



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06566

Date and time of decision: 27 May 2019 14:57:00
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 an 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. He arrived in Australia [in] July 2013. On 27 February, he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. In a decision dated 12 April 2019, a delegate of the Minister refused to grant the visa. The delegate found that the applicant did not face a real chance of serious harm or significant harm on account of his being of his and his brothers' association with the Liberation Tigers of Tamil Eelam (LTTE), his being a young Tamil male from the north or his being a failed Tamil asylum seeker who had departed illegally or because he has spent a significant period of time in a country with a large Tamil diaspora.

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 is a Tamil from the Northern Province of Sri Lanka.
 - His [brother] was also a LTTE combatant who was shot and left the LTTE. His [other] brother was a LTTE combatant who was killed in 1999. His [other] brother was conscripted by the LTTE but was only involved in for one month. In 2008, his [other] brother was conscripted by the LTTE; however after three days he ran away.
 - From 2005 until January 2006, he worked for [an organisation] where he worked [in Occupation 1], and he [worked in Occupation 2]. From 2006 until 2008, he worked [in Occupation 3] that was owned by the [organisation].
 - From 2009 until 2012, he lived in [camps] while the government cleared land mines in the Northern Province.
 - In 2012, he moved to [City 1] and [Town 1] as he wanted to flee Sri Lanka because two of his friends who he had worked with had been abducted within a month after leaving [a camp] and he had heard other stories of Tamil men being abducted by the Criminal Investigation Department (CID).
 - He tried to leave Sri Lanka illegally by boat on two separate occasions in October 2012; however, the Sri Lankan Navy intercepted the boats. He was charged by the Sri Lankan authorities for illegally departure. He has never been convicted of the above charge.
 - The CID detained him for a period of [days] when the navy returned him to Sri Lanka after his second attempt to depart Sri Lanka in October 2012. A judge ruled that he had to pay [amount] and that he had to sign at a CID office once a month. The CID informed him that he had to report to [an office] in Colombo once a month. He reported to the CID's Colombo office on two occasions but he could not continue to go as the office is a [number of hours] drive from his house and the travel costs were too expensive. In January 2013, he stopped reporting at the CID's [office] in Colombo.

- In April 2013, the CID came to his house and detained him for two days, during which time he was interrogated and physically abused. The CID asked him to confess to being a LTTE combatant because he tried to flee as an asylum seeker and because he failed to meet the monthly reporting requirement. He did not admit to being a former LTTE combatant or working at the [organisation] but he did admit to working [in Occupation 3] which was owned by [an organisation]. Again, the CID informed him that he was required to report in the CID [Office] in Colombo. However, he did not return to the CID office in Colombo.
- In June 2013, the CID informed him that somebody had tipped them off that he had previous ties to the LTTE. The CID questioned him for 1.5 hours about his involvement with the LTTE and they again told him to report to their [office] in Colombo. He believes his neighbours informed the CID that he had former ties with the LTTE because they had a dispute about land ownership in the past and because his mother had told their neighbours about his work at the [in Occupation 3].
- His mother has told him that the CID in 2014 and 2015 have come looking for him because he had not reported. His [brother] is trying to go overseas because the CID are shooting people and because “white van” abductions are occurring.
- Due to his extended time overseas he will be harmed by the Sri Lankan authorities on suspicions of being a former LTTE combatant and current LTTE sympathiser. He will also be harmed because he is a failed Tamil asylum seeker returning to Sri Lanka.

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 a copy of his Sri Lankan birth certificate and temporary 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.

Tamil and LTTE and past illegal departure claims

8. The applicant has been consistent and generally credible in relation to some of his claims. His claims accord with country information that that hotels, transport, education, local bodies, cultural activities, media, and food distribution and civilian administration were under LTTE control in his area during the time in which the applicant claims to have been employed by the LTTE.¹ I accept that his [brother] was also a LTTE combatant who was shot and left the LTTE. I accept that [another] brother was a LTTE combatant who was killed in 1999. I accept that his [other] brother was conscripted by the LTTE but was only involved in for one month. In 2008, his [other] brother was conscripted by the LTTE; however after three days he ran away. I accept that from 2005 until January 2006, the applicant worked for [an organisation] where he worked as [in Occupation 1] and he [worked in Occupation 2]. I accept that from 2006 until 2008, he worked [in Occupation 3] that was owned by [an organisation]. I accept that from 2009 until 2012, he lived in [a camp] while the government cleared land mines. I accept that two of his [brothers] went into detention for [years] after the conflict ended in 2009 and they were then released.
9. There are a number of claims of the applicant that I do not accept. I do so for the following reasons:
 - At the SHEV interview, the applicant told the delegate that in April 2013, he was taken by the CID to their Colombo office and that is where he was beaten. However, in his statement that accompanied his SHEV application (which was prepared with the assistance of his migration agent and was interpreted to him by qualified interpreter in the Tamil language) he stated that in April 2013 he was taken to their office in [City 2] and held their beaten. I note that [City 2] and Colombo are around [distance] apart from each other.² I find this inconsistency to be substantial and to detract from his credibility.
 - At the SHEV interview, the applicant claimed that he was detained by the CID for [a number] days after his second attempt to depart Sri Lanka. However, he made no mention of this in in his statement that accompanied his SHEV application (which was prepared with the assistance of his migration agent and was interpreted to him by qualified interpreter in the Tamil language) despite its obvious importance to his claims and I find this further detracts from his credibility.
 - At the SHEV interview, the applicant told the delegate that he did not have his bail documents but they were “back home” and he could obtain them within a week if required. The delegate told him that if he could provide them it would be helpful. She later told him that he could provide further information within seven days and after that he could request an extension. The applicant stated that he may need 10-15 days and was told that any additional information he provided before a decision was made

¹ Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, “An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)”, Geneva, CCDP Working Papers, 1 November 2014.

² Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka”, 23 May 2018, p.1.

would be considered. The SHEV interview was conducted on 9 November 2018 and the delegate did not make her decision until 12 April 2019. However, the applicant did not request any extension and he has not provided any court documents or provided any explanation as to why he could not provide such documents to either the Department or the IAA despite his evidence that they were “back home” and he could provide them. I find this further detracts from his credibility.

- I note the applicant’s evidence that he believes that his neighbours who did not like his family due to past land disputes told the police that he had former ties with the LTTE and that his mother had informed the neighbours that he had worked [in Occupation 3]. However, the applicant’s involvement with the LTTE was only low level and he was released from [a camp] in 2012 after he had been questioned by the authorities which indicates that he was not of any adverse interest to them. Whilst I note they are older and have families, his brothers who had been in the LTTE as combatants were detained for around three years and then released and have not experienced any problems since. I find it is not credible or plausible, that in all these circumstances, the applicant in 2012/2013 was suspected by the CID of having been an LTTE combatant and subjected to the mistreatment and adverse interest that he has claimed. I find this further detracts from his credibility.
10. Given these significant concerns about his credibility, I do not accept that the applicant tried to leave Sri Lanka illegally by boat on two separate occasions in October 2012 and the navy intercepted the boats. I do not accept that he was charged by the Sri Lankan authorities for illegally departure. I do not accept that in 2012, he moved to [City 1] and [Town 1] as he wanted to flee Sri Lanka because two of his friends who he had worked with had been abducted within a month after leaving [a camp] and he had heard other stories of Tamil men being abducted by the CID. I do not accept that the CID detained him for a period of 14 days when the navy returned him to Sri Lanka after his second attempt to depart Sri Lanka. I do not accept that a judge ruled that he had to pay [amount] and that he had to sign at a CID office once a month. I do not accept that the CID informed him that he had to report to their [Office] in Colombo once a month. I do not accept that he reported to the CID’s Colombo office on two occasions but he could not continue to go as the office is a [number of hours] drive from his house and the travel costs were too expensive. I do not accept that in January 2013, he stopped reporting at the CID’s [office] in Colombo. I do not accept that in April 2013, the CID came to his house and detained him for two days, during which time he was interrogated and physically abused. I do not accept that the CID asked him to confess to being a LTTE combatant because he tried to flee as an asylum seeker and because he failed to meet the monthly reporting requirement. I do not accept that admitted to working [in Occupation 3] which was [owned by an organisation]. I do not accept that again the CID informed him that he was required to report in the CID [Office] in Colombo and that he did not return to the CID office in Colombo. I do not accept that in June 2013, the CID informed him that somebody had tipped them off that he had previous ties to the LTTE. I do not accept that the CID questioned him for 1.5 hours about his involvement with the LTTE and they again told him to report to their [office] in Colombo. I do not accept that his neighbours informed the CID that he had former ties with the LTTE because they had a dispute about land ownership in the past and because his mother had told their neighbours about his work [in Occupation 3]. I do not accept that his mother has told him that the CID in 2014 and 2015 have come looking for him because he had not reported. I do not accept that the applicant was or is of any adverse interest to the Sri Lankan authorities for any reason including his and his family’s actual or imputed links to the LTTE and his claimed illegal attempts in October 2012 to depart Sri Lanka and seek asylum.

11. In making my findings, I have taken into account the country information submitted by the applicant's representative including that of Human Rights Watch, the Immigration and Refugee Board of Canada, the United States Department of State and Integrated Regional Information Networks. However, I have given substantial and greater weight to latest DFAT report because it is authoritative and more recent 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. Based on the country information before me, conditions in Sri Lanka, particularly in the north and east (where the applicant comes from) have significantly improved since the ending of the war in 2009 and from when the applicant left the country. DFAT have assessed that monitoring of Tamils in day-to-day life has decreased significantly under the current government though surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Members of the Tamil community have described a positive shift in the nature of their interactions with the authorities, including feeling able to question their motives or object to monitoring. DFAT state that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015 and that the current government includes 29 Tamils and President Sirasena presides over a diverse coalition of parties that includes Tamil members. DFAT state that they are not aware of any evidence to suggest that Sinhalese, Tamil, Muslim or other parties face any differences in treatment and that they understand Tamils do not receive unwarranted attention from authorities because of their political involvement. They assess that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. They assess that there is no official discrimination on the basis of ethnicity in public sector employment but that limited Tamil appointments are a result of a number of factors including disrupted education because of conflict and language constraints. DFAT have stated that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members has reduced significantly since the ending of the conflict and disappearances are no longer common.³ Country information also indicates that the Prevention of Terrorism Act was suspended in 2016 and that only a small number of persons are detained under it.⁴
12. In making my findings, I have also taken into account the UK Home Office report on Tamil separatism which states the following in terms of Tamil profiles of interest to the Sri Lankan authorities that a person being of Tamil ethnicity would not in itself warrant international protection. Neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.⁵
13. The applicant's representative referred to the "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", dated 21 December 2012, and stated that the UNHCR recognises people who provided assistance to the LTTE in various ways as a group that face a risk of persecution and refers to a range of people

³ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

⁴ DFAT, "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017;

⁵ United Kingdom Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017.

including persons with family links to persons with profiles of former LTTE combatants. I also note this report is cited in the DFAT Country Information Report on Sri Lanka for 2018. However, given the information in the UNHCR report has not been updated since 2012 and noting that significant political and social changes have occurred in Sri Lanka since that time, I have given greater weight to more recent country information that I have referred to above.

14. Given the above country information showing a substantial improvement in the human rights situation for Tamils and a reduction of abductions, I do not accept that his [brother] is seeking to leave Sri Lanka because the CID are shooting people and because “white van” abductions are occurring.
15. The applicant has not claimed to have been in any post-conflict Tamil separatist activities either in Sri Lanka or Australia and he did not have a significant role in the LTTE. His involvement in the LTTE was low level and many years ago and he was allowed to leave [a camp]. I find that there is not a real chance that he will be imputed with a pro-LTTE or pro-Tamil separatist political opinion upon his return to Sri Lanka.
16. I note that the applicant has several close family members who reside in Sri Lanka and there is nothing before me to indicate that he will not be able to access accommodation upon his return. I note that he has work experience in Sri Lanka [in Occupation 4] and [in Occupation 5] and I am not satisfied that his capacity to subsist will be threatened. Whilst the country information indicates that the applicant may face a low risk of societal or official discrimination on the basis of his ethnicity, given his profile and particular circumstances, I do not accept that there is a real chance that he will face serious harm upon return at the hands of the Sri Lankan authorities or anyone else on account of any of these claims.

Failed Tamil asylum seeker who departed illegally

17. I have considered the chance of the applicant facing harm on his arrival at Colombo airport or afterwards on account of being a failed asylum seeker who departed the country illegally. I accept that the applicant departed the country illegally by boat in mid-2013.
18. In making my findings, I have taken into account the country information submitted by the applicant’s representative including that of Freedom of Torture, Amnesty International, Tamils Against Genocide and the International Truth and Justice Project. However, I have given substantial and greater weight to latest DFAT report because it is authoritative and more recent 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. 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.⁶

19. 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. I note that the applicant has several close family members who reside in Sri Lanka and there is nothing before me to indicate that he will not be able to access accommodation upon his return. I note that he worked as a [in Occupation 4] and [in Occupation 5] in Sri Lanka and I am not satisfied that his capacity to subsist would be threatened. I do not consider the treatment (monitoring and social stigma) he may face as a returning failed asylum seeker constitutes serious harm.
20. 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.⁷ I have not accepted that the applicant has court proceedings or charges against him for past illegal departures. I have found that he is not of any adverse interest to Sri Lankan authorities and that there is not a real chance that he will be imputed with a pro-LTTE or pro-Tamil separatist political opinion and I am not satisfied that any investigations would lead to a real chance of him being seriously harmed. I do not accept that the applicant will face a real chance of serious harm due to being a failed Tamil asylum seeker who has spent a significant period of time in a country with a large Tamil diaspora.
21. 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 Immigration and Emigrants Act (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 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.⁸

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

⁷ Ibid.

⁸ Ibid.

22. Penalties for illegal departure 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.⁹ The evidence before me does not suggest that the applicant was involved in facilitating people smuggling or organising the vessel that was used to travel from Sri Lanka and I do not accept that there is a real chance that he will be perceived as such by the Sri Lankan authorities.
23. 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.¹⁰
24. 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. The applicant has no particular vulnerabilities and given the shortness of the time of detention that he faces and the information from DFAT about the treatment of persons who have illegally departed the country, I do not accept that his brief 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.
25. I am not satisfied on the evidence before me that there is any more than a remote chance of the applicant being detained for more than a brief period. 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. The evidence before me does not indicate that the applicant will be unable to pay the fine or any possible associated court costs.
26. I am not satisfied that the questioning, brief detention, the imposition of a fine, monthly reporting and any associated court costs if they arise would 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.
27. In any event, 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 it is a law of general application that is not applied or enforced in a discriminatory manner and not for reasons of race, religion, nationality, membership of a particular social group or political opinion and therefore does not constitute persecution.

Overall assessment

28. Considered cumulatively, I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, and questioning, official and social discrimination

⁹ Ibid.

¹⁰ Ibid.

having to pay a fine, monthly reporting and possible court costs if they arise and being subject to a short term detention) amount to serious harm or constitute persecution.

29. Considering his profile overall (including his being a young Tamil male from the north, his and his family members' past history and interaction with the Sri Lankan authorities and the LTTE and his being a failed Tamil asylum seeker who departed illegally and who has spent significant time in a country with a large Tamil diaspora), I find that the applicant does not face a real chance of serious harm or persecution for any reason. His fear of persecution is not well-founded.

Refugee: conclusion

30. 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

31. 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

32. 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.
33. For the reasons given above, I have found that the applicant would not face a real chance of serious harm for any of the reasons claimed including his being a young Tamil male from the north, his and his family members' past history and interaction with the Sri Lankan authorities and the LTTE and his being a failed Tamil asylum seeker who departed illegally and who has spent significant time in a country with a large Tamil diaspora. Considering his profile overall, I also find that he would not face a real risk of significant harm on account of these reasons.
34. I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning, official and social discrimination having to pay a fine, monthly reporting and possible court costs if they arise and being subject to a short term detention) amounts to significant harm even when considered cumulatively.
35. I find that the treatment that the applicant faces for illegal departure is one faced by the population of the country generally if they depart the country illegally and is not faced by him

personally. While I have found above that the applicant will not receive a custodial sentence, I have considered the conditions the applicant may face if he is held while waiting to come before the magistrate. The evidence of DFAT does not indicate that any of these prisoners who are subject to short periods of detention and are awaiting prosecution under the I&E Act have been subject to the death penalty or have been otherwise arbitrarily deprived of their life or that they have been tortured. There is also no indication that authorities or others, through any act or omission intentionally inflict pain or suffering on these persons such as to meet the definition of cruel or inhuman treatment or punishment, nor any intention to cause extreme humiliation. 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

36. 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.