



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05691

Date and time of decision: 24 January 2019 10:21:00
D Corrigan, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan national. On 16 June 2017, he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. In a decision dated 13 September 2018, a delegate of the Minister refused to grant the visa. The delegate found the chance that the applicant would face serious or significant harm on account of his Muslim religion, Malay ethnicity and for being a failed asylum seeker who departed illegally to be remote and not real. The delegate also did not accept that the applicant would be perceived as a people smuggler by the Sri Lankan authorities.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He was born [in] the Hambantota province of Sri Lanka and resided there until his departure of Sri Lanka.
 - He is a Malay Muslim. He faced discrimination from the Sinhalese majority in Sri Lanka.
 - When he was a teenager, people from Sinhalese villages came to the applicant's village and threatened and beat him and other Muslim residents when they were at a mosque.
 - He worked as a fisherman for 10 years. Sinhalese fisherman would pour water into their oil cans, which was needed to provide fuel for the boats. Furthermore, they would also cut the fishing nets for Muslim fishermen, deliberately forcing them to lose their catch of prawns. Sinhalese fishermen would also drill holes into the boats of Muslim fisherman or burn the boats. On two occasions the boat he was working on was tampered with or destroyed to prevent him from fishing.
 - Two months prior to his departure of Sri Lanka, a young Muslim girl from a community he knew, was raped by Sinhalese men.
 - Two weeks prior to his departure of Sri Lanka, he decided to visit a female Sinhalese friend, [Ms A] who he knew since birth but had not seen for a long time. He went to her house to visit her; however she was there with her husband. He was not aware she was married. Her husband, [Mr B] was offended by his presence and beat the applicant. A week later, the applicant noticed [Mr B] at the fishing harbour, and proceeded to beat him because he was angry about what happened a week earlier. The fight was broken up by other fishermen, however, [Mr B] threatened to kill the applicant if he ever saw him again. At the SHEV interview, the applicant claimed that it was his friend not himself who beat [Mr B] up. The applicant went and stayed at friends' houses.
 - He decided to depart Sri Lanka because of fear of retaliation from [Mr B] and the fact that he had [number] brothers. He also made the decision to leave Sri Lanka because of his experiences as a Malay Muslim.

- He illegally departed Sri Lanka by boat. He assisted the captain of the boat by preparing food and helping around the boat since he had the necessary skills to do so as a fisherman. He assisted people to get on to the boat that he was a passenger on by giving his hand. However, after some of the crew members were returned to Sri Lanka by the Australian authorities, they informed the Sri Lankan authorities that he was a crew member. His brother advised him that a friend of his named [Mr C] informed him that people sent back to Sri Lanka from Australia had given his name to the Sri Lankan authorities. [Mr C] saw the applicant's name on a board on a piece of paper at [a public place] after his return to Sri Lanka from Australia. Consequently, the Sri Lankan authorities now have his profile and he is wanted by them.

Refugee assessment

5. 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

6. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

Country of reference

7. The applicant has provided originals of his Sri Lankan birth certificate and national identity card and he has consistently maintained that he is a Sri Lankan national. I accept that he is a Sri Lankan national and I find that Sri Lanka is his receiving country.

[Mr B]

8. I have considered carefully, the applicant's claims but I do not consider his evidence to be credible. I do so for the following reasons:

- In his statement that accompanied his SHEV application, the applicant stated that when he was at the fishing harbour, he beat [Mr B] and eventually had to be held back by other fishermen. However, in his SHEV interview, he stated that it was his friends who beat up [Mr B] at the harbour. I note the applicant was represented in the preparation of his SHEV application by a registered migration agent and that the contents of the statement were interpreted to him from English to Sinhalese. I consider this to be a highly significant and fundamental inconsistency as this is the central claimed event that the applicant claims led to him fleeing Sri Lanka. I find that this detracts substantially from his credibility.
 - At the SHEV interview, the applicant was asked why he did not contact the police regarding the threat of harm against him. He stated that there was “no point” and that when he was at school a girl was raped and the police did nothing. However, I note that the applicant had been at school many years before this claimed incident and I do not find this to be a credible or plausible explanation for not seeking the protection of the authorities after being beaten up by [Mr B], a private citizen in 2012. The Australian Department of Foreign Affairs and Trade (DFAT) in 2013 stated that there was very little official discrimination on the basis of religion. It stated that the criminal and civil legal system is available to all citizens regardless of ethnicity. DFAT assessed there was no law or government policy which hinders access to state protection on the basis of religion or ethnicity. DFAT also stated that it was not aware of any cases over the last few years where persons were denied access to legal remedies based on ethnicity or religion. Tamils, Sinhalese and Muslims have the same access to judicial authorities subject to logistical and resource limitations.¹ Taking into account this highly authoritative information, I find it to be implausible and not credible that the applicant would not have sought the protection of the state authorities after being beaten up and threatened by [Mr B]. I find this further detracts from his credibility.
9. Given these highly significant and fundamental concerns, I do not accept that prior to his departure of Sri Lanka, the applicant visited the house of a female Sinhalese friend and that her husband was offended and beat him up. I do not accept that later the applicant noticed [Mr B] at the fishing harbour and he or his friends beat [Mr B] up. I do not accept that [Mr B] threatened to kill the applicant if he ever saw him again and the applicant went and stayed at friends’ houses. I do not accept that he decided to depart Sri Lanka because of fear of retaliation from [Mr B] and his [number] brothers. I do not accept the applicant has ever been of adverse interest to [Mr B] and his brothers.
10. I find that the applicant does not face a real chance of any harm on account of these claims.

Religion

11. I have taken into account the submitted country information concerning the situation of Muslims in Sri Lanka. However, in making my findings, I have given greater weight to the latest DFAT report because it is recent, authoritative and based on DFAT’s on the ground knowledge and discussions with a range of sources as well as taking into account relevant and credible open source reports including those of the UNHCR, western governments and human rights organisations and Sri Lankan non-governmental organisations. Furthermore, it has been specifically prepared with regard to the current caseload for decision-makers in Australia.

¹ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report, Sri Lanka”, 1 July 2013.

12. DFAT have stated that Muslims are 9% of Sri Lanka's population and that the government has publicly declared its commitment to religious and ethnic reconciliation. Sri Lanka recognises religious holidays for Muslims and Muslim leaders attend religious functions. School students are able to study Islamic religious classes in most public and private schools, depending on the availability of teachers and there are some Muslim public schools. Although most Muslims sided with the (Sinhalese) government forces during the conflict, religious tensions between Muslims and the Sinhala Buddhist majority have risen since the end of the conflict. Nationalist Buddhist groups such as the BBS, Sinha Le (English: Lion's Blood), and Sinhala Ravaya (English: Sinhalese Roar) continue to stoke religious and ethnic tensions, including through social media posts. Greater freedom of expression under the current government has enabled an increase of hate speech against Muslims and other religious minorities in Sri Lanka.²
13. Minority Rights Group International reported 60 incidents of hate speech, discrimination or attempts to desecrate or destroy Muslim religious buildings in the first six months of 2016. The OHCHR reported 30 registered incidents of violence against Muslims across the country around May 2017, mostly against Muslim-owned businesses and mosques, and accompanied by anti-Muslim rhetoric from Sinhala Buddhist groups such as the BBS. In September 2017, a mob led by Buddhist monks reportedly belonging to the organisation Sinhalese Nationalist Front vandalised and attempted to storm a Colombo house where 31 Muslim Rohingya refugees were staying. Buddhist groups burned more than 70 Muslim shops and houses in Gintota, Southern Province, in November 2017. The Muslim Council of Sri Lanka wrote to Prime Minister Wickremesinghe in May and September 2017 urging the government to take action against the hate speech and violence targeting the Muslim community. President Sirisena has committed to investigate anti-Muslim hate crimes and bring perpetrators to justice, although local sources claim that for political reasons authorities are reluctant to address violence perpetrated by religious clerics due to concern of public backlash. According to the US Department of State, local police and local government officials sometimes tacitly support Sinhala Buddhist nationalist groups by failing to respond to complaints of harassment or property damage by Buddhist monks.³
14. On 6 March 2018, the government declared a nationwide State of Emergency for 12 days in response to incidents of communal unrest between members of the Sinhalese Buddhist and minority Muslim communities in Kandy District, Central Province. Despite the deployment of high numbers of military and police, several arrests and extended curfews, violence continued in several towns around Kandy until 7 March, and four people (two Muslims and two Sinhalese) were killed and dozens injured. Police arrested the leader of the Buddhist extremist group *Mahason Balakaya* (English: Strong Ghost Regiment), Amith Weerasinghe, in relation to the violence. The events in Kandy represented the largest violent incident between Buddhist and Muslim communities since June 2014 when Galagoda Aththe Gnanasara, General Secretary of BBS, delivered a speech that many blamed for inciting riots in Aluthgama that lasted two days; Police arrested and subsequently released Gnanasara on several occasions. The events in Kandy followed a smaller incident on 27 February 2018 whereby Buddhist nationalist groups perpetrated arson attacks against Muslim-owned residences, shops and a mosque in Ampara, Eastern Province. Rumours that a Muslim restaurant was mixing 'sterilisation drugs' in its food to make Sinhalese women infertile triggered the attacks. Social media aggravated both the Kandy and Ampara incidents.⁴

² DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018.

³ Ibid.

⁴ Ibid.

15. In 2016 and 2017, local groups reported the construction of Buddhist shrines in the north and east in Hindu and Muslim areas with few, if any, Buddhist residents. In some locations in the north, the military was reportedly involved. In 2016, *Sinha Le* reportedly orchestrated protests against the construction of a mosque in Kandy. A lack of reliable statistics precludes an accurate assessment of whether incidents are increasing, but supporters of Sinhala Buddhist nationalist groups have engaged in a sustained campaign of hate speech against Muslims in recent years. While there have been incidents of property damage and personal violence, overall violence remains sporadic. DFAT assesses that Sri Lankan Muslims face a low risk of official and societal discrimination and a low risk of violence.⁵
16. The United Kingdom Home Office has reported that most violence against religious minorities is perpetrated by hardline Sinhalese Buddhist nationalist groups, but they represent a minority of Buddhists and in general there is peaceful coexistence between religions. Large-scale violence occasionally flares up, most recently in March 2018. However, this was the first such reported incident targeting a religious group since the Aluthgama riots of June 2014, when groups apparently inspired by Bodu Bala Sena, a Sinhalese Buddhist nationalist group, attacked Muslim homes and properties, killing four and injuring 80 people. They assess that in general, a person will not face a real risk of serious harm or persecution from non-state or societal actors because of their religion.⁶
17. I accept that when the applicant was a teenager, people from Sinhalese villages came to the applicant's village threatened and beat him and other Muslim residents when they were at a mosque. I note, however, that this incident occurred many years ago and I do not accept that the applicant faces a real chance of any harm on account of this incident.
18. I accept that the applicant was employed as a fisherman and that Sinhalese fishermen poured water into their oil cans, which was needed to provide fuel for the boats. I accept that they would also cut the fishing nets for Muslim fishermen, deliberately forcing them to lose their catch of prawns. I also accept that Sinhalese fishermen would also drill holes into the boats of Muslim fishermen or burn the boats. I further accept that on two occasions the boat he was working on was tampered with or destroyed to prevent him from fishing. I note, however, that the applicant was able to work as fisherman for a decade and pay a substantial amount of [money] to a smuggler for his journey to Australia and I do not accept that these incidents threatened his capacity to subsist or otherwise constituted serious harm or that if they re-occur in the future they would constitute serious harm to him.
19. I accept two months prior to his departure of Sri Lanka, a young Muslim girl from a community he knew, was raped by Sinhalese men. However, this incident now occurred a substantial period of time ago and did not involve the applicant and I do not accept that the applicant faces a real chance of any harm on account of this incident.
20. The applicant has not claimed that anything adverse has happened to his family since he departed Sri Lanka. He was able to complete studies until Year [number] and be employed for a decade prior to his departure. The weight of the country information before me indicates that violence is sporadic and that Muslims face only a low risk of official and societal discrimination and violence. Given, his particular circumstances and this information, I find that the chance that he would be seriously harmed on account of his religion is remote and not real.

⁵ Ibid.

⁶ United Kingdom Home Office, "Country Policy and Information Note Sri Lanka: Minority religious groups ", 28 March 2018.

Race

21. DFAT assess that Sri Lankans of all backgrounds face only a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, housing and employment. DFAT have stated that the Malay community in Sri Lanka is Muslim,⁷ and I have already found that the chance that he will be harmed on this basis is remote. There is no specific information before me to indicate that persons in Sri Lanka are being harmed on account of their Malay ethnicity. The applicant has not claimed that anything adverse has happened to his family since he departed Sri Lanka. He was able to complete studies until Year [number] and be employed for a decade prior to his departure and he still has family resident in Sri Lanka. The country information before me indicates he would face only a low risk of official or societal discrimination based on his ethnicity. Given, his particular circumstances and this information, I find that the chance that he would be seriously harmed on account of his race is remote and not real.

Imputed people smuggler

22. DFAT have stated that facilitators and organisers of people smuggling ventures can be charged under section 45C of the Immigration and Emigration Act (the I&E Act) and are not usually released on bail. According to Sri Lankan Police information as at September 2017, all facilitators, organisers and skippers (captains of boats) convicted under section 45C had received prison sentences of one year.⁸ Under s.45C of the I&E Act, any person, who "(a) organizes one or more persons to leave Sri Lanka in contravention of any of the provisions of this Act; or (b) attempts or does any act preparatory to, or aids and abets any other person to, so organize under paragraph (a), shall be guilty of an offence."⁹
23. The applicant has claimed that he physically helped people onto the boat and that he helped supply meals to the passengers on the boat from Sri Lanka to Australia as well as helping persons who were sick and vomiting. He stated he was not the only one on the boat engaging in this activity. He has stated that he paid [amount] to come to Australia and he did not receive anything for his assistance on the boat. I accept these claims as the applicant has been consistent and generally credible with this evidence.
24. The applicant has claimed that his brother has told him that his friend, [Mr C], who returned to Sri Lanka from Australia, identified his name on a list on a notice board and that some of the people from the boat who were returned to Sri Lanka had given the applicant and two friend's name to the Sri Lankan authorities. I do not accept these claims. I do not find it plausible or credible that if the applicant was wanted by the Sri Lankan authorities, they would have had his name listed on an arrest list that was in full public view of others. I also note that the applicant has given evidence that [Mr C], who accompanied him on the boat to Australia in November 2012, returned to Sri Lanka after two months. The applicant was asked if anyone came to look for him in Sri Lanka and he stated that his brother did not mention anything about that. There is no evidence of probative value before me that the applicant has been charged with any crime, including that of being in violation of s.45C of the I&E Act. The applicant's evidence of his activities upon the boat and his complete lack of activities prior to this, do not support that he would be or has been charged with being in violation of s.45C of the I&E Act. I do not accept that he has been charged with being in violation of s.45C of the I&E Act or that there is a real chance of this occurring upon his

⁷ DFAT, "DFAT Country Information Report, Sri Lanka", 23 May 2018.

⁸ Ibid.

⁹ Parliament of the Democratic Socialist Republic of Sri Lanka, "Immigrants and Emigrants (Amendment) Act, No.31 of 2006", 26 September 2006.

return. Considering all the evidence, I do not accept there is a real chance that he will be imputed by the Sri Lankan authorities of being a people smuggler and to face any harm as a result.

Failed Malay Muslim asylum seeker who departed illegally

25. In its most recent report, DFAT reported that between 2008 and 2017, over 2,400 Sri Lankans departed Australia for Sri Lanka. Many others have returned from the US, Canada, the UK and other European countries, and most of these returnees are Tamils. The Sri Lankan government claims that failed asylum seekers are welcome back with the Sri Lankan Prime Minister publicly stated this during a 2017 visit to Australia. However, DFAT have also noted that returnees may face practical difficulties upon return. There is limited reintegration assistance available and some returnees have reported social stigma from community members upon return. DFAT notes that the biggest challenge facing returnees are bureaucratic inefficiencies, rather than official discrimination, which can result in delays in obtaining official documentation and support. The Sri Lankan government has reportedly decreased systematic surveillance of returnees, although DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the North as recently as 2017. DFAT assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within the communities. However, UNHCR conducted interviews with returnees in 2016 and only 0.3 per cent indicated they had any security concerns following their return.¹⁰
26. I accept it is possible that the applicant may be subject to monitoring for a period by the Sri Lankan authorities and face social stigma as a returning failed asylum seeker. I also accept that he will need to re-establish himself in Sri Lanka. However, the applicant has previously worked for a decade as a fisherman in Sri Lanka and he has family members there. I do not consider the treatment he may face as a returning asylum seeker constitutes serious harm.
27. DFAT have reported for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.¹¹ I have already found that he is not of any adverse interest to Sri Lankan authorities for suspected involvement in people smuggling and he has not claimed that of interest to the authorities when he left the country and I am not satisfied that any investigations would lead to a real chance of him being seriously harmed.
28. I do not accept, on the evidence before me, that the applicant will face a real chance of serious harm due to being a failed Malay Muslim asylum seeker.
29. I accept the applicant left Sri Lanka illegally and that on return he may be identified by the authorities as such. DFAT have stated that most Sri Lankan returnees are questioned upon return and where an illegal departure from Sri Lanka is suspected, they can be charged under the I&E Act. DFAT understands the Sri Lankan Police Airport Criminal Investigations Unit at Colombo's Bandaranaike International Airport makes most arrests. In the process, police will

¹⁰ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

¹¹ Ibid.

take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are former LTTE members. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. The magistrate then makes a determination as to the next steps for each individual; crew and facilitators or organisers of people smuggling ventures are usually held in custody. Apprehended individuals can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.¹²

30. The applicant departed Sri Lanka irregularly by boat via an unauthorised port and in doing so may be found to have committed an offence under the I&E Act. Penalties under the I&E Act for this offence can include imprisonment of up to five years and a fine. In practice those individuals who were mere fare paying passengers of a people smuggling venture are issued a fine which acts as a deterrent to depart illegally in future. The Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger has been given a custodial sentence for departing illegally.¹³ Fines are issued by the Magistrate and act as a deterrent to future illegal departure. A guilty plea will attract a fine and can be paid in instalments and the defendant is free to go. The fines vary and can be LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,760). Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of a personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high.¹⁴
31. I accept that the applicant may be questioned and detained at the airport for processing by authorities for up to 24 hours with the possibility that he may be further held at an airport holding cell for up to two days. Given the shortness of the time of detention that the applicant faces and the information from DFAT about the treatment of persons who have illegally departed the country, I do not accept that his detention would constitute serious harm nor do I accept that there is a real chance that he will be tortured or face any other form of serious harm during this.
32. If the applicant does plead not guilty, there is no suggestion he will not be able to secure bail and I note that he has family members in Sri Lanka who could give a personal surety or guarantee. I accept that he may have to pay a fine but I note that this may be paid in instalments and it is a first offence. I note the applicant's SHEV application indicates that in Sri Lanka he had worked as fisherman for a decade and that he has family members in Sri Lanka. The evidence before me does not indicate that he will be unable to pay the fine or any possible associated court costs.
33. Country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I find that the questioning, temporary

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

detention and imposition of a fine and any associated court costs if they arise would not constitute serious harm to the applicant. I am not satisfied that the applicant faces a real chance of serious harm due to his illegal departure from Sri Lanka.

34. I am not satisfied that the applicant faces a real chance of serious harm on account of these claims.

Overall assessment

35. Considered cumulatively, I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning, being subject to a short term detention, official and social discrimination, having to pay a fine and possible court costs and any further incidents of tampering by Sinhalese fishermen) amount to serious harm.
36. Considering his profile on a cumulative basis (including that he is a Malay Muslim and failed asylum seeker who departed the country illegally), I find that he does not face a real risk of serious harm for any reason.

Refugee: conclusion

37. 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

38. 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

39. 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.
40. For the reasons given above, I have found that the applicant would not face a real chance of serious harm on account of being a Malay Muslim and a failed asylum seeker who departed the country illegally or due to perceived involvement in people smuggling. The real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm on these bases even when considering his profile cumulatively.

41. I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning, being subject to a short term detention, official and social discrimination, having to pay a fine and possible court costs and any further incidents of tampering by Sinhalese fishermen) amounts to significant harm. I am not satisfied that there is a real risk that the applicant will be arbitrarily deprived of his life, be subject to the death penalty or be subject to torture. Nor does the evidence before me indicate that there is a real risk that he will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for any reason.

Complementary protection: conclusion

42. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.