



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00958

Date and time of decision: 27 March 2017 09:13:00
Scott MacKenzie, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from a village in Jaffna District, Northern Province, Sri Lanka. He arrived in Australia [in] October 2012 as an unauthorised maritime arrival. [In] April 2016 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] September 2016, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. [In] October 2016 the IAA received a submission from the applicant's representative. The submission comprises argument that responds to issues arising from the delegate's assessment and refers to country information before the delegate, which I consider does not constitute new information. Parts of the submission are a recitation of the law, that bears a striking resemblance to that which appears in many AAT decisions, that was in force prior to the introduction of the fast track assessment process, and does not apply to visa applications like this one, that were made on or after 16 December 2014.
5. The applicant's representative has referred to numerous sources of country information that was not before the delegate. She also refers to the following claims that were not previously before the delegate:
 - The applicant was reading a [Qualification] at [a university in Colombo] in 2013 and is opposed to the Sri Lankan government and its lack of human rights practices
 - The applicant was sexually abused by the Sri Lankan Army
 - The applicant and his [sibling] were arrested together and the applicant's [sibling] has since sought asylum in [country 1]
 - The applicant is at risk of harm due to his profile of being a media personality and [a former occupation].
6. The IAA must not consider any new information from an applicant unless satisfied exceptional circumstances justify considering the new information and the new information was not and could not have been provided to the Minister, or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
7. The new country information not before the Minister pre-dates the delegate's decision and the submission does not provide reasons as to why this information could not have been provided to the delegate or why it may be considered credible personal information. In the circumstances, I am not satisfied that the country information could not have been provided before the delegate's decision was made. Nor am I satisfied the new information is credible personal information.

8. The new claims significantly differ from those put forward by the applicant in his SHEV application and appear to have no bearing on those claims presented to the delegate in the SHEV interview. Given the applicant's account of his circumstances prior to leaving Sri Lanka in 2012, it is difficult to relate these new claims to the applicant and I strongly suspect these claims relate to another person. The applicant has never claimed to have attended university, that he was involved in the media or was a [occupation], or that he has a [sibling] in [country 1], or that he was sexually abused. In any case, the new claims relate to events that pre-date the delegate's decision and the applicant's representative has not provided any reason as to why this information was not provided to the delegate before the decision was made. I also note the applicant was legally represented both in respect of his SHEV application and at the SHEV interview and these matters have not previously been mentioned. In the circumstances, I am not satisfied these new claims represent credible personal information or could not have been provided before the delegate's decision was made.

Applicant's claims for protection

9. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
- The applicant is a Tamil male from [town 1], Jaffna District, Northern Province;
 - The applicant lived and worked in [country 2] from December 2004 until September 2008;
 - In around July 2009, the applicant was arrested, detained, and assaulted by the Sri Lankan Army (SLA) on suspicion of involvement with the Liberation Tigers of Tamil Eelam (LTTE);
 - Following his release, the applicant was required to attend a SLA camp weekly and sign his name;
 - The applicant lived and worked in [country 3] from 2009/10 to 2010/11;
 - While in [country 3], the authorities questioned the applicant's parents;
 - About six weeks after returning from [country 3], the applicant was arrested by the Criminal Investigation Department (CID);
 - In the last four years, the Sri Lankan authorities went looking for the applicant at his [relative's] house;
 - The applicant's parents were killed by violence (date unspecified);
 - The applicant's [sibling] was kidnapped (date unspecified);
 - If returned to Sri Lanka the applicant fears harm from the Sri Lankan authorities on account of his:
 - Tamil ethnicity
 - imputed LTTE connections
 - illegal departure from Sri Lanka
 - his asylum application abroad.

Refugee assessment

10. 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

11. 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.
12. The applicant claims to be from [town 1], Jaffna District in the North of Sri Lanka. The applicant has provided some evidence of his identity, and on the basis of his evidence, I accept that he is a Tamil male from this part of Sri Lanka.
13. In the SHEV statement, [in] February 2016, the applicant claimed that in 2009 he was arrested and assaulted by SLA personnel. He stated that the SLA had found weapons 300 metres from his house and suspected him of involvement with the LTTE. The applicant was stripped naked and beaten. His parents secured his release through the payment of a bribe. Following this, the applicant was required to sign weekly at a SLA camp.
14. In the SHEV interview, the applicant said this incident occurred around July 2009. He advised the delegate that he was reading some newspapers in a [venue] about one kilometre from his home when he was arrested. The applicant said that he and three other men [at the venue] were taken to an SLA camp one kilometre from his home, detained and beaten. He was released five hours later when his mother and relatives of the other detainees came to the camp and started crying. The applicant explained to the delegate that the SLA only released him because his mother and others were forming a crowd and making a commotion. He said that the SLA did not like a crowd and would have been wary of attracting media attention. The applicant said that following his release he signed at the camp for the next three weeks. He was beaten each time he signed.
15. The applicant advised the delegate that he departed for [country 3] in August 2009 and remained in there for one year. This was consistent with information the applicant provided in an earlier interview [in] January 2013 (entry interview), where he stated that he resided in

[country 3] from 2009 until 2010. However, in his SHEV application, it is recorded that he resided in [country 3] from July 2010 until July 2011.

16. In his SHEV interview, the applicant said that while he was in [country 3] the Sri Lankan authorities went to his house looking for him on one occasion. He said his mother told them that he had gone overseas and no further enquiries were made. This claim was not advanced in the applicant's SHEV statement.
17. In his SHEV interview, the applicant said he returned to Sri Lanka in 2010. He said he had no problems or difficulty with the authorities at the airport upon return. He stated that he returned to live with his parents but that after about six weeks the CID came to his house and arrested him. The applicant said there were three CID personnel present and that one of the men was involved in his 2009 arrest. He was severely beaten and tortured by the authorities and released after two hours. Later in the interview, the applicant advised the delegate that he was released after his mother paid a bribe. The applicant's oral account of his 2010 arrest differed from his SHEV statement where he stated that four men associated with the SLA camp came and assaulted him.
18. The applicant claimed that following his 2010 arrest he moved to a different place for a short period to avoid the authorities. During this time the authorities went to his family home and told his parents that they were looking for him, and that if they arrest him again they will shoot him. In 2011, the applicant moved to [the town 2] District where he remained until he departed Sri Lanka in September 2012. The applicant provided conflicting accounts of when he moved to [town 2]. In the entry interview he said he moved there in November 2011. In the SHEV application it is recorded as July 2011 after he returned from [country 3]. In the SHEV interview the applicant initially told the delegate he lived in [town 2] for one year, but later said it was for 10 months. He also stated that his mother was questioned by the authorities on four occasions while he was living in [town 2] and that she was first questioned in February 2011. According to the applicant's driver's licence, his permanent address in June 2012 was [Town 4], which is in Jaffna District.
19. In his SHEV statement, the applicant stated that both his parents have been 'killed by violence' and that his [sibling] had been kidnapped and is missing. He further stated that the SLA were 'aware' of him because his parents had been killed and his [sibling] missing, and for these reasons he had a target on his back. The applicant also claimed that for the past four years the SLA has been looking for him at his [relative's] house. The applicant further stated that he feared that if he returned to Sri Lanka the authorities would ask him to clean toilets or sexually abuse him. These particular claims were not raised by the applicant or explored by the delegate in the SHEV interview. However, in the entry interview [in] January 2013, the applicant said that both his parents were alive and that he had a [sibling] living in [country 1] and another [sibling] living in Sri Lanka. In his SHEV application, the applicant recorded at question 42 that his parents and all [number] siblings were residing in Sri Lanka and he did not otherwise indicate that his parents were deceased or that his [sibling] was missing. The delegate asked the applicant what he fears will happen to him if returned to Sri Lanka, to which he said he feared harm on account of his imputed involvement with the LTTE because of the weapons that were found in 2009. The applicant said there was no other reason he feared returning to Sri Lanka.
20. I accept that the applicant was arrested, along with three other men, by the SLA in around July 2009 following a cache of weapons being discovered 300 metres from his home. I also accept that at this time he was detained for five hours and physically assaulted before being released into the custody of his mother. I further accept that following his release he was required to

report to the SLA camp weekly, which he did for three weeks prior to his departure to [country 3]. The country information documents the detention and mistreatment of ordinary Tamils during the civil war, noting that LTTE support was at times imputed on the basis of ethnicity.¹ Mahinda Rajapaksa's former government (2005 to 2015) were known to monitor any possible LTTE activity and Tamils in the north and east reported being monitored, harassed, arrested and/or detained by security forces.² I find that the applicant provided a reasonably coherent and detailed account of this incident in the SHEV interview, which suggested he was recounting a genuine personal experience. Further, this claim was consistent with information provided by him in the entry interview.

21. As noted above, various dates were provided by the applicant as to when he departed Sri Lanka and returned from [country 3]. The dates provided in the SHEV application were inconsistent with his evidence in the entry and SHEV interviews. I prefer the applicant's consistent oral evidence and find he was in [country 3] from about August 2009 until July 2010. His claim in the SHEV interview that while in [country 3] the Sri Lankan authorities went to his house looking for him was not mentioned in his SHEV statement. However, in circumstances where the applicant ceased his weekly reporting at the SLA camp, I find it plausible that the authorities enquired of him at his home following his departure to [country 3].
22. However, I find the applicant's evidence in relation to the claimed events that followed his return from [country 3] in about July 2010 to be unconvincing.
23. Significantly, the applicant's claim in the SHEV interview that he was arrested by three CID or SLA persons six weeks after he returned to Sri Lanka, detained for two hours, and released following the payment of a bribe, was not mentioned in his SHEV statement. In his SHEV statement, the applicant appeared to describe this event as an incident where four Sinhalese persons, who were associated with the SLA camp, came to assault him. There was not mention of being detained or the payment of a bribe.
24. The delegate found the applicant's evidence in relation to his claimed 2010 arrest and the circumstances of his release problematic. He put to the applicant that his SHEV statement made no reference to the second arrest in 2010 or the payment of a bribe. He also put to the applicant that in his SHEV statement he had claimed that he was assaulted by four Sinhalese persons associated with the SLA, not detained. He further noted the applicant's conflicting evidence between his SHEV statement and SHEV interview as to whether his mother paid a bribe to secure his release following the first arrest in 2009. The applicant's response was that he was released in 2009 because many people came, and that he was released in 2010 because his mother paid a bribe.
25. In the circumstances, I find the applicant did not provide a persuasive or satisfactory explanation for the discrepancies and inconsistencies put forward by the delegate. I also note in the entry interview that he was asked whether he had ever been arrested or detained by police or security organisations. He said that he had been arrested in 2009 following the discovery of weapons. I expect that if the applicant had been arrested and detained in around August 2010, beaten severely, and tortured as claimed in the SHEV interview, that he would have also mentioned this more recent arrest in the entry interview. As noted above, the applicant provided conflicting evidence as to when he moved to [town 2], a move that he said was prompted due to the problems he claimed he was having with the authorities in Jaffna in 2010. For these reasons, I conclude that the applicant was not recalling a personal experience

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, 3.7

² *ibid*, 2.39, 3.7

in relation to the events that followed his return from [country 3] in mid-2010. I note the applicant's evidence is that when he returned to Sri Lanka in around July 2010 he was able to pass through airport immigration and security without difficulty, which indicates he was not a person of concern to the authorities on account of any imputed LTTE links or criminal matters at that time. I also find the applicant's decision to obtain a driver's licence in June 2012, coupled with the fact he was given one without issue, to indicate that he was not in fear of, or wanted by, the authorities in Sri Lanka at that time. I am not satisfied that the applicant came to the adverse attention of the CID, the SLA or any other authority following his return to Sri Lanka in around July 2010. It follows that I reject the applicant's claim that the authorities have been looking for the applicant at his [relative's] house. There is no other evidence before me that indicates that the applicant is a person of ongoing interest to the Sri Lankan authorities in relation to his 2009 arrest.

26. As noted, there were a significant number of discrepancies between information provided in the applicant's SHEV application and SHEV statement to that provided by him in his SHEV interview. In light of those discrepancies, I have some concerns about the reliability of the applicant's claim in his SHEV statement that his parents have been killed by violence and a [sibling] kidnapped and missing. However, on the evidence before me I cannot conclude, with any certainty, that these events did not occur. I give particular weight to the applicant's oral evidence that he fears returning to Sri Lanka on account of his imputed involvement with the LTTE in connection with the discovery of weapons in 2009. The applicant said there was no other reason he feared returning to Sri Lanka and he has not raised any claim that he fears harm on account of his parents' or [sibling's] circumstances. On this basis I am not satisfied that the applicant has a well-founded fear of persecution on account of the death of his parents or the kidnapping of his [sibling].
27. Country information indicates that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009.³ There are several Tamil political parties in Sri Lanka, with the largest alliance of parties operating under the umbrella of the TNA. The TNA currently has 16 members of parliament and holds the majority of seats in the Northern Provincial Council. The TNA leader Sampanthan is leader of the Opposition.⁴ More generally, DFAT advises that there are no official laws or policies that discriminate on the basis of ethnicity or language in Sri Lanka, which includes education, employment or access to housing and the report also suggests that implementation of laws and policies by the current Sirisena government is generally without discrimination.⁵ The applicant completed secondary education up to [level], worked [in two occupations], and was able to obtain a passport which enabled him to travel freely in and out of Sri Lanka both during and following the conflict. There is no evidence before me that indicates that the applicant has or will experience any barriers to accessing education, employment or any government services in Sri Lanka.
28. I accept there is some indication by DFAT of societal discrimination against certain ethnic groups in Sri Lanka, but the information is silent as to how this specifically manifests and the impact it has on Tamils specifically.⁶ Country information overall indicates there have been significant positive developments for Tamils in the country politically and socially. While I accept that the applicant may still encounter a degree of societal discrimination, I am not satisfied that this would constitute serious harm.

³ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143

⁴ Ibid, 3.5.

⁵ Ibid 3.3.

⁶ Ibid.

29. I have accepted that the applicant (and others) was arrested, assaulted, and briefly detained in July 2009 under suspicion of involvement with weapons that were found 300 metres from his home. I have also accepted that the applicant was required to sign weekly at the SLA camp following his release from detention. I have further accepted it is plausible that the Sri Lankan authorities enquired of him at his home when he ceased reporting following his departure to [country 3]. However, I have found that the applicant did not come to the adverse attention of the CID, the SLA or any other authority following his return to Sri Lanka in around July 2010. The applicant was able to pass through airport security and immigration without difficulty and in 2012 he renewed his driver's licence. Due to the inconsistencies and discrepancies noted, I have rejected the applicant's claim that he was arrested, detained and beaten in 2010 by the CID or the SLA. I have further rejected that the Sri Lankan authorities have been searching for the applicant at his [relative's] home. I have determined that the applicant does not have a well-founded fear of persecution on account of the claimed death of his parents or the claimed kidnapping of his [sibling]. I am not satisfied that the applicant is of ongoing interest to the Sri Lankan authorities in relation to his 2009 arrest.
30. The UNHCR 2012 Guidelines for assessing the eligibility of Sri Lankans for asylum state that there is no longer a presumption of a requirement for protection simply for reason of being of Tamil ethnicity.⁷ The Guidelines state that persons suspected of certain links with the LTTE may be in need of international refugee protection, depending on the individual circumstances of their case. Given my findings about the profile of the applicant, and having regard to the country information before me, I conclude that he is not a person that faces a real chance of serious harm by virtue of his Tamil ethnicity or on account of any actual or imputed LTTE connections.
31. Accordingly, I am not satisfied that the applicant faces a real chance of serious harm due to his Tamil ethnicity, his imputed LTTE profile, or for any other reason, upon his return to Sri Lanka, now or in the foreseeable future.

Illegal departure/ Returning asylum seeker

32. I accept that if the applicant returned to Sri Lanka he would do so as an asylum seeker returned from Australia. I also accept that the applicant would be identified by the Sri Lankan authorities as someone who departed Sri Lanka illegally.
33. Having regard to the country information in the referred material, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities by virtue of his return as a Tamil asylum seeker. In particular, I note that DFAT reports that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia. Although there have been reported instances of returnees being harmed, the information before me indicates those were people with substantial links to the LTTE or those suspected of committing serious crimes.⁸ I am not satisfied the applicant is a person with that kind of profile. For these reasons I am not satisfied the applicant faces a real chance of serious harm due to being a failed asylum seeker from Australia, now or in the reasonably foreseeable future, if he returns to Sri Lanka.
34. Country information indicates that most Sri Lankan returnees, including those from Australia, are questioned by police on return and, where an illegal departure is suspected, are charged under the Immigrants and Emigrants Act (IAEA). DFAT reports as part of this process, most

⁷ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁸ DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143, 4.22-4.23.

returnees will be fingerprinted and photographed, transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each individual returnee. Returnees who are arrested can remain in police custody at the CID Airport Office for up to 24 hours after arrival. Should a Magistrate not be available before this time – for example, because of a weekend or public holiday – returnees who are charged may be held at a nearby prison.⁹ DFAT rates general prison conditions in Sri Lanka as not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions.¹⁰

35. I accept that as the applicant departed Sri Lanka without a passport, he may be found to have committed an offence under the IAEA. Country information indicates that persons who have departed Sri Lanka illegally may face penalties that can include up to five years imprisonment and fines of up to SLR200,000; in practice, penalties are applied to such persons on a discretionary basis and usually in the form of a fine.¹¹ Advice from Sri Lanka's Attorney General's Department to DFAT is that no returnee who left Sri Lanka unlawfully as a simple passenger has been given a custodial sentence for their breach of the IAEA. Fines are common for returnees, but the amounts vary depending on the circumstances of the case and can typically be paid by instalments.¹²
36. DFAT indicate that returnees will be processed by the Department of Immigration and Emigration, the State Intelligence Service (SIS) and the CID based at the airport who check travel documents and identity information of returnees against the immigration database and intelligence databases, as well as determining whether a returnee has any outstanding criminal matters.¹³ I am satisfied on the information before me that the applicant has no identification concerns and I am not satisfied the applicant is a person with a criminal or security record that would raise the concern of these authorities.
37. On return to Sri Lanka, I find the applicant would be charged and fined under the IAEA and then released. In the less likely event that the applicant elected to plead not guilty to the offence under the IAEA, he would either be granted bail on personal surety or have a family member act as guarantor.¹⁴ There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face any chance of imprisonment, but it is highly likely that he will be fined. As noted above, DFAT has assessed the risk of mistreatment for people suspected of an offence under the IAEA is low. While the applicant may be subjected to poor prison conditions during a short period of detention, the prison conditions to which the applicant may be subject do not of themselves constitute serious harm as defined by the Act. Further, I am not satisfied the applicant will face a real chance of serious harm during any brief time spent in detention. On the evidence before me, I find the imposition of any fine, surety or guarantee would not of itself constitute serious harm. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being levelled against low profile illegal departees with a profile such as the applicant. In the context of a significant number of Sri Lankan nationals being returned to Sri Lanka, and the absence of any profile that would elevate the penalty the applicant would face, I find there is not a real chance that the applicant would face imprisonment.

⁹ Ibid 5.32.

¹⁰ Ibid 5.13.

¹¹ Ibid 5.27.

¹² Ibid 5.33.

¹³ Ibid 5.19

¹⁴ Ibid 5.33.

38. I am also satisfied that the provisions and penalties of the IAEA are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process or penalty the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act. In light of this I find that the applicant does not face a real chance of serious harm from Sri Lankan authorities due to his illegal departure, travel to Australia or for any other reason.

39. After having regard to the applicant's claims individually and cumulatively, I find that he does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

40. 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

41. 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

42. 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.

43. I have concluded that the applicant is not of interest to the SLA, the CID, or any other group or persons due to his arrest in 2009 and/or his imputed links to the LTTE and does not face a real chance of serious harm on this basis. I have also concluded that the applicant does not face a real chance of harm in connection with his claim that his parents have been killed, his [sibling] kidnapped, or for any other reason including in connection with him being a returning asylum seeker. The Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear'.¹⁵ Accordingly, for the same reasons set out above, I find that the applicant does not have a real risk of suffering significant harm on return to Sri Lanka.

¹⁵ *MIAC v SZQRB* (2013) 210 FCR 505

44. The country information in the referred materials confirms that the trend of monitoring Tamil civilians in day-to day life has eased since 2009. Having considered the applicant's own circumstances and evidence discussed above I am not satisfied that the treatment the applicant may face amounts to significant harm as defined in the Act. I am not otherwise satisfied he faces a real risk of significant harm as a Tamil from the north.
45. I have accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally and may be detained for several hours at the airport and potentially detained on remand for a number of days pending bail. I am satisfied that the risk of torture or mistreatment for returnees, including for those suspected of offences under the IAEA, is low. On the country information, I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport.
46. I accept that returnees may be held for a short duration in prison while waiting to appear before a magistrate or while on remand awaiting bail. While I accept that that the applicant may be subjected to poor prison conditions during his detention, country information confirms this is due to overcrowding, poor sanitation and lack of resources. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, there is no intention to inflict pain or suffering, severe pain or suffering, or 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 by the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention.
47. While I accept the applicant may be subjected to questioning and may be required to pay a fine or provide a surety on return to Sri Lanka, I am not satisfied that this amounts to significant harm. I find that the questioning, imposition of a fine and the potential of being held in detention, individually or cumulatively not to amount to the death penalty, arbitrary deprivation of life, torture or that there is an intention to inflict pain or suffering, severe pain or suffering or cause extreme humiliation. I am not satisfied this amounts to significant harm as defined by the Act.
48. After having regard to the applicant's circumstances both individually and cumulatively, I find that he does not face a real risk of suffering significant harm.

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.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

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5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

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36 Protection visas – criteria provided for by this Act

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

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

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Protection obligations

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

Determining nationality

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