



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06221

Date and time of decision: 15 February 2019 16:53:00
J McLeod, 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) arrived in Australia [in] November 2012 and applied for a Safe Haven Enterprise Visa (SHEV) on 7 March 2017. He claims to fear harm from the Sri Lankan authorities on the basis of his Tamil ethnicity, his clash with police over greasemen attacks and his pro-Tamil/anti-government political opinions. A delegate of the Minister for Immigration (the delegate) accepted most of the applicant's claims but ultimately found he would not be returning with a profile that would result in a real chance of persecution or a real risk of significant harm. She refused the grant of visa on 9 January 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) ('the review material').
3. There is reference in the delegate's decision to an Enhanced Screening Interview transcript but it has not been referred with the other material under s.473CB and it does not appear to have been considered. Overall I am not satisfied it was in fact before the delegate when the decision was made or that it was considered otherwise relevant to the review. No concerns have been raised by the applicant about the fact that it was not considered. I am not satisfied that it is relevant. Nor am I satisfied that the information referred relating to the applicant's Status Resolution Support Services (SRSS) or his 'DHS Debt return' is relevant. I have not had regard to those documents.
4. No further information has been obtained or received by the IAA.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Catholic Tamil who originates from [City 1] in the Eastern Province of Sri Lanka.
 - When he was [age] years old, the Criminal Investigation Department (CID) became angry when he refused their direction to give letters to girls on their behalf. After this they attempted to beat him whenever they spotted him. By [age] (2000) he could no longer tolerate the beatings; he went to [Country 1].
 - He returned in 2004 and was caught by agents of the government. He went to [Country 2] for around eight months but faced the same problems again upon return. He did not want to live like a slave so in 2009 he went to [Country 3] for around eight months.
 - In 2011, greasemen were terrorising his area, targeting Tamil women. He spearheaded protests against the greasemen which lasted up to two months. The CID photographed him protesting. The authorities identified that he was responsible for the protests and plotted to kill him.
 - [In] December 2011 he was attacked (knifed and burned) in his home. He escaped and then lived in hiding but in 2012 he was found and abducted by the army. His family came to the army camp threatening to complain to the Red Cross or Human Rights Commission but the authorities would not release him. They tied him up, beat him and

burned [him]; he still has scars. He believed they were going to kill him but he managed to escape.

- In Australia he has been attending Martyrs Day commemorations in Australia and uploading things on [social media] promoting the Tamil cause.
- He fears returning to Sri Lanka because he believes that those who attacked him will try to kill him.

Factual findings

Identity/receiving country

6. There are no concerning issues as to the applicant's nationality and identity. I accept they are as claimed. While the applicant spent considerable periods of time overseas between 2000 and July 2009, living for months or years at a time in [Country 1], [Country 2] and [Country 3], returning to his home area in the Eastern Province in between, the evidence does not suggest he has re-entry or residency rights in these [countries], nor any other country apart from Sri Lanka. I accept the applicant is a Tamil male who originates from [City 1] in the Eastern Province of Sri Lanka, his receiving country.

Problems in Sri Lanka

7. I accept that during the war, the applicant faced harassment including beatings or significant physical harassment from members of the authorities including the CID. The applicant has described facing such problems on and off from [age], and while he went to [Country 1] to stay with his [brothers], and on work contracts to [Country 2] and [Country 3], I accept his leaving was also motivated in part by his desire to avoid these problems. The applicant stated his [problems] resulted from his refusal to hand out letters for the CID and I accept this. The applicant confirmed that neither he nor any member of his family had any involvement with the LTTE however he stated his life wasn't straightforward as he was nonetheless accused of being a Tamil Tiger and beaten. I accept this.
8. However relevantly, the problems the applicant faced from the authorities occurred against a backdrop of the ongoing war and its aftermath. Country information reports in the review material from sources such as the Danish Immigration Service (2010), UNHCR (2012) and others indicates that this was a time when Tamils in Sri Lanka and in the diaspora were treated with suspicion and many (particularly young males in the North and East) were reportedly harassed, monitored, detained and harmed. The applicant's experiences are indicative of the then common profiling of young Tamil males in the North at that time.
9. I take into account that the applicant was issued two passports, each with a five year validity period, in 2000 and approximately 2005 and he was able to travel internationally on his own passport three times internationally between 2000 and July 2009. The applicant was in [Country 3] in May 2009 when the war ended and while his family were displaced due to shelling and fighting they went to stay with relatives in another part of [City 1] until they were able to return to their home; they were never detained in any camp and were able to return to their home after a period. While applicant was questioned when he returned from [Country 3], he stated in the SHEV interview that it was part of the usual checking undertaken by the authorities. On the evidence, neither the applicant, nor any of his family members, have ever been formally arrested charged, taken for rehabilitation or subject to reporting regimes or any

other formal repercussions that would suggest they were of concern to the authorities for LTTE related reasons.

10. The applicant claims he will be harmed on account of his involvement in leading protests against the activities of greasemen terrorising his area in 2011. I accept the applicant's claims that he and some other villagers took it upon themselves to patrol the area and sometimes chased the greasemen. He claims this culminated in many clashes with police who blocked their chase and allowed greasemen refuge in police stations or army camps, and that some may themselves have been members of the police or army.
11. Country information supports the applicant's claims about greasemen terrorising Tamil villages in the period claimed. His evidence recalling this, and about his role in patrolling and chasing the greasemen and clashing with the police on the matter was convincing and the claims are plausible, as are his claims of shots being fired, and even of his being identified as the ringleader in his area. The applicant has also provided a letter from his Grama Sevakar and [a priest] of Trincomalee which supports his claims. I accept these claims.
12. I accept too that the applicant was attacked in his home [in] December 2011 and I note he has provided evidence of his being hospitalised for the claimed wounds. The applicant claims the attack was carried out by the police intelligence unit in connection with the greasemen protests. From the discussion at the SHEV interview and the note on the hospital admission form that he was attacked by 'unknown persons' I am not satisfied there is any direct evidence that the perpetrators were members of the authorities, or that the applicant in fact knows who they were. Nevertheless, given the timing of the incident the applicant's activities in the lead up to the attack, and country information suggesting that the authorities acted with impunity around this time, as did some government aligned paramilitary groups, it is not implausible that the attack was connected in some way to the greasemen activities and protests.
13. In addition to the home attack, the applicant stated the police knew who the protesters were, and knew that he was taking a lead role in standing up to them and would stop them and beat them when they were going to work. He claimed that in the period after the home attack he was hit, harassed and forced to buy cigarettes for members of the police and the police intelligence unit while travelling to and from work, and that this continued until his departure. While I suspect the applicant has embellished on the frequency of these incidents, I accept the applicant faced some such harassment from members of the authorities in this period. The motivation for this is unclear but the applicant said they were not extortion demands, but acts of retaliation. I am prepared to accept this had some connection with his activism against the greasemen, although as it was common at the time, I consider it also likely included elements of racial harassment.
14. I do not accept the applicant's suggestion that the reason he was never arrested, detained or charged in relation to his activism against the greasemen attacks was because he never got caught. His evidence about being harassed upon until departure undermines this suggestion, and also undermines his claim of being in hiding. On basis of his evidence at the SHEV interview, I do not accept the applicant ever lived in hiding in Sri Lanka. Rather, I am satisfied that he stayed living in his family home and was fully employed up until he left Sri Lanka in October 2012. I accept the applicant was harassed and given a hard time by some of the local officers but I do not accept the authorities were looking to arrest the applicant for his anti-greasemen protests or clashes against them.
15. In his written application the applicant claimed that in 2012 he was abducted, taken to the army camp where he was tied up and harmed, and that he managed to escape. However he

made no mention of this in the SHEV interview, even when asked if anything further had happened to him after the attack at home, and very little information was provided in the written statement. I find the claims vague and lacking in specificity, and I am concerned with the plausibility of his escape from the camp. I note he claims he has scars from this incident but no evidence has been given of them. I am not satisfied that this incident occurred.

Activities in Australia

16. At the SHEV interview the applicant mentioned he has been following the political scene in Sri Lanka, and that he has been politically active, attending Martyrs Day commemorations in Australia and uploading things on [social media] promoting the Tamil cause. He said he has attended five Martyrs Day ceremonies (one per year). He confirmed he has not been involved in organising; that he has just participated by remembering and laying flowers for the dead. Regarding [social media], the applicant said he shares material about the atrocities that have occurred that other [users] have posted or supplied.
17. I have some concerns about these claims noting that the applicant has not provided any evidence of his attendance at Martyrs Day events or [social media] activity and he has not previously shown any interest or support for the LTTE. Nevertheless, I am prepared to accept he has participated in some annual commemorations but I am satisfied that his participation has remained low-level and that it would also remain low-level should he participate in such activities upon return.
18. According to the applicant, his [social media] account is in a variation of his name and is not his full name and on the basis of what he has described, I am not satisfied that his social media activity to date would be of concern to the authorities in Sri Lanka. On his own evidence the applicant has only shared information posted by others and there is no indication that he has made any comments or created such material. I am not satisfied the applicant has engaged in anything more than low level of activity, or that he would do any more than this in the future.

Refugee assessment

19. 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

20. 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.
21. I have accepted the applicant is a Tamil male from the Eastern Province. I have accepted he faced harassment from the CID and other members of the local authorities during the war, and also afterwards, consistent with the experiences of many Tamils in the East in the war's aftermath and under the Rajapaksa regime.
 22. However the sum of the country information that was before the delegate indicates the situation has significantly improved, in particular due to the easing of the security situation and a change of government in 2015 to the Sirisena administration, who was elected on a platform of human rights, reconciliation and transitional justice and overall good governance.
 23. Admittedly, it is now four years into Sirisena's presidency and the optimism that initially came with this change has somewhat receded. Information in the review material from sources such as UN Special Rapporteurs, Human Rights Watch and others indicates that the pace of change has slowed and key election commitments remain unmet. The government has been criticised inter alia, for the slow progress on the return of military occupied land and investigations into missing persons, because the Prevention of Terrorism Act (PTA) still hasn't been repealed and for a lack of effective action overall to achieve justice and accountability for past wrongs. It is evident that the government still keeps a close eye on the north and east of the country and is sensitive about possible Tamil separatist activity and a potential re-emergence of the LTTE as well as certain other types of political activism. DFAT's 2018 reporting indicates that Tamils continue to claim that authorities monitor public gatherings and protests and engage in targeted surveillance and questioning of individuals and groups. It indicates continued surveillance of Tamils in these areas, particularly those associated with politically sensitive issues such as missing persons, land release and memorial events, and those with links to foreign groups, including some in the Tamil diaspora. Sources before me including DFAT, UKHO, Human Rights Watch, ITJP, Special Rapporteurs and others indicate there are also continuing reports of mistreatment including arbitrary detention, torture and other harms particularly against Tamils, perpetrated by Sri Lankan police and security forces. As raised by the applicant in the SHEV interview, there has also been some political disturbance recently, which in one incident resulted in physical fighting between MPs involving the hurling of chilli powder in Parliament.
 24. However the balance of the all the country information before me from authoritative sources including DFAT (2017, 2018) and the UKHO (2017) indicates that while there are problems, the Sirisena Government has taken steps to curb the excesses of military power exercised under the previous government and the situation for Tamils has improved significantly, both politically and socially. I consider it too speculative to conclude that the recent events the applicant mentioned such as the incident in Parliament will lead to a risk of harm to the applicant upon his return. Country information before me indicates that the past few years have brought more stability and greater security for Tamils in Sri Lanka and the Sirisena government maintains effective control.
 25. DFAT indicates that Tamils now face a low risk of official or societal discrimination on the basis of their ethnicity; they have gained a substantial level of political influence and their inclusion in political dialogue has increased; there has been a noticeable demilitarisation of the north and east; and the prevalence of monitoring and harassment of Tamils (even in former LTTE controlled areas) has greatly reduced such that only those associated with politically sensitive

issues would now attract monitoring, and even then, such practices may be questioned by community members.

26. Country information does not indicate that Tamils are at risk of persecution in Sri Lanka currently or in the reasonably foreseeable future on account of their race, nor because they originate from, or reside in, an area that was previously controlled by the LTTE or held some other wartime significance. It does not support that the applicant would be imputed with LTTE membership or support or of having a pro-LTTE opinion on the basis of his being a Tamil male of a certain age (ie. a young Tamil male) from or in [City 1] or anywhere in the Eastern Province, and harmed on those bases.
27. Recent information from DFAT (2018) and the UKHO (2017) indicates that the authorities' focus is now on identifying people who had significant involvement with the LTTE and/or have been active in post-conflict Tamil separatism within the diaspora and/or through a renewal of hostilities within Sri Lanka; people who would be considered a threat to the integrity of the state. The information in the review material indicates that the overwhelming majority involved persons accused of having adverse profiles in recent times have been former LTTE combatants or high level supporters, separatists, human rights activists of a certain level, or, truth seekers, as opposed to someone with the applicant's profile.
28. I have considered the applicant's claims regarding [social media] and Martyrs Day attendance. The evidence before me does not suggest the applicant's [social media] and Martyrs Day activities have been monitored in Australia; I find the chance of this is remote. I am satisfied that any such future activities the applicant may engage in will remain low-level and I am not satisfied that this would be of the level or type of activity that would attract adverse attention leading to anything beyond monitoring, which would not amount to serious harm.
29. Having regard to the applicant's particular circumstances and profile and the country information depicting a changed country situation in Sri Lanka which has altered the government's security focus and radically affected the country's security and political landscape for the better, I am satisfied the applicant would not now, or in the reasonably foreseeable future, face a real chance of serious harm on account of his Tamil race nor any pro-LTTE/separatist/anti-government imputations arising from his race, gender, age, origins from the East, his Martyr's Day attendance and [social media] activity, nor any other factors in his circumstances.
30. As for the applicant's involvement in fending off greasemen, spearheading protests against them, and clashes with police, the country information before the delegate indicates the greasemen incidents and related protests were isolated to a brief period of time in 2010/11 and have not reoccurred. It also indicates that overall the situation for Tamils has improved and that harassment has significantly reduced. There is no indication that greasemen attacks are ongoing or that people involved in past attempts to capture or chase greasemen, or who protested and clashed with authorities over them are of ongoing interest to the authorities. I have not accepted the authorities wanted to arrest the applicant before for his anti-greasemen protests and while he was subjected to harassment I am not satisfied this was part of any official measures taken against him. Rather, I find the harassment was opportunistic and carried out by rogue officers. I am not satisfied the applicant was being officially monitored or that he was a subject of official interest to the authorities when he left Sri Lanka. Given this, that it has been seven years since the applicant's involvement in these matters, and the country information discussed above, I find that there is not a real chance that the applicant will be harmed in relation to these matters on return to Sri Lanka.

31. Although not raised by the applicant, the delegate considered the risk of harm to the applicant as a failed asylum seeker who lived for period abroad and departed the country illegally. I accept the applicant would be returning on a temporary travel document and would therefore be identifiable to authorities at the airport as a failed or returning asylum seeker from Australia. I also accept his illegal departure will be apparent on his return.
32. Based on the information provided by DFAT in 2018 (and also the 2017 report the delegate relied upon), upon arrival in Sri Lanka, the applicant will be processed in groups with other returnees and the whole process may take several hours. DFAT advises that during this time an investigative process will be undertaken by authorities and that after conducting their checks the authorities will confirm the applicant's identity and background and determine whether he is a person of interest. I accept this may involve interviewing him, contacting the police in the applicant's home area in [City 1], contacting his former neighbours and his family, checking criminal and court records and checking him against sophisticated intelligence databases.
33. I accept that through their enquiries and investigations in this process, the authorities will become aware of the applicant's history, including his involvement in the anti-greasemen activities in 2011. However I have found the applicant would not be returning with an adverse security profile and there is nothing to suggest there would be extant criminal charges or proceedings against him. I am satisfied that through their investigation of the applicant's profile and history it will be determined that even having been identified as the ringleader of anti-greasemen activities and protests in his locality, there was never an interest to pursue any official measures against him, and that there are no other risks presenting from his profile. I am satisfied it will be determined that the applicant did not before he left Sri Lanka, and does not now, present any risk or threat to the integrity of the Sri Lankan state.
34. As the delegate has noted, allegations of torture and mistreatment of returnees have been raised by human rights observers such as the ITJP, Human Rights Watch, and several others. However I note the number of allegations has reduced since 2015 and I do not in any case accept these reported incidents are informative of the circumstance that would be faced by the applicant, whom I am satisfied, the authorities, through their investigations, will conclude is not any kind of LTTE suspect, a separatist, terrorist or person who otherwise threatens the integrity of the Sri Lankan state. DFAT (2017, 2018) advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during this processing. Having regard to all the circumstances I am not satisfied that the applicant would for any reason face a real chance of suffering a threat to his life or liberty or other harm amounting to serious harm during returnee processing.
35. I have considered may occur when the applicant re-settles in his community as a returnee. I take into account that DFAT's 2018 reporting indicates that over the past few years there have been reports of authorities including police checking on returnees. There is anecdotal evidence that there had been regular visits and phone calls by the CID to failed asylum seekers as recently as 2017. DFAT (2018) assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities and this accords with reports of refugees and failed asylum seekers being socially stigmatised upon their return. DFAT assesses that returnees may face some societal discrimination upon return to their communities, which could also affect their ability to secure housing and employment.
36. I accept the applicant may be visited by the authorities upon his return to [City 1] and that he may be monitored upon return on the basis of his returnee status and in the event that he becomes involved in politically sensitive issues (such as the Martyrs Day commemorations as he has observed in Australia, or for his activities on [social media]). However I am satisfied that

any such visits/monitoring will not amount to serious harm, even if any politically sensitive activities he undertakes means that he is monitored more, or more closely than other returnees.

37. As for the social stigma and discrimination, I accept many returnees face difficulties re-integrating and finding suitable employment but I am satisfied the applicant will be able to draw on his family in Sri Lanka (noting he still has his mother and sister, and his aunt still in [City 1] and also his wife's parents who are also in Sri Lanka and who, since his wife's passing have been looking after his children) for assistance in making connections in the community and finding employment. He also has varied work experience from several jobs in Sri Lanka, the Middle East and Australia. I am not satisfied that any discrimination he may face will be more than low-level and would affect his ability to access basic necessities and services or otherwise amount to serious harm.
38. Given his illegal departure, I accept on the basis of DFAT reporting that the applicant may also be arrested and charged, have his photograph and fingerprints taken and enquiries may be made about his departure and his activities while abroad. According to DFAT (2018), the applicant will be brought before the Magistrate's Court at the earliest opportunity but subject to magistrate availability, he may be detained for up to two days in an airport holding cell (not a prison, as earlier DFAT reporting suggested). I consider there to be only a remote chance of the applicant being held for this time, but nonetheless, having regard to all the circumstances I am also not satisfied that the applicant would for any reason face a real chance of suffering a threat to his life or liberty or other harm amounting to serious harm if he is detained in a holding cell awaiting court transfer.
39. When he does come before the magistrate, from DFAT's information, I surmise that should the applicant plead guilty to departing illegally, he may be fined a penalty of up to LKR 200 000 and may then be free to go. The I&E Act does allow for imprisonment but there is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger and according to the Sri Lankan Attorney-General's Department no custodial sentences have ever been issued to such persons.
40. If a not-guilty plea is entered, usually in these circumstances the magistrate would grant bail on the basis of personal surety or guarantee by a family member and the returnee may need to wait for the guarantor to come to court. I am not satisfied there is any reason the applicant would not be granted bail on his own personal surety but if guarantor arrangements are necessary I take into account that the applicant has family members including inter alia, his mother and aunt in Sri Lanka and I am not satisfied he would not have a willing family member to go guarantor if required. Bail conditions are rarely imposed on a discretionary basis and according to DFAT this can involve monthly reporting to police at their own expense. When the case against him is being heard, he would be required to appear in court in the location where the offence occurred and the applicant may incur legal and transport costs to the Chilaw area (where he caught the boat) for court appearances.
41. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances over protracted lengths of time can be high. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment and manage arrangements for his court appearances and I do not consider that any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with the applicant's court appearances would constitute serious harm.

42. Additionally, I am satisfied the arrest and judicial processes the applicant may face result from the lawful prosecution of a crime and there is no evidence before me that laws relating to illegal departure are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. I find that the process leading to arrest, charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to all Sri Lankans who depart illegally and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
43. Overall, I am not satisfied that the applicant faces a real chance of persecution arising from the circumstances he may face in returnee processing or his status as a failed/returned asylum seeker, nor from the processes and consequences arising from his illegal departure.

Refugee: conclusion

44. Considering the applicant's profile and his circumstances as a whole, I accept he may face some discrimination and may be subject to visits/monitoring but that this would not amount to persecution, and nor would his potential arrest and judicial processes and penalty that may arise for his illegal departure. Nor will the applicant face a real chance of persecution from any branch of the authorities, or anyone for any other claimed reason/s – not even when all the applicant's claims and circumstances are considered cumulatively. Overall I am satisfied he does not have a well-founded fear of persecution.
45. 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

46. 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

47. 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.
48. I am satisfied the applicant has had no LTTE involvement and even taking into account his profile as a young Tamil male from the Eastern Province, his past activities/protests/clashes responding to the greasemen attacks and his [social media] activity and Martyrs Day attendance, he will not be considered to have an LTTE, separatist or some other anti-government profile. I have found the applicant would not face a real chance of serious harm for these reasons and I am also satisfied he does not face a real risk of significant harm.

49. I have accepted that as a returnee the applicant may face some societal discrimination and routine visits/monitoring and that he may also be monitored if he engages in politically sensitive issues such as Martyrs Day or [social media] activities however I found it would not amount to serious harm. Similarly, I am satisfied that this discrimination and visits/monitoring would not manifest in any way that would result in a real risk of his facing harm amounting to significant harm as defined for the purposes of s.36(2A).
50. I accept that as a returnee asylum seeker and an illegal departee the applicant will be investigated and held for several hours at the airport, and possibly (though I consider the chance of this to be low) detained for some days in an airport holding cell pending appearance before a Magistrate. I accept he will be bailed and that he may be subject to a protracted judicial process requiring travel for court appearances and to meet any reporting conditions of his bail and that he may be fined. However I am satisfied he will not be perceived as having an adverse security or criminal profile and I have found that the returnee and illegal departee processing he will experience in the airport and in the judicial system will not amount to serious harm. I also conclude he will not face a real risk of harm from any of this that would involve significant harm as defined in the Act.
51. I have sympathy for the applicant noting that his wife passed away last year. However I have considered his claims in their totality and I am not satisfied that even when taken together, he faces a real risk of significant harm, nor as assessed above, a real chance of persecution.

Complementary protection: conclusion

52. 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.

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36 Protection visas – criteria provided for by this Act

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- (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.

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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.