the applicant will be detained in prison is remote, but if he does I accept the applicant may experience poor prison conditions during his detention. Critically, I note that country information indicates the poor conditions are due to overcrowding, poor sanitation and lack of resources. I find there is no real risk that the applicant will be arbitrarily deprived of his life or be tortured. While the conditions are poor, I find there is no intention to inflict pain or suffering or extreme humiliation. In these circumstances, the poor prison conditions to which he applicant may be subject do not of themselves constitute significant harm as defined under the Act. I am not satisfied that, individually or cumulatively, any processes or penalties the applicant may encounter under the IAEA, would constitute significant harm as exhaustively defined under ss.36(2A) and 5 of the Act.

Balance of claims

41. In relation to the balance of the applicant's claims, I found above the applicant singularly or cumulatively does not have a real risk of serious harm on the basis of his being a Tamil, his family's connections to the LTTE and/or EPDP, because he would be someone with an imputed pro-LTTE or ant-Sri Lankan government political opinion, or because he will return to Sri Lanka as a failed asylum seeker. For the same reasons, and applying the authority in *MIAC v SZQRB*⁵ I am not satisfied the applicant will face a real risk of significant harm if he is removed to Sri Lanka.

Complementary protection: conclusion

42. I find 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 the requirements of s.36(2)(aa).

Decision

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

⁵ (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...