



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06933

Date and time of decision: 19 August 2019 15:30:00
V Price, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be from Sri Lanka and that he is an ethnic Tamil. He lodged an application for a protection visa on 19 November 2015.
2. On 26 July 2016 a delegate of the Minister for the Department refused to grant the visa. The IAA affirmed this decision on 26 October 2016. This was upheld by the Federal Circuit Court in November 2018. However, [in] July 2019 the Federal Court set aside the decision of the IAA and remitted the matter to be determined according to law.

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).
4. The applicant provided a written submission to the IAA on 13 August 2019 regarding the matters addressed in the delegate's decision. No new information was included in this submission and I have considered it in my assessment.
5. I have obtained the Australian Department of Foreign Affairs and Trade Country Information Report on Sri Lanka (DFAT 2018) and the United Kingdom Home Office report on Tamil Separatism (UKHO June 2017) which relate to the current treatment of Tamils, returned asylum seekers and those who have departed Sri Lanka illegally. The delegate's decision was made three years ago and these current reports update the equivalent 2015 DFAT report and the 2014 UKHO report relied upon in that decision. I am satisfied there are exceptional circumstances to justify considering this information for s.473DD(a) of the Act and I am not prevented from considering them. I have considered whether to obtain information from the applicant in relation to these reports. I note the information relates to classes of persons, the information contained in these reports is broadly consistent with that set out in the reports before the delegate, and no new issues arise from this material. I consider I do not need to obtain new information from the applicant and that I have sufficient information before me to assess the applicant's claims for protection.

Applicant's claims for protection

6. The applicant's claims as set out in the material before me can be summarised as follows:
 - The applicant resided in an area near a military camp. The applicant was not a member of the Liberation Tigers of Tamil Eelam (LTTE) but he assisted them to build bunkers when they were in his village.
 - He was detained, in some cases for up to [number] days, beaten and questioned many times by the Sri Lankan Army (SLA) both during and after the conflict. The applicant has scars from an incident in which he was attacked by the SLA with a bayonet.
 - He claimed on arrival in Australia to have had one brother (unnamed) who was a member of the LTTE. He also claimed that his brother, R, was arrested and held in an SLA camp for about two years on suspicion of LTTE involvement. He was eventually released and returned to the family. His brother S was also detained and questioned by the SLA for the same reason.

- The applicant moved to Colombo in 2008 to get away from the constant attention from the SLA. However, he was detained by the Criminal Investigation Division (CID) and the police for [number] days. He was asked about any connection to the LTTE, accused of being an informer and was beaten and tortured during that time. He was released after they verified his identity.
7. The applicant claimed to fear harm from the government and the SLA due to his Tamil ethnicity and his imputed political opinion and as a supporter or member of the LTTE. He claimed that he would be identified as a Tamil as he did not speak Sinhalese and that he would be arbitrarily arrested and detained under the Prevention of Terrorism Act (1978) (PTA) on return to Sri Lanka. The applicant claimed to have a brother in Australia who has been granted protection, and at interview, claimed to fear harm due to his illegal departure from Sri Lanka.
 8. The delegate considered claims to fear harm as a failed asylum seeker arose on the material.

Refugee assessment

9. 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

10. 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 and applicant’s background

11. I accept on the documentary and oral evidence before me that the applicant is a national of Sri Lanka and that he is of Tamil ethnicity. The applicant spent several years residing in Colombo. However, he was born in, and resided in Jaffna in the Northern Province of Sri Lanka for the majority of his life. His parents and several siblings continue to reside in Jaffna, and I consider this is the area to which he would return.

Assessment of claims

12. The applicant has provided a consistent and credible oral and written account of his past experiences in Sri Lanka throughout his interactions with the Department, including his claims that he assisted the LTTE to build bunkers and that he and several of his brothers were detained, questioned and assaulted by the SLA. He showed his scars to the delegate at the protection visa interview evidencing one such assault. His evidence on these matters is also consistent with information from a variety of authoritative sources in the review material including DFAT (2015), the UKHO (2008 and 2012), the United Nations High Commissioner for Refugees (UNHCR 2010 and 2012), the United States Department of State (USDOS 2013), the International Crisis Group (2012), and the Danish Immigration Service (DIS 2010) that: at the LTTE capital was based in the northern province of Sri Lanka; the largely Tamil civilian population of the areas controlled by the LTTE were required to interact with the military and civil administration of the LTTE as a matter of course; and the LTTE supported its administration in part through voluntary and forced recruitment of Tamils. The information also indicates that: during the conflict many Tamils in the north and east, were monitored, harassed, arrested or detained by security forces; at that time more Tamils were detained under the PTA than any other ethnic group; and Tamils were imputed with LTTE membership or support based on their ethnicity and/or residence in an LTTE area.
13. On the totality of the evidence before me I accept that: the applicant was never a member of the LTTE but assisted them to build bunkers during the conflict; the applicant was detained, questioned and assaulted by the SLA many times both during and after the conflict; his [specified body parts] was injured during one such assault and he has a scar from that injury; and in about 2008, the applicant was detained, questioned and assaulted by the CID in Colombo. I also accept that: his brother S was also detained questioned and assaulted by the SLA, and that his brother R was detained for two years in a military camp and released in about 1997. I accept the applicant and his brothers R and S were harmed in this manner due to their suspected connection to the LTTE arising from their Tamil ethnicity and residence in an area previously controlled by the LTTE.
14. In the Irregular Maritime Arrival Entry Interview (arrival interview) conducted with the applicant after his arrival in Australia he claimed that one of his brothers was a member of the LTTE. It is not clear to which of his [brothers] he was referring. The applicant did not make this claim in the later written statement provided with the protection visa interview, or in his oral evidence to the delegate, including when discussing the involvement of he and his family with the LTTE and their interactions with the SLA. No other details were provided regarding the nature of the claimed LTTE participation of his brother. However, I also accept that the applicant was not expressly asked to provide further details on this matter in his protection visa interview. Given his otherwise credible evidence and the independent information cited above, I accept that he did have one brother who was a member of the LTTE.
15. The applicant claimed, and I accept that his brother R was subject to an assault in 2014. However, the applicant did not contend this was in any way associated with his previous detention by the SLA and given this incident occurred about 17 years after his release from the military camp, I am not satisfied that it was. Nor am I satisfied on the evidence that his brother was targeted for this crime because he was Tamil. A 2015 report from DFAT indicated that crime rates across Sri Lanka were high in the Northern Province at about that time, but neither this report nor contemporaneous information from the UK Foreign and Commonwealth Office (2014) indicated that Tamils were specifically targeted in such incidents. The material before me also does not support that Tamils are currently targeted for such crimes (DFAT 2018). On the evidence I find that R was unfortunate victim of a random crime, and I am not satisfied that

this evidences a real chance of harm to the applicant on return to Sri Lanka in the reasonably foreseeable future.

16. The applicant gave evidence that one of his brothers, K, is in Australia and has been granted protection. When asked, the applicant indicated he did not know the basis upon which he had been granted protection and was unable to provide any further details on this matter. Nonetheless I accept that the applicant's brother K, has been granted protection in this country.
17. The weight of independent information before me indicates that the situation facing Tamils has changed since the applicant's departure from the country and that conditions in Sri Lanka have significantly improved, including in the north. While the Tamil community continue to report discrimination in employment, particularly in relation to government jobs, DFAT has assessed this is due to disrupted education because of the conflict and language constraints, not the result of an official policy of discrimination. Monolingual Tamil speakers can have some difficulty communicating with authorities due to the small number of Tamil speakers in the police officers and military, but there are government incentives to improve this situation and Sinhala and Tamil are both recognised as official languages of Sri Lanka. DFAT has assessed 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 and housing. The inclusion of Tamils in political dialogue has increased since 2015 with numerous Tamil political parties and it is considered that Tamils now have a substantial level of political influence. DFAT has advised that Tamils do not receive unwarranted attention from authorities due to their political involvement, and overall, there are no barriers to Tamil political participation.
18. DFAT has assessed in 2018 that the monitoring and harassment of Tamils in day-to-day life had significantly decreased. Many, though not all, Tamils detained under the PTA have now been released and, while the PTA remains in force, its operation has been suspended. Members of the Tamil community in the north claim the authorities monitor public gatherings and protests, and that they practice targeted surveillance and questioning of individuals and groups. However, this is largely directed at individuals with certain profiles, including those associated with politically sensitive issues (missing persons, land release and memorial events) rather than the Tamil community in general. Overall, members of the Tamil community reported they felt more empowered to question monitoring activities than they had in the past.
19. The current president was elected on a platform of post-conflict reconciliation, transitional justice, good governance, anti-corruption and economic reform (DFAT 2018). Information is that progress on these commitments has been slow, and the Sri Lankan public and other international and human rights observers are increasingly uncertain that the government will deliver the stated reforms. In its 2018 report, DFAT acknowledged concerns raised by various human rights commentators, including the International Truth and Justice Project, Amnesty International and Freedom From Torture, about the ongoing risk of mistreatment, including torture, by the security forces in Sri Lanka. DFAT also had regard to the 2016 report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and assessed that torture may be carried out by police in regular criminal investigations, though it was noted that this risk increases when individuals were perceived to pose a threat to national security. Having considered the reports from the various human rights organisations, DFAT assessed that the incidents of torture have decreased, they are not state sponsored, and concluded that overall irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture. The DFAT report is distinct from Australian Government policy with respect to Sri Lanka and is prepared from on-

the-ground knowledge and discussions with a range of sources in Sri Lanka as well as reports from numerous international organisations, and I give weight to this assessment.

20. In its 2014 and 2017 reports on Tamil separatism, the UKHO concluded that being of Tamil ethnicity alone does not in itself warrant international protection. It was noted in these reports that the present objective of the Sri Lankan government is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. In this context, in 2017, the UKHO considers international protection is now warranted only for: individuals who had a significant role in the LTTE, or would be perceived to have a 'significant role' in relation to post-conflict Tamil separatism within the diaspora and/or in a renewal of hostilities within Sri Lanka; journalists or human rights defenders; individuals who gave evidence to the 'Lessons Learned and Reconciliation Commission' implicating the authorities in alleged war crimes; and persons whose name appears on a computerised 'stop' list accessible at the airport. The 2017 assessment by the UK Home Office that participation in diaspora activities, such as attending demonstrations, is not of itself enough to evidence that an individual will attract adverse attention on return to Sri Lanka, is consistent with the 2018 advice of DFAT that it is only high profile leaders of pro-LTTE diaspora groups may come to the adverse attention of Sri Lankan authorities.
21. DFAT also advised in 2018 that Sri Lankan authorities continue to monitor former LTTE members and supporters, including on 'stop' and 'watch' lists. The UKHO advised in 2017 that those on the 'watch list' are persons that are of interest to the authorities for minor offences or are former LTTE cadres; those on the 'stop list' are persons who have committed serious crimes, have a warrant outstanding, or perceived to be connected to terrorism. DFAT also advised that former LTTE leadership are at the highest risk of monitoring, arrest, detention or prosecution. Low profile former members of the LTTE would be likely to be detained and sent to rehabilitation centres. Both high and low profile former members would be monitored following release from rehabilitation; as would close family members of high profile former LTTE members. DFAT has been unable to verify that a family connection to former LTTE members has led to people being arrested and detained. DFAT indicates that certain former LTTE combatants may face societal discrimination, but this is largely those who participated in human rights abuses against the Tamil community.
22. There is some evidence that those with conflict related scarring have in the past been subjected to adverse attention from the authorities (DFAT 2018 and UKHO June 2017). However, the UKHO states that scarring may only be relevant where a person is detained for other reasons and may be stripped in the process of interrogation and the presence of a scar may increase suspicion. Nonetheless they considered that the presence of a scar (which in the cited example was an LTTE tattoo) was not of itself a risk factor. Further, DFAT advises that the known examples of adverse attention for such scarring related to the immediate end of the conflict and they are unaware of more recent evidence of people being detained due to scarring. I give weight to the information in these reports and conclude that the chance of a person being detained or harmed on the basis of conflict related scarring is so remote so as not to be real.
23. On the information before me I accept that problems remain in Sri Lanka. The Sri Lankan government is sensitive to the potential re-emergence of the LTTE and there are noted concerns regarding the ability of the current government to implement reforms. However, overall the information is that there has been an improvement in the situation for Tamils in Sri Lanka and that the Sirisena Government has taken positive steps towards reconciliation. Tamil is an official language in Sri Lanka, Tamils have greater representation in government, and a low risk of official or societal discrimination based on ethnicity, including in relation to access

to education, employment and housing. The PTA has been suspended and information does not support Tamils in general are being detained under that Act, the prevalence of monitoring of Tamils, even in former LTTE controlled areas, has reduced such that only those with certain profiles, including those involved with politically sensitive issues and those with certain LTTE profiles would now attract monitoring and the community feels able to question these practices. I give weight to assessment of the UKHO that the individuals with profiles identified above may be in need of international protection. The information before me does not indicate that Tamils face a real chance of harm in Sri Lanka solely on the basis of their Tamil ethnicity. Nor does the information indicate that being of Tamil ethnicity, residing in an area that was previously controlled by the LTTE, or having conflict related scarring, imputes LTTE membership or support.

24. I accept that the applicant has the following profile; he does not speak Sinhalese and will be identified as a Tamil on return to Sri Lanka; he is a Tamil male from the Northern province in Sri Lanka; he and his brothers were detained, questioned and assaulted by the SLA and the CID in the past; the applicant has some conflict related scarring; one of his brothers was a member of the LTTE; and one brother, K, has been granted protection in Australia. I accept these matters will be known to the authorities on his return to Sri Lanka. In respect of the brother who was a member of the LTTE, the evidence does not disclose that he was a high ranking member of that organisation and I am not satisfied that he was. The applicant's brothers R and S were both released from their respective periods of detention. In the case of R, he was released over 20 years ago. They continue to reside in Sri Lanka and the applicant's evidence did not disclose that they or their families have been subjected to further adverse attention, monitoring or harm from the SLA or the Sri Lankan authorities. This evidences that R and S, are not of any ongoing adverse interest to the SLA or the Sri Lankan authorities for any reason, including due to their own activities or that of their family, and noting this and the independent information above, I am not satisfied that they will be so in the foreseeable future.
25. The applicant was released by the SLA on each of the occasions upon which he was detained and questioned. He was similarly released by the CID after they confirmed his identity. That he was released by the SLA and the CID indicates that he was found during the course of being questioned not to have been of interest due to his own activities or that of any of his brothers. His evidence was that he was last taken in for questioning in by the CID about 2008, some four years prior to his departure from Sri Lanka, and even taking into account his evidence that he moved around to avoid detection, I consider that had the CID genuinely been interested in the applicant they would have been able to locate him during that time. Further, his evidence at the protection visa interview did not disclose that the SLA, the CID or anyone else, visited his family to enquire about him or his whereabouts since his departure from the country. Nor has the applicant indicated that his parents or other siblings in Sri Lanka have faced adverse attention for any reason, including due to the activities of the applicant and his brothers, and/or as his brother K has been granted protection in Australia. These matters further evidence that the applicant is not of any ongoing interest to the SLA, the CID or anyone else for any reason, and indicates that he will not be of adverse interest on return to Sri Lanka.
26. In addition to the above, I am not satisfied that the applicant's activity assisting the LTTE to build bunkers places him within the category of either high or low profile former LTTE member such that he would face any harm or monitoring on return. I have found I am not satisfied that his brother was a high ranking member of the LTTE and am not satisfied R or S are of ongoing interest to the authorities, such that the applicant faces harm or monitoring on return for that reason. Nor having regard to the independent information and the profile of he and his family, including his brother, K, am I satisfied that he will be of any future interest for any suspected LTTE membership or support, or that he otherwise has, or will have on return to Sri Lanka in

the foreseeable future, a profile of those currently of interest to the Sri Lankan authorities as set out in the independent information above. The evidence above indicates that the PTA has been suspended. Noting this, and having regard to his profile, I am not satisfied that he faces a real chance of being arbitrarily arrested and detained under the provisions of that Act for any reason on return to Sri Lanka in the reasonably foreseeable future. Further, on the independent information, noting he has family who continue to reside in Sri Lanka and his employment history in Sri Lanka, I am also not satisfied that he will be unable to find accommodation and employment on return to Sri Lanka, or that he otherwise faces a real chance of discrimination or harm for any reason associated with his Tamil ethnicity, his residence in the north, or his own past activities in Sri Lanka or that of his brothers.

27. On the totality of the evidence before me including the independent information and the applicant's profile and circumstances, I am not satisfied that he faces a real chance of harm from the SLA, the CID, the Sri Lankan government or anyone else on return to Sri Lanka now or in the reasonably foreseeable future due to: any reason associated with his Tamil ethnicity, including as Tamil male from the north; any reason associated with his scarring; any reason associated with his own past activities or that of his brothers and family; as his brother has been granted protection in Australia; any actual or imputed political opinion; and/or any actual or suspected support or membership of the LTTE.
28. I have set out my findings above regarding the profile of the applicant and his family, which I have accepted will be known to authorities on the applicant's return. In addition to those matters, I also accept that on return to Sri Lanka the applicant will be identified as a failed Tamil asylum seeker and I accept that he departed Sri Lanka illegally in contravention of the Sri Lankan Immigrants and Emigrants Act (the I&E Act).
29. On the basis of information in the 2018 DFAT report I accept that on arrival in Sri Lanka the applicant's travel documents and identity information will be checked against immigration databases, intelligence databases and records of outstanding criminal matters. I accept he will be interviewed and that further enquires may be undertaken such as contacting his family and authorities in his home town. I accept he may be questioned about the reasons he left the country, and as noted above, accept authorities will become aware of his past and that of his family. I accept that this process can take several hours due to the administrative processes, interview lengths, and staffing constraints at the airport. The applicant will be processed in a group, and the individuals in that group cannot exit the airport until all returnees have been processed. DFAT has advised that all returnees are treated according to these standard procedures irrespective of their ethnicity and religion, and considers that returnees are not subject to mistreatment during processing at the airport. I consider the information set out above that DFAT are unaware of more recent evidence of people being detained due to scarring relevant to this assessment. Having regard to my findings above regarding the applicant's profile and that of his family, and having regard to the independent information, I am not satisfied he will be on a 'stop' or 'watch' list, that he will be considered a threat to national security, or that he will otherwise be found to have an adverse profile of any kind on return. I am not satisfied the processing of itself amounts to serious harm of the kind contemplated by the Act, and having regard to the applicant's profile and the independent information above, I am not satisfied that he faces a real chance of harm in the returnee processing phase at the airport.
30. I accept his illegal departure will be identified on return. DFAT advises that persons in breach of the I&E Act are questioned at the airport, subject to enquires and that they will be arrested and charged with an offence. After investigations are completed, police transport the individual to the closest Magistrate's Court, where responsibility for the individual shifts to the

prison services. Information from DFAT is that in general, prisons in Sri Lanka do not meet international standards but this is due to overcrowding, poor sanitary conditions and a lack of resources rather than any intentional conduct on the part of the authorities. Where a magistrate is unavailable, for example due to a weekend or public holiday, a returnee may be held for several days in an airport holding cell. However, as noted above, returnees are not subject to mistreatment at the airport and are treated the same irrespective of their background. DFAT advises that passengers on a people smuggling venture are generally issued with a fine, which can be paid by instalments, rather than a custodial sentence. If they plead guilty to a charge, they are fined and are free to go. If they plead not guilty, they are generally granted bail on personal surety or a family member may be required to act as guarantor. Bail conditions are discretionary and may involve monthly reporting to police at the returnee's expense. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture.

31. In this case, I accept that he will be subject to questioning and possible short term detention while awaiting appearance before a magistrate. Considering his accepted profile, and on the independent information set out above, I find the applicant would not face a real chance of serious harm during any questioning or during any brief period of detention, and even having regard to information above regarding poor prison conditions, in my view this does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment or otherwise amount to serious harm of the kind contemplated by the Act.
32. The applicant was a passenger on a people smuggling vessel and has not claimed to have been involved in organising or facilitating people smuggling. In these circumstances, I find that he will not be subject to any custodial sentence but that he will be fined for his illegal departure, which does not amount to serious harm. Having regard to his personal circumstances and profile, I accept he will be issued a fine and then released, or if he pleads not guilty, he will be released either on his own personal surety, or a family member may be required to act as a guarantor. I am not satisfied on the evidence before me that his family will not be available to do so if required, and nor am I satisfied that the applicant will not be able to pay any fine issued to him. I find that the applicant does not face a real chance of serious harm for his illegal departure if he returns to Sri Lanka now or in the reasonably foreseeable future.
33. In any event, I also find that the evidence is that all persons who depart Sri Lanka illegally are subject to the terms of the I&E Act on return to the country. The law is therefore not discriminatory on its terms and or in its application. For these reasons, I find that this is a law of general application. Case law confirms that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. As noted above, the information before me does not support that the law is selectively enforced or that it is applied in a discriminatory manner. Accordingly, even having regard to the applicant's profile, I find that the investigation, prosecution and punishment for his illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
34. DFAT advised in 2018 that there have been reports of authorities checking on failed asylum seekers/returnees in the north. DFAT assessed that continued surveillance of returnees contributes to a sense of mistrust within communities and this accords with reports of refugees and failed asylum including from Australia being socially stigmatised upon their return. DFAT also assesses that returnees may face some societal discrimination upon return to their communities, which could also affect their ability to secure housing and employment.

35. In this case, I accept the applicant may be visited and subject to some monitoring by the authorities as a returnee to Sri Lanka. However, having regard to his profile discussed above, I am not satisfied that any such visits/monitoring will amount to serious harm of the kind contemplated by the Act. I have found above that I am not satisfied he faces a real chance of being arbitrarily arrested and detained under the provisions of the PTA for any reason on return to Sri Lanka in the reasonably foreseeable future. The applicant is an adult; he has been steadily employed in Sri Lanka in the past and is returning to an area with a significant Tamil population and he has family who continue to reside in Sri Lanka. Overall, I am not satisfied that he will face social stigma at a level such that he will be unable to find accommodation and employment on return to Sri Lanka and nor am I satisfied that he will not be able to access basic necessities and services such that he faces serious harm on return to Sri Lanka.
36. On the totality of the evidence before me including the independent information and the applicant's profile, I am not satisfied that the applicant faces a real chance of serious harm or persecution for any reason associated with his illegal departure, as failed Tamil asylum seeker or the circumstances he will face through returnee processing.

Overall assessment

37. On the totality of all the evidence before me, including the independent information and the applicant's particular profile and circumstances, I am not satisfied that he faces a real chance of serious harm or persecution on return to Sri Lanka now or in the reasonably foreseeable future for any the reasons he has claimed. His fear of persecution is not well-founded.

Refugee: conclusion

38. 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

39. 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

40. 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.

41. I have set out above my findings in relation to the profile of the applicant and his family in Sri Lanka. I have accepted that: the applicant is from the Northern provinces of Sri Lanka: he does not speak Sinhalese and will be identified as a Tamil; he and his brothers were detained, questioned and assaulted by the SLA and the CID in the past; one of his brothers was a member of the LTTE; one of his brothers, K, was granted protection in Australia; and the applicant has some conflict related scarring. I accept these matters will be known to the authorities on his return to Sri Lanka. I also accept that the applicant will be identified on return to Sri Lanka as a failed Tamil asylum seeker and that he departed Sri Lanka illegally in contravention of the I&E Act.
42. I have described above the process the applicant will face on arrival in Sri Lanka as a returnee and have found that I am not satisfied he will be on a 'stop' or 'watch list', that he will be found to be a threat to national security, or that he will otherwise be found to have an adverse profile of any kind on return. Having regard to the independent information set out above and the applicant's accepted profile, I am not satisfied that he faces a real risk of significant harm in the returnee processing phase for the purpose of s.36(2)(aa) of the Act.
43. I have accepted that the applicant will be charged with an offence under the I&E Act and that he will be subject to questioning and possible short term detention while awaiting appearance before a magistrate. Considering his accepted profile, and having regard to the independent information above, I am not satisfied the applicant faces a real risk of significant harm during any questioning or during any brief period of detention, and even having regard to the poor conditions, in my view this does not rise to significant harm as defined: it does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, I am not satisfied that there is an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman, or that it amounts to degrading treatment or punishment intended to cause extreme humiliation. In these circumstances, the poor prison conditions to which the applicant may be subject do not of themselves constitute significant harm as defined under ss.36(2A) and 5 of the Act. I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention.
44. On the independent information and the applicant's profile, I accept that he will be fined for his illegal departure, which does not of itself amount to significant harm as defined. I find he will then be released, or if he pleads not guilty, he will be released either on his own personal surety, or a family member may be required to act as a guarantor. I am not satisfied on the evidence before me that his family will not be available to do so if required, and nor am I satisfied that the applicant will not be able to pay any fine issued to him. I am not satisfied that his illegal departure from Sri Lanka gives rise to a real risk of significant harm for the purpose of s.36(2)(aa) of the Act.
45. I have accepted above that the applicant may be visited and subject to some monitoring by the authorities as a returnee to Sri Lanka. However, having regard to his profile discussed above, I am not satisfied that any such visits/monitoring will amount to significant harm. On the independent information set out above and the applicant's profile, I am not satisfied that he faces a real risk of being arbitrarily arrested and detained under the provisions of the PTA on return to Sri Lanka in the future. The applicant is an adult; he has been steadily employed in Sri Lanka in the past and is returning to an area with a significant Tamil population and he has family who continue to reside in Sri Lanka. Overall, I am not satisfied that he will face social stigma at a level such that he will be unable to find accommodation and employment on return to Sri Lanka and nor am I satisfied that he will not be able to access basic necessities and services such that he faces significant harm on return to Sri Lanka. I am not satisfied that these

matters give rise to a real risk of significant harm for the purpose of ss.36(2)(aa) and 36(2A) of the Act.

46. On the totality of the evidence, including the independent information and the applicant's profile, I am not satisfied that the applicant faces a real risk of significant harm for any reason associated with being failed Tamil asylum seeker or any reason associated with his illegal departure from Sri Lanka, for the purpose of ss.36(2)(aa) of the Act.
47. I have otherwise found above that the applicant does not have a real chance of harm on return to Sri Lanka for the reasons he has claimed. As 'real chance' and 'real risk' involve the same standard,¹ I similarly find for the same reasons, and on the same evidence, set out above that those matters do not give rise to a real risk of harm for the purpose of s.36(2)(aa) of the Act.

Overall assessment

48. On the totality of all the evidence before me, including the independent information and the applicant's particular profile and circumstances, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm for the purpose of ss.36(2)(aa) and 36(2A) of the Act for the reasons he has claimed.

Complementary protection: conclusion

49. 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.

¹ *MIAC v SZQRB* (2013) 210 FCR 505.

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.