



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10280

Date and time of decision: 17 May 2022 14:49:00
S Kamandi, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Sri Lanka. He arrived in Australia in November 2012 and on 19 October 2016 lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 5 April 2017, a delegate of the Minister for Immigration (the delegate) made a decision refusing to grant the visa on the basis that the applicant was not a person in respect of whom Australia owed protection obligations. The delegate was not satisfied that the applicant was subjected to serious harm in the past or that he faced a real chance of serious harm or was at a real risk of significant harm for reasons of his claimed homosexuality, his illegal departure in 2012 or as a returned asylum seeker
3. The matter was referred to the Immigration Assessment Authority (IAA) which made a decision affirming the delegate's decision on 18 October 2017.
4. The applicant applied for judicial review of the IAA's decision and [in] February 2022, the Federal Circuit and Family Court remitted the matter to the IAA by consent orders. The Minister conceded that the IAA committed Jurisdictional error by failing to consider the applicant's representative's submission dated 29 March 2017, and in particular, the applicant's wife's [social media] posts attached to the submission, and that the error was material to the outcome of the IAA's decision.

Information before the IAA

5. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). The review material includes a number of documents which have been identified as information not provided to the IAA as part of the original referral in 2017. Some of the documents are administrative in nature and not relevant to the assessment of the applicant's claims. Others include various identity documents and completed Part C of the applicant's SHEV application which appear to be duplicates of the documents before the delegate. The IAA has also been provided with the applicant's submission dated 29 March 2017, which includes the applicant's wife's [social media] posts, which was not provided to the IAA in 2017. This submission and evidence of the applicant's wife's [social media] posts, which was discussed at the SHEV interview and requested by the delegate, is referred to and evaluated in the delegate's decision. This information was before the delegate and is not new information. The information provided also includes the applicant's submission to the IAA dated 1 May 2017 and transcript of his arrival interview, which is referenced in the delegate's decision. I do not consider these documents to be new information. In addition, the material includes a copy of the transcript of the applicant's Enhanced Screening Interview held on 1 December 2012. It is not apparent whether the transcript was before the delegate. In the event that it was not before the delegate and is new information, I am satisfied that there are exceptional circumstances to consider the transcript. The information in this transcript refers to the applicant's claims and is broadly consistent with the applicant's evidence provided throughout his SHEV application. It is relevant in assessing the applicant's overall claims and provides a complete picture of the applicant's case for protection since his arrival in Australia.
6. On 1 May 2017, the IAA received a submission from the applicant's representative. The submission puts forward arguments in support of the applicant's fear of harm for reasons of

his sexuality which I will consider in undertaking this review. The submission also references and includes extracts from a number of country information reports and news reports relating to treatment of homosexuals and the LGBTI communities in Sri Lanka. These include extracts from the 2016 Human Rights Watch report; the 2014 US Department of State report on human rights practices in Sri Lanka; an article published in the Daily Mirror on 16 November 2012; and extracts of information from a 2014 report by the Kaleidoscope Trust on the rights of LGBTI citizens from across the Commonwealth. The 2016 Human Rights Watch report was before the delegate and is not new information. The other information is extracted from reports that were not before the delegate and are new information. These reports all pre-date the delegate's decision. The applicant has not explained why these publicly available reports or extracts were not provided to the delegate. I am not satisfied that they could not have been provided to the delegate. The information is general country information and does not contain personal information in the relevant sense. A significant period of time has now passed since the publication of the reports. The nature of the information is broadly similar to the information that was presented in the reports that were before the delegate. Given these matters I am not satisfied that either limb of s.473DD of the Act are met.

7. The delegate relied on the 2017 Department of Foreign Affairs and Trade (DFAT) report for Sri Lanka¹, which was current at the time. Since the delegate's decision in 2017, DFAT has produced further publicly available reports on Sri Lanka, the most recent of which was published on 23 December 2021.² The report includes information about the treatment of returned asylum seekers who departed Sri Lanka illegally. Given the 2021 DFAT reports updates prior DFAT reports and considering that DFAT reports are prepared specifically for the purposes of assisting in determination of protection claims, I am satisfied that there are exceptional circumstances to justify considering the 2021 DFAT report.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - The applicant was born in Sri Lanka and resided in the Southern province of the country. He is of Sinhalese ethnicity and a practising Buddhist.
 - After completing his primary and secondary education in [year], the applicant worked with his father. In 2007, the applicant obtained a working visa to [Country 1]. He worked as a manufacturing worker in [Country 1] from August 2007 until his return to Sri Lanka in June 2012. Upon return he started his own business buying and selling [product 1] and operating a [product 2] shop which he continued until his departure from Sri Lanka in November 2012.
 - Since adolescent, the applicant knew that he was sexually attracted to males but hid it from his parents and the society.
 - In June 2012, the applicant started a sexual relationship with his friend "M". They were very close and couldn't live apart. They kept their relationship a secret from others.
 - [In] October 2012, the applicant and his partner M were caught having sex by M's brother. This occurred at M's [business 1]. M's brother spread the news to others in the village. The applicant and M were stoned by the villagers. They ran to a clothes shop, bought some clothes, and decided to leave the village for Colombo.

¹ DFAT, 'Sri Lanka - Country Information Report', 24 January 2017, CISED50AD105.

² DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

- The applicant and M remained in Colombo for about a week. In that period, they planned their journey and departed the country, arriving in Australia [in] November 2012.
- In Australia, the applicant resided with M until 2014 when M went to Adelaide.
- [In] August 2015, the applicant married his wife, an orphan who he knew in Sri Lanka. His wife is aware that the applicant is a homosexual but is not leaving the marriage as she has no one to look after her. She is receiving treatment under a mental health plan and has posted about her mental trauma and their relationship on [social media]. Their marriage is a façade for his family, and he has no sexual relations with his wife.
- The applicant's parents and [siblings] remain in Sri Lanka and are experiencing problems due to the applicant's homosexuality. His [siblings] are finding it difficult to find partners and settle down. His [brother] married in October 2015 in Sri Lanka and came to Australia on a student visa due to harassment from the villagers. The applicant's mother is suffering from mental stress and blood pressure due to the problems at the hands of the villagers.
- The applicant fears harm at the hands of his relatives and villagers for reasons of his homosexuality, if returned to Sri Lanka. As an adult, he is unable to hide his sexuality from the society.
- In Sri Lanka, homosexuality is illegal and against the social norms. He fears discrimination and degrading treatment due to his sexuality. He fears detention, physical assault, and torture at the hands of the Sri Lankan police.
- The applicant also fears serious harm for reasons of his illegal departure from Sri Lanka, and as a returned asylum seeker who has resided in Australia for a long period.

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.
11. The applicant has consistently claimed to be a national of Sri Lanka, of Sinhalese ethnicity, and a practising Buddhist. He provided the delegate with documentary evidence supporting his identity and nationality. I accept that the applicant is a national of Sri Lanka and that Sri Lanka is the receiving country for the purposes of this review. I also accept that the applicant is Sinhalese and a practising Buddhist. He has not claimed to fear harm for reasons of his ethnicity or as a practising Buddhist.
 12. The applicant's evidence is that after finishing school and assisting his father in his business, he obtained a working visa for [Country 1] and that he worked and resided in [Country 1] from August 2007 until his return to Sri Lanka in June 2012. Upon return he started his own business buying and selling [product 1] and operating a [product 2] shop which he continued until his departure from Sri Lanka in November 2012. I accept the applicant's evidence in this regard.
 13. Regarding his family, the applicant's evidence is that his parents and [siblings] remain in Sri Lanka. His [brother] married in Sri Lanka and came to Australia on a student visa in October 2015 and is currently residing in Australia. The applicant provided the delegate with his marriage certificate which supports his evidence that he married his wife in Australia [in] August 2015. I accept the applicant's evidence in this regard.
 14. The applicant's primary claim is that as a homosexual and that he fears harm for this reason if returned to Sri Lanka.
 15. The applicant has consistently claimed to be a homosexual. In his SHEV statement, the applicant states that since adolescent, he realised that he was sexually attracted to males, but hid it from his parents and the society. At the SHEV interview, the applicant was asked questions about how he understood that he was homosexual. He stated that from childhood his "feelings were on same sex" and his "inclination has always been for males". He referred to having been fascinated with hanging around "male partners" and wanted to be around them and that during adolescent his desire for males developed. He stated that he had his first sexual partner in [Country 1] in March 2008. He was a [Country 1] national and they met at a restaurant. I note that the applicant has not referred to having had a sexual partner while in [Country 1] in his SHEV statement. In his post-interview submission to the delegate, it is submitted that the applicant knew his former partner, M, from childhood and he liked him very much. At the SHEV interview, the applicant stated that he met M after he returned from [Country 1], about five months prior to their departure from Sri Lanka (June 2012). He stated that M was from the same village as him and that after they realised that they had mutual feelings, they commenced a relationship. The applicant explained that M had a [business 1] and that every time he held M's hand, M did not object, and that is how he realised that they had mutual feelings.
 16. Regarding the harm that the applicant claims he suffered in Sri Lanka, he claims that [in] October 2012, him and his then partner, M, were caught having sex at the [business 1] by M's brother. He claims that M's brother spread the news to the villagers and that this prompted the villagers to attack/stone them causing them to leave the village for Colombo to save their lives. At the SHEV interview, the applicant was asked several questions about the events that followed once they were caught. When asked how long after this incident, stones were thrown at them by the villagers, the applicant stated that it was after a while. When asked how long a while was, the applicant stated that he couldn't tell. When prompted to indicate

whether it was a few minutes, hours, or days after they were caught, the applicant stated a few hours. When asked what they did after being caught, the applicant stated that in Sri Lanka homosexuality is a degrading situation, not acceptable and that he knew they would come after him. When asked what they did, the applicant stated that M suggested for them to leave for Colombo. When asked what they did until they got to Colombo, the applicant stated that they went to a clothing boutique, spent about 30-40 minutes there and then went to Colombo. When reminded of his evidence that a few hours after the incident, they had stones thrown at them, and asked what else they did, the applicant stated he was confused and didn't know how the time passed. When asked where they went when they went back to the village from the [business 1], the applicant stated that they never realised that M's brother would expose them, they did not know what to do, and that the villagers started throwing stones at them once they got to the village. When asked where in the village this occurred, the applicant stated that they were travelling on the road, they went to the boutique, bought some clothes, and then left for Colombo. When asked why they bought clothes, the applicant stated that they couldn't just go to the shop without buying anything. When asked how they managed to get away from the villagers, the applicant stated that they just ran. Like the delegate, I am not at all convinced of the veracity of the applicant's claim that he was caught in a sexual act with his partner M and the subsequent events. I found the applicant's evidence in this regard problematic and highly implausible. The applicant was unable to articulate the events that followed and the actions that they took after the claimed exposure of their sexual relationship and I consider that if this event occurred as claimed, the applicant would have been able to articulate the sequence of events and provide more meaningful details, given that this incident is claimed to have prompted their immediate departure from their village and then the country within a matter of a week. I do not accept that this incident occurred or that the applicant departed Sri Lanka for this reason.

17. At the SHEV interview, the applicant was asked if aside from having a sexual partner in the past, was there anything else that identified him as a homosexual or impacted his daily life. At first the applicant stated that his partner M was in Adelaide and that he had no sexual partner. When the delegate explained that the question was less about having a sexual partner and more about his lifestyle and behaviours as a homosexual, the applicant stated that as a human being there are sexual desires that he is confronted by and that after coming to Australia he had not been able to fulfill those desires. When asked to explain, the applicant stated that he was sexually deprived because he had no partner. When the question was clarified and repeated on a further two occasions, the applicant referred to his "physical attributes" and that the way he does things and indulges in sport, points towards him being a homosexual and "not active as a man". When asked if anything changed for him since arriving in Australia compared to when he was in Sri Lanka, the applicant stated that he came to Australia with M and that they were together while in Melbourne and that nothing changed for him. He stated that M moved to Adelaide and that they have not talked to each other since November 2014. In response to the delegate's observation that arguably homosexuals in Australia have more freedom to conduct themselves how they choose, and given this why hasn't anything changed for him, the applicant referred to constant fear that is on his mind which has negated him from being free. When asked if there were any differences in being a homosexual in Australia compared to in Sri Lanka, the applicant referred to homosexuals having more freedom in Australia and that they can hold hands. When asked if, after the end of his relationship with M in 2014, the applicant tried to find another partner, the applicant stated that he had not due to fear of what he experienced in Sri Lanka, which I do not accept occurred.
18. The applicant married his wife in Australia in August 2015. At the SHEV interview, the applicant stated that after he departed Sri Lanka, his family faced problems due to his homosexuality. He referred to his siblings' inability to find a partner due to the stigma because of his

homosexuality and that his mother experienced health issue because of the treatment they faced in the village and burnt herself with boiling water. He stated that he married a girl in Australia “as a superficial” to show the world. In response to the questions by the delegate about his siblings’ problems, the applicant stated that his brother got married in Sri Lanka and came to Australia because if he remained there, his marriage would have broken down. The applicant referred to the stigma attached to homosexuals and that no family would allow their daughter to marry someone with a homosexual family member. When asked when his brother got married, the applicant stated in May 2014. The delegate observed that the applicant’s sexually didn’t appear to hinder his brother’s ability to get married as claimed. The applicant stated that their marriage/engagement was conducted in a secretive manner in a different town and that only immediate family were there, and the event was not prominent. The applicant provided the delegate with a document referred to as “diagnostic ticket” indicating that [an age]-year-old “[his mother’s name]” sustained superficial burning and was admitted for treatment in July 2014.

19. At the SHEV interview, when asked if his siblings’ inability to find partners was the most serious issue that his family faced, the applicant stated that his family were threatened and were unable to go to the police station to sort it out. When asked to explain how his family were threatened, the applicant stated that there was an incident when stones were thrown at their home. When asked how he knew that this incident was related to his sexuality, the applicant stated that his family was a respectable family and had status and provided the delegate with a police report. The police report dated in February 2017, over four years after the applicant’s departure from Sri Lanka, indicates that the applicant’s family faced all sorts of harassment for the last four years. It indicates that the applicant’s father did not know who the perpetrators were and that he had no enemies. It refers to the applicant having had problems which caused him to leave Sri Lanka and that unknown people have visited the family, seeking the applicant’s phone number, and threatening to kill him if he returned to Sri Lanka. The applicant stated that these kinds of incidents occurred prior to the family reporting it to the police and that he did not mention these incidents in his written claims because he didn’t think it would come to this.
20. Regarding his marriage to his wife, the applicant claims that he married his wife as a façade for his family and that he had no sexual relations with his wife. At the SHEV interview, the applicant stated that he knew her from Sri Lanka. She was an orphan and that he found out that she was coming to Australia on [social media]. He claims that he did not tell his wife about his homosexuality prior to their marriage as she would not have married him but after their marriage, she realised that the applicant was a homosexual. The applicant confirmed that their marriage was ongoing and when asked about why his wife remains with him given that she was aware of his sexuality, the applicant stated that it is because she is an orphan, has no one else to take care of her and that it may also be the case that she does not want to return to Sri Lanka and that there is stigma attached to a young girl divorcing her husband. The applicant also stated that his wife has posted on [social media] about her mental struggles and their relationship. The delegate was provided with a copy and translation of a post on the applicant’s wife [social media] and a GP mental health pan dated in November 2016 indicating that the applicant’s wife suffers from depression and lists the applicant as her key family support/contact person. The [social media] post ([dated]) includes a photo of the applicant and his wife. The post is addressed to the applicant and refers to people having said things about him in 2012 and expressing her doubt the people who denigrated the applicant as a homosexual are true Buddhists. It refers to the applicant’s house being attacked two months ago, that she feels unsafe and that because of all this they cannot think about having a child right now. It refers to the love that the applicant’s wife feels for him and that she needs him forever.

21. Apart from not accepting the incident that the applicant claims to have caused him to depart Sri Lanka in 2012, I have a number of significant concerns regarding the applicant's claim that he is a homosexual, that his family have experienced issues due to his sexuality and will harm him if returned to Sri Lanka and that his marriage to his wife is a facade for his family.
22. The applicant's claim that his family will harm him because of his sexuality is undermined by his evidence that he continues to be in contact with his family by phone and they provided him with copies of his passport, which he originally claimed he could not obtain because he was afraid of his family and they were waiting to harm him. While he claims that his brother, who is residing in Australia, does not respect him [as a] brother, his evidence is that he is in contact with his brother, and he has not provided any supporting evidence from his brother in this regard or that his family are aware of his homosexuality and have any animosity or feeling of disrespect towards him. The applicant's evidence that his siblings faced issue to find partners because the villagers were made aware of the applicant's homosexuality is undermined by the fact that his [brother] married in Sri Lanka and then came to Australia with his wife. I do not accept the applicant's explanation that his brother's marriage was low key and did not involve anyone but immediate family. The applicant's evidence is that he resided in a small village where everyone knew each other and, in my view, his explanation about his brother's marriage does not overcome the applicant's evidence that in Sri Lanka no family would allow their daughter to marry a person with a homosexual family member. I do not accept that the applicant's [siblings] experienced the claimed issues because of the applicant's claimed homosexuality.
23. While I accept that the applicant's mother may have sustained superficial burn injuries as evidenced in the medical evidence provided and was admitted into hospital in 2014, I am not satisfied that the incident was in any way connected to claimed harassment and treatment by villagers because of the applicant's sexuality. I do not accept that the applicant's family home was attacked in 2017, over four years after the applicant's departure from Sri Lanka, in connection with the applicant or that there are unknown people looking for the applicant and threatening to kill him for any of the claimed reasons or otherwise. I do not give the police report any weight and do not consider it to support the applicant's claims that he is homosexual or that the villagers are aware of this and are continuing to harass and harm his family for this reason.
24. I accept that the applicant married his wife in August 2015. While getting married to woman does not necessarily indicate that the applicant is not a homosexual, on the evidence before me, I am not satisfied that the applicant married his wife as a facade for his family or that their marriage is just for show as claimed. While the applicant claims that his wife is an orphan and has no one to care for her as a reason why she remains with him, his evidence is also that his wife brother and his family are in Australia. The applicant's claim that his wife suffers from mental health issues and is suicidal because of their relationship is not supported by the [social media] post, which appears to have been created days prior to the SHEV interview, referring to his wife's love for him and the mental health plan which lists him as the support person. The [social media] post refers to the applicant and his wife not being in a position to have a child due to uncertainty, which undermines his claim that he has no sexual relations with his wife.
25. Overall, I am not satisfied that the applicant is homosexual. While I accept that he departed Sri Lanka with M in 2012, I do not accept that they were sexual partners or that they departed Sri Lanka in the claimed circumstances. I note that since the IAA's decision in 2017, the applicant has not provided any further evidence to support his claims. I am not satisfied that the applicant faced any harm for the claimed reasons in the past, or that his family members were mistreated and faced the claimed issues due to the applicant's sexuality or that he faces any

risk of harm for reasons of his claimed homosexuality at hands of his family, villagers, or any other person, if returned to Sri Lanka. I reject the applicant's claim in this regard in its entirety.

26. The applicant claims, and I accept, that he left Sri Lanka illegally as a passenger on a boat and is not in possession of a valid Sri Lankan passport. The applicant claims that on return, he would harm for reasons of his illegal departure and as a returned asylum seeker who has resided in Australia for a long period
27. DFAT³ indicates that Sri Lankans without passports can re-enter the country on temporary travel documents, also known as an Emergency Passport or a Non-Machine-Readable Passport, issued by diplomatic and consular missions and valid for re-entry to Sri Lanka. Given that the applicant's passport has expired he may be returning to Sri Lanka on temporary travel documents. 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. DFAT is not aware of detainees being subjected to mistreatment during processing at the airport.
28. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). The applicant departed Sri Lanka in contravention of the I&E Act. According to DFAT⁴ persons such as the applicant are very likely to be questioned at the airport, have their criminal history checked and be charged under the I&E Act. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine, though DFAT indicates that it is unaware of a prison sentence being given for illegal departure by itself. Those charged are required to appear in court in the location where the matter was first heard, reportedly Negombo Courts, near the airport, which involves legal and transport costs. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the I&E Act appear in court every 3-6 months, regardless of their plea and that cases of those charged with illegal departure may take years to resolve, requiring on-going court appearances.
29. Although the arrival process could take several hours, on the information before me it appears that all returnees are treated according to these standard procedures. The applicant has not claimed to have been involved in people smuggling and there is no evidence that the applicant has committed or been charged with any criminal offense. The applicant's evidence does not suggest that he had a negative profile with the authorities while in Sri Lanka. I also note that there no evidence to suggest that the applicant has engaged in any activities while in Australia that would be of concern to the authorities and I am not satisfied that the investigative process at the airport, apart from his illegal departure, would otherwise identify him as a person of interest. While the applicant will very likely be charged for illegal departure, any penalties or processes resulting from the application of the I&E Act is neither discriminatory on its terms nor applied in a discriminatory manner or selectively enforced. I consider that the treatment and process he may encounter does not involve systematic and discriminatory conduct or amount to persecution for the purposes of s.5J of the Act.
30. DFAT⁵ notes that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from Australian community. It is reported that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis or are treated in such a

³ DFAT, 'Sri Lanka - Country Information Report', 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

⁴ DFAT, 'Sri Lanka - Country Information Report', 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

way that endangers their safety or security. DFAT⁶ reports that returnees may face financial difficulties reintegrating into their communities or may face challenges in securing employment or reliable housing on return. Societal discrimination is not considered a major concern and DFAT assesses that returnees face a low risk of societal discrimination on return to their communities. The applicant's parents and [sibling] remain in their village and I consider it very likely that he would return to his village where he resided and worked in the past. The applicant's evidence is that he completed school, can speak Sinhalese, and worked in Sri Lanka and [Country 1], including operating his own businesses. He has maintained contact with his family members in Sri Lanka, and I do not accept his claims that his family will harm him for reasons of his homosexuality, a claim which I reject. There is no indication that he would not be supported by his family on return to Sri Lanka. Given the applicant's circumstances, I am not satisfied that there is a real chance the applicant's capacity to subsist would be threatened and consider any societal discrimination that he may face does not amount to serious harm. There is also no information in support of the applicant's submissions that he would face harm for reasons of his prolonged stay in Australia.

31. In considering the applicant's circumstances and overall profile in the context of the country information cited above I am not satisfied that there is a real chance that the applicant would face persecution in the reasonably foreseeable future for departing Sri Lanka illegally and having lived in Australia for a prolonged period or because he sought asylum.
32. The applicant does not have a well-founded fear of persecution within the meaning of s.5(J) of the Act.

Refugee: conclusion

33. 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

34. 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

35. 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.

⁶ DFAT, 'Sri Lanka - Country Information Report', 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

36. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
37. I accept that on return to Sri Lanka the applicant will very likely be subjected to an investigation process on arrival. I am not satisfied that there is a real risk he would be identified as a person of interest or otherwise be harmed during this process. In considering the country information about difficulties that a person returning to Sri Lanka may face on return, I also accept that the applicant may face some low-level societal discrimination as a returning asylum seeker. I accept that the applicant may face some challenges in securing employment and re-establishing himself. However, I do not consider that illegal departure processes and penalties that the applicant will very likely face or the difficulties that he may encounter on return to Sri Lanka involves significant harm. I am not satisfied that, there is an intention to inflict pain or suffering that can reasonably be regarded as cruel and inhuman in nature, severe pain or suffering or an intention to cause extreme humiliation such as to meet the definitions of torture or cruel or inhumane treatment or punishment or degrading treatment or punishment. I am also not satisfied that the applicant will face a real risk of being arbitrarily deprived of his life or be subject to the death penalty or tortured. I am not satisfied that the applicant faces a real risk of significant harm as defined.
38. I am not satisfied that there is a real risk that the applicant will suffer significant harm in Sri Lanka.

Complementary protection: conclusion

39. 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.