



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00380

Date and time of decision: 09 August 2016 17:54:53
Lesley Hunt, 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 he is a national of Sri Lanka of Tamil ethnicity. [In] September 2015 he applied for a Safe Haven Enterprise Visa (SHEV).
2. [In] July 2016 a delegate of the Minister for Immigration and Border Protection refused the visa application. The delegate found the applicant to be credible and accepted most of the applicant's claims. However the delegate relied on country information and found the circumstances in Sri Lanka have changed such that the applicant does not face persecution or significant harm for the reasons claimed. The delegate concluded that the applicant is not a person in respect of whom Australia has protection obligations.

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. No further information was obtained or received.

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 [year] in [a] Village, [District 1] District, Eastern Province, Sri Lanka. He lived there continuously except for four occasions when he lived and worked in [another country]. This was in 2001 to 2005, March to April 2006, 2007 to 2009, and April 2011 to April 2012.
 - The applicant claims that after returning to Sri Lanka from [another country] in April 2012 he faced several problems. A member of the Tamil paramilitary group (Karuna group) targeted him several times from June 2012 until September 2012 when he left Sri Lanka to travel to Australia. The Karuna group extorted money from him and took his personal belongings including his motorbike.
 - They came to his house on [a number of] occasions in June 2012 and threatened to shoot and kill him if he did not hand over money. During June 2012 the applicant gave them a total of approximately [amount]. His motorbike was taken around seven or times a month and was often damaged when it was returned to him.
 - Sometime during August 2012 the applicant received phone calls from the Karuna group members and they asked him to go to the sea shore close to his village. When there he was ordered by armed paramilitaries to purchase alcohol and cigarettes for them from a nearby bar. The paramilitaries believed the applicant was wealthy because he had travelled overseas several times and they used his money for their alcohol and cigarettes. This happened about five or six times during August 2012.
 - Sometime in mid-August 2012 the applicant received a call from the Karuna group asking him to go to the seashore. He decided not to go because he was tired of doing these things for them.

- At approximately 9p.m. [in] August 2012 [a number of] men in a white van came to the applicant's home. They told him to get dressed and to go with them. He refused and was physically assaulted. He was dragged into the white van, blindfolded and taken to an unknown location. It took approximately one and a half hours to get there.
- The applicant was taken into a room in a building and detained there for 7 days. His abductors told him they were members of the Karuna group and that he needed to work with them and help out during the upcoming election in September 2012. He was told to hand over all the money he had in his bank account. He was beaten severely with wooden sticks and with bare hands and kicked.
- [In] August 2012 the applicant was blindfolded and taken in the van at about midnight. They drove for approximately one hour and fifteen minutes. When the van came to a halt his blindfold was untied. He was in a village approximately [distance] kms away from his house. He was told to paste posters on a wall of a house. A Karuna group member who he had seen before and who he believes has police connections also pasted posters on the wall and was close to the applicant. There were other Karuna group members some distance away from him.
- The applicant grabbed some sand and threw it in the face of the Karuna group member next to him and ran away. He fled to nearby jungle and hid there until dawn. He then travelled to his [relative]'s house which is approximately [distance]kms away.
- The applicant's [relative]'s [family member] arranged for him to leave Sri Lanka in early September. After arriving in Australia the applicant has learnt that the people who abducted him in the white van had been to his house looking for him several times. The men assaulted his father because the applicant was not at home. They said they would shoot and kill the applicant if they saw him. The applicant recently learnt that one of the men who went to his house was the man he threw the sand at. This person told the applicant's parents he would shoot and kill the applicant if he saw him.
- The applicant fears he will be seriously harmed and possibly killed by members of the Karuna group because he escaped from their custody and was not willing to cooperate with them. He believes he is at risk of being targeted by Karuna group members because he is perceived to be wealthy. The police will not protect the applicant because the Karuna group has links with the police and works closely with the government.
- The applicant claims he is not able to live anywhere else in Sri Lanka because he does not speak Sinhala and he has no relatives outside the [District 1]. Also members of the Karuna group could track him down. Sinhalese people would be suspicious of him because he is Tamil. They may think he is a member of the LTTE, as generally a Tamil from a Tamil area who moves to a Sinhalese area is suspected in this way.
- The applicant also claims that prior to 2012 he had problems with the Sri Lankan Army (SLA). He was often rounded-up by the SLA, together with the others in his village, and taken to an SLA camp where he had to work and labour for them.
- In a post-SHEV interview submission the representative provided country information regarding the situation for Tamils in Sri Lanka and in support of the applicant's claims. The country information refers to systematic and widespread attacks directed against the Tamil civilian population including arbitrary arrests, torture and forced disappearances, a lack of effective investigation and prosecution of perpetrators. Reference is made to the ongoing militarization of the Tamil north and east, post-war violations of international criminal law, no political will on the part of the Sri Lankan

government to cooperate with the UNHCR investigation into war crimes, and little reconciliation with the Tamil populations in the north and east of Sri Lanka.

- The submission refers to the recent report from the Bar Human Rights Committee of England and Wales and The International Truth and Justice Project. The report refers to the sworn testimony of Tamil victims of human rights violations and the culture of impunity in Sri Lanka. Reference is made also to election violence. It is submitted that despite the many changes implemented by the newly elected President the situation remains dire for Tamils and human rights defenders. Reference is made to the systematic abuse and torture of former LTTE members and the arrest of people suspected of supporting the LTTE.
- It is submitted that the previous Australian government and the previous Rajapaksa Sri Lankan government agreed to stay quiet on Sri Lanka's human rights abuses in exchange for cooperation in combating people smuggling. It is submitted that forced returnees and failed asylum seekers are at risk of being tortured, harassed, arrested or killed on return to Sri Lanka and that internal relocation is not a viable option where the feared persecution emanates from the state.

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.

Does the applicant have a well-founded fear of persecution?

Nationality and Identity

8. The applicant submitted the original of his expired Sri Lankan passport, the original of his current Sri Lankan passport and the original of his National Identification Card to the Department of Immigration and Border Protection (DIBP). On the basis of the evidence provided I am satisfied that the applicant is a national of Sri Lanka and no other country as claimed. I find that Sri Lanka is the receiving country for the purposes of s.5J of the Act.
9. I accept that the applicant is a Tamil who was born and lived in the [District 1], Eastern Province of Sri Lanka. I note that he travelled to live and work in [another country] on four separate occasions between 2001 and April 2012.

Rounded-up by Sri Lankan Army prior to May 2009

10. During his SHEV interview the applicant claimed that he was taken by the Sri Lankan Army (SLA) several times during the war when SLA soldiers rounded up all Tamils in his village in [District 1] in the Eastern Province. During his detention on these occasions he was required to work in the camps and this included [a certain task] and other labouring jobs. The applicant clarified that after the end of the war in May 2009 this did not continue and he had no further problems with the SLA.
11. I note the independent country information which states that the Eastern Province was under the control of the Liberation Tigers of Tamil Eelam (LTTE) for many years during the civil war which commenced in July 1983 and ended in May 2009.¹ Tamil residents of areas under LTTE control were routinely subjected to cordon and search operations in which they were rounded up and detained, sometimes for long periods, under suspicion of involvement with the LTTE.²
12. I accept that the applicant was rounded-up along with others in his village as claimed and that he was required to labour in the army camp as claimed. Given that the war ended in May 2009 when the Sri Lankan military decimated the LTTE as a fighting force, and the applicant has not claimed to have continuing problems with the SLA, I find this does not give rise to a real chance of serious harm or a real risk of significant harm in the foreseeable future for the applicant in Sri Lanka.

Extortion and Abduction by Karuna group in 2012

13. In summary, the applicant claims that after returning from working in [another country] in April 2012 he was targeted by members of the Karuna group who demanded money from him as they perceived him to be wealthy because he had been working in an overseas country. He claims that in total they extorted around [an amount] Sri Lankan rupees from him in June 2012.
14. In addition, members of the Karuna group regularly took the applicant's motorbike and returned it in damaged condition. On several occasions the applicant was forced to go an area near the sea and buy alcohol and cigarettes for the Karuna group. On one occasion he refused to go to the seashore as ordered and [in] August 2012 he was abducted by armed men in a white van who transported him to an unknown location, detained for seven days and beaten including with weapons. He was then transported to a village and forced to paste up election campaign posters. He escaped after throwing sand in the face of one of the Karuna group and running into a nearby jungle area.
15. Country information regarding the Karuna group indicates that it is a paramilitary group founded by Vinayagmoorthy Muralitharan, known as Karuna. He was originally an LTTE

¹ DFAT, "Country Information Report, Sri Lanka", 18 December 2015.

² UK Home Office, "Sri Lanka: Country of Origin Information Report, 7 March 2012.

commander in the Eastern Province and based in [District 1]. He broke away from the LTTE in 2004 and formed the Karuna group and a political party, the Tamil Makkal Viduthalai Pulikal (TMVP). The party was officially registered in 2007. Karuna subsequently left the TMVP, joined the Sri Lanka Freedom Party (SLFP), and became a Deputy Minister for Resettlement in the government of former President Rajapaksa and the United People's Freedom Alliance (UPFA).³

16. The Karuna group was closely aligned with the Rajapaksa government and reports indicate that it engaged in paramilitary and criminal activity during and after the end of the war and operated with impunity. The criminal activity engaged in by the Karuna group includes extortion, kidnap for ransom, abduction, torture and murder.⁴
17. I have listened to the SHEV interview recording and found the applicant to have given a coherent and credible account. His claims have been consistent throughout the processing of his visa application. I note the country information reports which detail the criminal activities engaged in by Karuna group members. On the evidence I accept that the applicant was subjected to extortion demands, forced to purchase goods for Karuna group members, had his motorbike taken on a regular basis, and when he refused to cooperate with Karuna group demands he was abducted in a white van by armed men from the Karuna group, detained for seven days and beaten. I accept that he escaped in the manner he described and after this experience he made arrangements to depart Sri Lanka in September 2012.
18. In assessing the applicant's claims of fearing serious harm in the future from Karuna group members, and in particular the individual member he accosted when he escaped, I note that four years have passed since the events referred to by the applicant in his claims. I note also that the applicant stated that the last occurrence of any Karuna group members having contact with his family members was in February 2013. The applicant clarified in his SHEV interview that his [sibling], who is an Australian resident, travelled to the family's home area in 2015. The applicant did not claim that his [sibling] was subjected to extortion demands or harmed in any way during [that] stay.
19. In 2014 Amnesty International reported that there continue to be credible reports of the unlawful use of force and violations of human rights by state agents and paramilitary groups under the control of the armed forces in Sri Lanka, particularly in the north and east. Parties accused in this regard include the TMVP and the Karuna group. Amnesty International states that: "The Sri Lankan authorities have taken insufficient measures to prevent violations by government forces and their affiliates by failing to adequately discipline personnel and by failing to ensure that paramilitary agents and political parties aligned with the government are disarmed."⁵
20. However, since the applicant's departure from Sri Lanka, and subsequent to the 2014 Amnesty International report, there has been a change of government in Sri Lanka. Country information reports indicate that the Presidential election held on 8 January 2015 was "relatively peaceful". The election saw Maithripala Sirisena defeat President Mahinda Rajapaksa winning 51.3 per cent of the vote, with a historically high voter turnout of 81.5 per cent. The Tamil vote was reported to be significant in Sirisena's victory. Sirisena campaigned on a platform of democratic reform, good governance and anti-corruption. A relatively peaceful parliamentary election on 17 August 2015 ushered in a 'national unity government' of major parties. The

³ DFAT, "DFAT Thematic Report – People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014.

⁴ United States Department of State, "Country Reports on Human Rights Practices for 2011 – Sri Lanka," 24 May 2012; Amnesty International, "Amnesty International Country Information Report – Sri Lanka", 1 September 2010; DFAT, "Country Information Report – Sri Lanka", 18 December 2015.

⁵ Amnesty International "Ensuring justice: Protecting human rights for Sri Lanka's future", September 2014.

Tamil National Alliance (TNA) now formally leads the opposition. The parliamentary election was described by the Commonwealth Observer Group as credible, and meeting the key criteria for democratic elections, with an outcome that reflected the will of the people.”⁶

21. The Sirisena government is reported to have a more proactive approach to human rights and reconciliation than the previous government. The new Government has replaced military governors in the Northern and Eastern Provinces with civilians; reduced High Security Zones and released land held by the military; released some individuals held under the *Prevention of Terrorism Act 1979 (PTA)*; engaged constructively with the Tamil National Alliance and the UN and other international partners; and established the Office of National Unity and Reconciliation (ONUR).⁷
22. DFAT assesses that the number of incidents of extra-judicial killing, disappearances and abductions for ransom has fallen considerably since the end of the conflict and the TMVP, the Karuna group and other paramilitaries have renounced their paramilitary activities.⁸ News reports confirm that the TMVP is no longer operating as an active paramilitary group and that Karuna, the TMVP leader Pillayan and the TMVP party secretary are all under investigation by the Criminal Investigation Department.⁹ The Daily News notes that Karuna and his former associate known as Pilleyan were the leader and deputy leader of the Karuna group, a paramilitary group that operated with the blessing of the previous government. It is reported that Karuna defected from the SLFP in the wake of several investigations initiated by the CID into “certain incidents swept under the carpet by the previous government.” Among them are investigations into the murders of ex-Parliamentarians and atrocities committed during the final phase of war.¹⁰
23. I note that in recent annual reports on human rights in Sri Lanka under the government of President Sirisena, Amnesty International, Freedom House and the UK Home Office make no mention of extortion or ransom.¹¹
24. With regard to the TMVP, the Karuna group and other paramilitaries, DFAT in its December 2015 report states that: “While these groups have reportedly renounced paramilitary activities, DFAT is aware of credible reports that these groups continue to be active in Sri Lanka, including in criminal activity. However verifying these reports is difficult.”¹²
25. In the post-SHEV interview submission and attachments the applicant’s representative submitted an article from The Sunday Leader dated January 2016 which refers to a report from The International Truth and Justice Project. The report refers to new evidence emerging of ongoing torture and sexual violence by security forces one year after the Siresena government came to power promising a radical clean up. In the article the Executive Director of the International Truth and Justice Project, Yasmin Sooka, is reported as stating that “Sadly Sri Lanka’s notorious ‘white vans’ are still operating: it’s very much business as usual.” The report focuses on 20 cases of torture and sexual violence by the security forces that occurred under the new government in Sri Lanka during 2015. The victims were accused of involvement in organizing demonstrations, being involved in a variety of peaceful protests or election activities

⁶ DFAT, “DFAT Country Information Report: Sri Lanka”, 18 December 2015.

⁷ Ibid

⁸ Ibid

⁹ Dissanayake, R, “TMVP Secretary arrested”, Daily News, 6 November 2015.

¹⁰ Jayakody, R “Waiting in a Quagmire”, Daily News, 6 November 2015.

¹¹ Amnesty International, “Amnesty International Report 2015-2016, Sri Lanka”, 23 February 2016; Freedom House, “Freedom in the World 2016”, 27 January; UK Home Office 2014, “Country Information and Guidance – Sri Lanka: Tamil Separatism”, 28 August 2014.

¹² Ibid

demanding rights for Tamils, campaigning for the TNA during elections, campaigning for the disappeared, attending memorial events and diminishing the reputation of the Sri Lankan government internationally.¹³ Reference is made in the report to torture and sexual violence occurring under the new government in a known army camp in the north of Sri Lanka, the Vanni Security Force Headquarters in Vavuniya Town, TID headquarters in Colombo, and in secret camps operating in diverse places in Sri Lanka. The ITJP report notes that the new government, if it is to be taken seriously, must deal immediately, decisively and conclusively with those in the security forces who continue to commit these serious crimes and / undermine accountability. The article states that the Sri Lankan government, in response to the report, says it is prepared to investigate all the allegations and will do so through the domestic accountability mechanism.¹⁴

26. As stated previously, I have accepted that the applicant was a victim of extortion, abduction, beating, ransom and forced labour by members of the Karuna group, a Tamil paramilitary group aligned with the previous Rajapaksa government. I accept therefore that he was subjected to serious harm and note the applicant's evidence that this occurred because he was perceived as being wealthy as he had returned from working for a year in [another country]. I accept that these experiences caused the applicant to leave Sri Lanka as he feared further harm.
27. I note that four years have passed since these events occurred and three years have passed since the applicant's family were approached by the men who subjected the applicant to extortion and abduction in the past. In that time there has been significant change in Sri Lanka. A new government was elected in 2015 and a level of positive change and reform was introduced. I note that the paramilitary groups were disbanded, leading figures in the Karuna group are under criminal investigation, and the incidence of extortion, ransom, kidnap and white van abductions are greatly reduced. Recent human rights reports do not refer to extortion and ransom in Sri Lanka.
28. I accept that extortion and white van abductions still occur; however I note that the white van abductions, torture and sexual assault referred to in the ITJP report relate to crimes committed by security forces against people involved in political activities, albeit peaceful and legitimate political activities. The applicant does not claim to have supported the LTTE or been involved in political activities either in Sri Lanka, [another country] or Australia. The report does not refer to people being subject to white van abductions and extortion demands by criminal gangs or paramilitaries.¹⁵
29. The applicant claims that the police will not protect him because the Karuna group has links with the police and works closely with the government. I note again that there has been a change of government in Sri Lanka since this claim was made and the Sirisena government has identified the independence of the police as part of its agenda for constitutional reform.¹⁶ It is evident from the country information that the Siresena government is investigating and taking action against paramilitaries including Karuna group members.¹⁷ I note also that there is a

¹³ "Sooka Reignites 'White Van' Abductions Debate", The Sunday Leader, 10 January 2016.

¹⁴ Ibid

¹⁵ Ibid

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015.

¹⁷ Ramakrishnam, T "Ex-Eastern Province CM Pillayan, who rebelled against LTTE, arrested in murder case", The Hindu, 13 October 2015; "Body of Ekneligoda dumped at Trincomalee sea", Lankasri News, 20 October 2015; "TMVP's criminal complicity", Sunday Observer, 1 November 2015; Dissanayake, R "TMVP Secretary arrested", 6 November 2015.

National Police Commission which investigates complaints against individual police officers or the police force in general.¹⁸

30. After assessing all the evidence I am satisfied that the chance of the applicant being subjected to white van abduction and extortion or any other form of serious harm in the foreseeable future in Sri Lanka is remote.

Tamil failed asylum seeker returning after departing Sri Lanka illegally

31. In the referred material there is reference to the applicant being at risk of harm because he departed Sri Lanka illegally and would be returning there as a failed Tamil asylum seeker. I note that the applicant departed Sri Lanka without a passport and without exiting at an authorised port of departure. As such the applicant will go through the following procedures if returned to Sri Lanka.
32. According to DFAT and the UNHCR, on return to Sri Lanka the applicant will be questioned at the airport and will undergo identification, character and security checks. These checks are undertaken by the Department of Immigration and Emigration, the State Intelligence Service and the Airport Criminal Intelligence Division. Under the Sri Lankan Immigrants and Emigrants Act it is an offence to depart from Sri Lanka other than from an official port of entry or exit. The applicant will therefore be arrested and charged under the Immigration and Emigration Act in relation to his illegal departure from Sri Lanka. He will be held on remand, released on bail, to appear at a later date before a magistrate charged with having departed the country illegally in breach of Sri Lanka's immigration and emigration laws. The penalty specified under this legislation can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees. According to DFAT no returnee who was a passenger on a people smuggling boat has ever been sentenced to a term of imprisonment for illegal departure and the fines imposed range between 5 and 50 thousand Sri Lankan Rupees. People smugglers who organized the boats have been sentenced to terms of imprisonment however passengers are generally viewed as victims of crime.¹⁹ There is no information before me to indicate that the applicant has been involved in organizing the boat to Australia or any other aspect of people smuggling.
33. On the information before me I am satisfied that on being returned to Sri Lanka the applicant will be held on remand for a number of hours whilst the identity, character and security checks are completed. This could extend to a number of days if he arrives on a weekend or public holiday. DFAT states that if a person pleads guilty, they will be fined and discharged. Generally, if a person pleads not guilty, they are granted bail on personal surety and may be required to have a family member act as guarantor and if so may have to wait until a family member comes to collect them. There are rarely any conditions in relation to being released on bail.
34. There is no evidence before me to indicate that the applicant will be unable to pay the fine or bail imposed in relation to his illegal departure and I am satisfied that the applicant has family members who will be able to collect him and provide a surety if required.
35. There is no evidence before me to indicate that the applicant has engaged in people smuggling, or any other crime, or that he has the profile of an anti-government activist or a Tamil separatist, or that he has links, or will be perceived as having links to the LTTE. As such, I am

¹⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015.

¹⁹ Ibid

satisfied that the applicant will not be detained for a lengthy period of time or subjected to serious harm or significant harm on arriving back in Sri Lanka. I am satisfied that the applicant will undergo routine processing as outlined in the preceding paragraphs. DFAT reports that returnees are treated according to these standard procedures, regardless of their ethnicity and religion.²⁰ I find that the procedures the applicant will undergo do not amount to serious harm.

36. I am satisfied that the applicant will be charged and convicted for his illegal departure and fined an amount between 5,000 and 50,000 Sri Lankan rupees. I find this treatment is prosecution for an offence against the Immigration and Emigration Act and does not amount to serious harm or significant harm.

37. I also find the procedures under which the applicant as a returnee would be dealt with, and any penalties to which he may be subjected, will be applied in a non-discriminatory basis under a law of general application, and as such do not constitute persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

Cumulative grounds

38. I have considered each of the applicant's claims and have also considered them cumulatively. However, for the reasons outlined above I am not satisfied there is a real chance that the applicant will face serious harm now or in the reasonably foreseeable future in Sri Lanka. His fears of persecution are not well-founded.

Refugee: conclusion

39. 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

40. 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

41. 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.

²⁰ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015.

Does the applicant have a real risk of suffering significant harm?

42. In *MIAC v SZQRB*, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to refugee determination.²¹ Given the findings above, that the applicant does not face a real chance of serious harm in Sri Lanka, I am satisfied that he does not face a real risk of significant harm in Sri Lanka as that term is defined in s.36(2A) of the Act with regard to his claims of being rounded-up by the SLA, fearing white van abduction and extortion, or because he will be returning as a failed Tamil asylum seeker.
43. In relation to the procedures under which the applicant will be dealt with and the penalties he may face because of his illegal departure from Sri Lanka I am satisfied that this will not amount to significant harm as that term is defined in the Act. That is, they will not result in the death penalty, arbitrary deprivation of life, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.
44. I considered the applicant's claims separately and cumulatively. I am satisfied that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, he will be at real risk of significant harm as that term is defined in s.36(2A).

Complementary protection: conclusion

45. 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.

²¹ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

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.

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