



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA17/02453

Date and time of decision: 12 December 2017 15:37:00

Radhika Kumar, 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. [In] October 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV) XE-790. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] April 2017.
2. The delegate accepted that the applicant was a Tamil who may have had an imputed political opinion in support of the (Liberation Tigers of Tamil Eelam) LTTE and that he departed Sri Lanka illegally and had sought asylum. He was not however, satisfied that there was a real chance or risk that the applicant would be subject to serious or significant harm on his return to Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The applicant provided a submission to the IAA on 28 April 2017 forwarded on his behalf by [a support agency]. In the submission, the applicant said that he was not able to provide written submissions stating the short timeframe for providing submissions were unreasonable and arbitrary and he was not able to complete the submission within this time. He also said he required the assistance of a lawyer to complete a submission and he could not afford to go to a private lawyer or access free legal assistance. The applicant stated that the delegate's decision was lengthy and written in English. He states he has not had this decision translated to him in his own language although he states that the delegate has made many findings that he had only just heard for the first time.
5. The IAA contacted the applicant on 28 April 2017 with a Tamil interpreter and advised him that if he required more time to prepare submissions and/or new information he may request an extension of time in writing. The applicant advised that he was not aware of the content of the submission sent on his behalf. It is of some concern that the submission was prepared on behalf of the applicant without his apparent awareness of the content. Nevertheless I have considered the arguments being made.
6. No further contact was made by the applicant seeking further time and no information has since been received from the applicant.
7. The delegate's decision is 12 pages. I note that the applicant was assisted in making his application and accompanying statement, however the applicant is not currently represented. I have had regard to interview recordings where the applicant appeared to be engaged with the process and provided clear and concise responses to the delegate's questions. At the interview the delegate put the applicant on notice regarding issues that were the subject of the decision.
8. The applicant's letter also states that he has concerns regarding the IAA process including that it is not fair or reasonable mainly because of the short deadlines in allowing him the proper opportunity to present his case, that as a matter of procedural fairness he needed a copy of all of the information before the IAA to properly answer his case, that the IAA's unreasonably short timeframes for lodging submissions coupled with the long delays in getting documents under Freedom of Information (FOI) impacted upon his ability to properly present his case,

that as the IAA only allows new information only in exceptional circumstances it was potentially missing country information which was relevant to his case and was not a proper review of his case and also requested that he be afforded an oral hearing.

9. The IAA contacted the applicant on 28 April 2017 and advised him that the IAA can assist by providing some of the department material administratively, outside of FOI, namely the SHEV application and supporting documents, the decision record and refusal notification, and both the arrival and protection visa interview recordings. The applicant said that he understood and would pass this on to whoever he gets to assist him. The IAA offered to send these documents to the applicant by email so that he and whoever assists him had access to it. The applicant said he understood but would request this later if he needs to. No request was received regarding release of these materials.
10. The submission requests an oral hearing to present his claims in person. The applicant has, in my view, had an opportunity to present his claims and to have his claims tested in his interview conducted by the delegate and taking all of the circumstances into account, I am not satisfied the circumstances of this case warrant inviting the applicant to give new information whether by interview or otherwise.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:

- He is a Catholic Tamil born in the North Western Province.
- His father was a fisherman.
- He has been mistreated by the Sri Lankan authorities because he is a Tamil man.
- In 2001 he moved to Negombo. Since that time he pretended to be Sinhalese to avoid harassment. He did not tell people he was Sinhalese but spoke Sinhalese so that people assumed that he was Sinhalese.
- In [2011] he was [in] Colombo with his children when a van approached them and [a number of] police rounded up the men who were Tamil. He was rounded up and his children who were [age range] years old were left [behind]. He was taken to police cells and beaten. He had scars from when he was young and the police assumed that these scars meant he was a member of the LTTE. His wife engaged a lawyer who secured his release from the police.
- At the start of 2012 he was taken by the police again in Negombo who accused him of being LTTE. They took him with other Tamils to the police station and put them in chains. They beat him for [a number of days].
- He was released and became fearful for his life and went into hiding. He slept [in a separate location] at night time. He hid for approximately ten months. During this time he met a man named D who said that he could send him to Australia.
- In 2013 when he was in [an Australian detention centre] a man named R who was Sinhalese and on the same boat at him got deported back to Sri Lanka. R falsely told D that he had told people in Australia that D collected money and brought people to Australia.

- After this D threatened his wife and family in Sri Lanka. His wife told him that D was arrested and then released and D believes that this happened to him because of the applicant.
- His cousin S told him that R also told S that he had told the Criminal Investigation department (CID) that the applicant was the person that collected the money for people going illegally by boat to Australia and said that to escape persecution by the CID for leaving Sri Lanka illegally.
- Since this time his family has received multiple threats. They do not know whether the threats are from the CID or from D.
- After 2005 his family were living with a [church official's relative] who is Sinhalese and as she was related to the [church official] they were afforded protection. After the 2012 incident he does not feel safe and contacting his family when there are other people around and will only speak to them when they are alone.
- He cannot return to Sri Lanka as he will be persecuted by the Sri Lankan authorities including the CID. He fears that they will torture him and even kill him because he is a Tamil man. He is also fearful that the Sri Lankan authorities will think that he is a people smuggler because of what R said and arrest him when he returns.
- He is also fearful of D and he is sure that D will kill him. His wife is constantly telling him that people are still coming to his home threatening his life if he returns.
- His wife also told him about a Tamil man from his area being taken from his home by the CID.

Refugee assessment

12. 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

13. 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.
14. The applicant has consistently claimed to be a national of Sri Lanka and has provided documentary evidence of this. I accept that the applicant is a citizen of Sri Lanka and that Sri Lanka is the receiving country.
 15. I have significant concerns regarding the credibility of the applicant's claims and evidence. The applicant has provided differing stories at his arrival interview, in his statutory declaration and SHEV interview which makes me question the real version of events. I accept that the arrival interview may not be a complete record of the reasons that a person left their home country however I am concerned at the gravity of the inconsistencies which I will discuss below.
 16. In his statutory declaration, the applicant said that in 2001 he moved to Negombo and since that time he pretended to be Sinhalese to avoid harassment. At his SHEV interview the applicant was asked whether he could speak Sinhalese and he said not very well but to some extent he could speak it. When he was asked what language he spoke when he met people in the community outside his home he said the he spoke mostly Tamil but to some of them he showed himself as Sinhalese. Then when asked whether the local community knew him as Tamil he responded that they did not know him as Tamil, they knew him as Christian and they thought that all Christians in that area were Sinhalese. In his statutory declaration the applicant said that he did not tell people he was Sinhalese but spoke Sinhalese so that people assumed that he was Sinhalese. The applicant's evidence is confusing. He has said that he spoke Sinhalese to avoid harassment and so people assumed he was Sinhalese however, if he could not speak Sinhalese very well as he said in his SHEV interview then I find it difficult to believe that anyone, whether they were Tamil or Sinhalese would have believed that he was Sinhalese. Further he initially stated that he spoke mostly Tamil to people he met in the community but then says that the local community did not know he was Tamil and that they believed he was Sinhalese because he was a Christian. The applicant's Register of Births has his father and mother listed as Sri Lankan Tamils and the applicant's marriage certificate also lists him and his wife as being Tamil. On the evidence before me I am not satisfied that the applicant spoke Sinhalese to avoid harassment or that he ever convinced anyone that he was Sinhalese. I am unclear why the applicant went into considerable detail regarding this aspect of his claims when in his statutory declaration he said that he is a Catholic Tamil born in the North Western Province and he had been mistreated by the Sri Lankan authorities because he is a Tamil man. His illogical and conflicting evidence regarding this makes me doubt whether the applicant is telling the truth regarding other aspects of his protection claims.
 17. The next concern I have relates to the applicant's claims in his statutory declaration where he states that in [2011] he was [in] Colombo with his children when [a number of] police in a van rounded up the men who Tamil including him. He was taken to police cells and beaten and he had scars from when he was young and the police assumed that these scars meant he was a member of the LTTE. He claimed that the police injured [a part of his body] and Australian doctors have confirmed that it is an extremely bad injury. In this instance his wife engaged a lawyer who secured his release from the police. He claimed that at the start of 2012 he was again taken by the police again in Negombo and accused of being LTTE. He was beaten and kept for [a number of] nights.
 18. The first issue that I have regarding these events relates to his arrival interview in which he states that he was detained in 2001 on suspicion of being LTTE for [a number of] hours and released with no charges. He was then detained in 2002 by police from [Town 1] on suspicion

of being a LTTE member and detained for [a number of] days then released with no charges being laid. The applicant was asked to clarify this at his SHEV interview and asked when the police took him away and he responded 2011 and [2012] then he went into hiding for ten months and mostly slept [in another location]. He said that he was arrested on suspicion for being a LTTE member and the first time his wife engaged a lawyer who secured his release. He said that he was also caught by the police in 2012 and detained for [a time] when the lawyer again secured his release. When asked why he said the years were 2001 and 2002 in his arrival interview the applicant said that he mixed up the dates and he reversed it. However, in his arrival interview the immigration officer asked the applicant when he was arrested he said ten years ago and did not mention a date. The officer asked whether he recalled the date and the applicant said that he did not remember the date but it was ten years ago. I accept that the applicant may have been stressed during the time of his arrival interview however he is claiming in his statutory declaration that he left Sri Lanka in 2012 as a result of being detained and harmed by the Sri Lankan police that same year and the year prior which is drastically different to the events having occurred ten years before he left Sri Lanka. It is hard to accept that the applicant would be mistaken about the significant issue of when he was detained being either just prior to his departure from Sri Lanka or a decade prior.

19. In considering the applicant's claim regarding his detention by the SLP I have had regard to a receipt of arrest that the applicant provided to the DIBP. The receipt of arrest states that the applicant was arrested on [a date in] 2011 and held for [a number of] days at [a police station] under detention orders and after investigation released on bail ordering him to appear before the [police station] every [particular day of the week]. This document is inconsistent with the applicant's evidence. Firstly the document states that the applicant was arrested and held for [particular number of] days in 2011 when the applicant gave evidence at his arrival interview that the first time he was arrested it was for [a number of] hours in 2001 and released without charge and the second time he was detained for [a smaller amount of] days in 2002 at [Town 1] and released without charge. At his SHEV interview he said that he was arrested in 2011 for a maximum of [a smaller amount of] days in Colombo and [a similarly short duration] in 2012 in Negombo. The applicant made no mention that he had to report to any police station and said that he did not have to go to court. None of this evidence is consistent with any aspect of the receipt of arrest provided by the applicant. Combined with my general credibility concerns regarding the applicant and the inconsistent evidence provided in the receipt of arrest, I am not satisfied that it is a genuine document and I do not place any weight on it.
20. I also do not accept that the applicant would have been suspected of being part of the LTTE. In his SHEV interview when asked whether he or any members of his family had any contact with the LTTE he said no. He has not claimed to have ever supported the LTTE or been a member with the LTTE. Although country information indicates and I accept that that during the time of the conflict, many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces and the previous Rajapaksa Government during the conflict and while this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity¹ the applicant has claimed that in either 2001 or 2011 he was taken by police in Colombo and again in 2002 or 2012 in Negombo which are both situated in the Western Province of Sri Lanka and this is not consistent with country information. The applicant also did not make any mention of the LTTE at his arrival interview with the reason he gave for leaving Sri Lanka being that he could not find a job and secondly being a Tamil. The applicant claimed that he was beaten so badly by the police that he sustained serious injuries to [a particular area] which have been confirmed

¹ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.8

by the Australian government however I do not have any other evidence before me of these injuries and given my general credibility concerns regarding the applicant, I do not accept that any injuries that he may have to [a specific area of his body] were caused by Sri Lankan authorities.

21. The applicant has said that he had scars and that the police assumed that these scars meant that he was a member of the LTTE. At his SHEV interview he said that he had some minor wounds and that he had some scars. As I have not accepted that the applicant was detained by Sri Lankan authorities at any time, I also do not accept that because of his claimed minor scarring he would have been suspected of being LTTE.
22. The applicant responded to questions posed to him regarding the reasons he left Sri Lanka and being detained by the Sri Lankan police at his SHEV interview inconsistently and ambiguously. I do not accept that the applicant would have mistaken the dates of when he claims he was detained by the Sri Lankan police by a decade and his response at his SHEV interview has not satisfied me that he is a witness of truth in this regard. I do not accept that the applicant was detained by the Sri Lankan police in either 2001, 2002, 2011 or 2012. I do not accept that the applicant was ever detained by any Sri Lankan authority including the CID, SLA or SLP. For the same reason that I have given above, I do not accept that the applicant became fearful for his life and went into hiding for ten months and during this time he slept [in another location].
23. Regarding D, I am prepared to accept that the applicant knew D who said that he could send him to Australia and also met R in 2013 when he was in [an Australian detention centre] who was deported back to Sri Lanka. The applicant has not described his relationship with R in any details and I find it far-fetched and improbable that R falsely told D that the applicant had told people in Australia that D collected money and brought people to Australia. I cannot see any reason why R would make these allegations against the applicant and I do not accept these aspects of his claims.
24. Also for these reasons I do not accept that D threatened the applicant's wife and family in Sri Lanka or that the applicant's wife told him that D was arrested and then released and D believes that this happened to him because of the applicant. I do not accept that S told him that R also told S that he had told the CID that the applicant was the person that collected the money for people going illegally by boat to Australia and said that to escape persecution by the CID for leaving Sri Lanka illegally. I do not accept that since this time his family has received multiple threats whether from CID or from D or anyone. I accept that when the applicant spoke to his wife she told him about a Tamil man from his area were being taken by the CID though this information is consistent with country information, general and does not have any bearing on the applicant's personal circumstances. There is no evidence before me to suggest that the applicant was involved in people smuggling activities and I do not accept the Sri Lankan authorities will think that he is a people smuggler.
25. Considering the applicant's claims and evidence in their totality, I am not convinced that the applicant is credible or a witness of truth and I find that the applicant has fabricated the bulk of his evidence to enhance his protection claims. Nevertheless, I accept that the applicant is an ethnic Tamil. DFAT reports that since the applicant departed Sri Lanka and the change in Government in Sri Lanka, the situation has improved markedly for Tamils. DFAT has recently reported that that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. DFAT assesses that although there continue to be some reports of individuals being monitored, monitoring and harassment of Tamils in day to

day life has decreased under the current government.² DFAT reports that Tamils may face practical language barriers in communicating with government or security officials, but does not identify that Tamils experience discrimination, other than possible societal discrimination which can exist between ethnic groups, although the nature of this discrimination or the groups are not identified.³ Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. According to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of those individuals that have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals that the Sri Lankan security services consider to be of interest, including due to separatist or criminal activities.⁴ DFAT assesses that the LTTE no longer exists as an organised force in Sri Lanka. Any former LTTE members within Sri Lanka would have only minimal capacity to exert influence on Sri Lankans, including those returning from abroad.⁵ The most recent DFAT report supports the finding that a person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidences past membership or connection to the LTTE unless they have or are perceived to have a significant role in relation to post conflict Tamil separatism or appear on a 'stop' list at the airport.

26. On the evidence before me, I accept that during the conflict and shortly after, the applicant suffered harassment and discrimination on the basis of his Tamil ethnicity. Aside from during this time, I am not satisfied that the applicant was singled out or targeted on this basis. I am not satisfied there was any interest in the applicant by the Sri Lankan authorities including the CID or the SLP. The applicant did not support the LTTE nor did any of his family members support the LTTE. He said that he did not receive any military training. I accept he may have some visible scarring but do not accept that this has given, or will give rise to any adverse attention. Looking at the evidence together, I am not satisfied that the applicant would be imputed to hold pro-LTTE opinions, or be suspected of ever having been involved with the LTTE himself. I am not satisfied that he is on a 'stop' list at the airport. I am satisfied that the applicant does not face a real chance of harm from any Sri Lankan authority including the CID, SLA or the SLP on the basis of being a Tamil male from the North Western province with scarring or suspicion of involvement with the LTTE now or in the reasonably foreseeable future.

Fear of harm as a returning asylum seeker and having departed Sri Lanka illegally

27. I accept that the applicant left Sri Lanka illegally in September 2012. DFAT advises that a returnee such as the applicant will be processed at the airport by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the Sri Lankan CID who check for identity and any outstanding criminal matters.⁶
28. In his SHEV application he stated that he had never been charged, convicted or wanted for an offence in Sri Lanka. The IAA received a document purporting to be a receipt of arrest which for the reasons outlined above I do not consider a genuine document. I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the concern of the authorities. I am satisfied that he will not be at risk of harm during, or as a consequence

² DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.47

³ Ibid., 3.4, 3.7

⁴ Ibid., 3.29

⁵ Ibid., 3.31

⁶ Ibid., 5.19-5.20

of this routine investigation. Nor would his profile raise suspicion about him, in my view, that would result in a real chance of him being followed up later.

29. Information in the DFAT report notes that after processing at the airport, persons who departed illegally are charged under the Sri Lanka's Immigrants and Emigrants Act (I&E Act), fingerprinted and photographed, and then transported to the closest Magistrate's Court at the first available opportunity once investigations are completed, at which point responsibility shifts to court or prison services.⁷ Because he departed illegally the applicant may be arrested and charged under the I&E Act. When brought before a court, a person who pleads guilty will most likely be fined and discharged. While penalties can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees (SLR), DFAT advises that no returnee who was merely a passenger on a people smuggling venture has ever been given a custodial sentence for departing Sri Lanka illegally. Fines are imposed on a discretionary basis, are generally between 5 and 50 thousand SLR, and may be paid by instalment. As I have found he was not involved in organising or facilitating people smuggling and would not be perceived as having such involvement, I find that there is no real chance that the applicant will be given a custodial sentence.
30. Based on DFAT's advice I find that if the applicant were to plead not guilty, he would either be immediately granted bail on personal surety, or he might have to wait to be collected by a family member if required to have a family member act as guarantor. DFAT advises that if bailed is granted there are rarely any conditions. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to police or police stations between hearings. I am not satisfied that the imposition of any fine, surety or guarantee would of itself constitute serious harm. As DFAT advises that there are usually no reporting requirements attached to the grant of bail, I do not consider that the applicant would be required to report regularly to local police in his village. In the absence of any information provided by the applicant to detail the reasons why he would be unable to post bail, I am not satisfied that he would not be able to do so.
31. On the basis of DFAT's advice, I accept that on return the applicant may be detained for a short period during investigation and while waiting to be taken before a court. I am not satisfied that brief period of detention, even taking the conditions of detention into account, rise to the level of a threat to life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm in this case. I also consider that the totality of the treatment that the applicant is likely to experience on return, including being questioned and detained at the airport, then potentially being detained on remand for up to several days in overcrowded and unsanitary conditions, and having to pay a fine, does not amount to serious harm.
32. Further, I find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution. In this case, the evidence does not suggest that the I&E Act is electively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be pursuant to a non-discriminatory law of general application and does not amount to persecution within the meaning of s.5J(4). I am not satisfied that it involves systematic and discriminatory conduct.

⁷ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.21

33. I have considered the evidence before me and while there are reports of failed asylum seekers returning to Sri Lanka being detained on arrival at the airport or after returning to their villages, and then being mistreated and subjected to torture particularly if they are detained for prolonged periods, the country information, considered as a whole, indicates that the key risk factor is whether the returnee is a Tamil has actual or perceived links to the LTTE.⁸ DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce, including for those suspected of offences under the I&E Act.⁹
34. I am not satisfied on the evidence before me that merely being an asylum seeker, Tamil asylum seeker or having departed Sri Lanka illegally is enough to give rise to a real chance of harm on return. I am also not satisfied that the applicant, a Tamil asylum seeker with his history and attributes, faces a real chance of any harm on that basis.
35. Having regard to the totality of the material before me, I find that the applicant does not face a real chance of persecution on returning to Sri Lanka.

Refugee: conclusion

36. 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

37. 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

38. 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.
39. I have found that the applicant does not face a real chance of harm as a result of being a Tamil male asylum seeker from the North Western province with scarring or as a consequence of his dealings with R and D. I have considered whether the applicant would face significant harm for these reasons and as 'real chance' and 'real risk' have been found to equate to the same threshold, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

⁸ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.21

⁹ Ibid.

40. I have accepted that the applicant will be detained at the airport for questioning and security and character checks as a result of his illegal departure. He may be charged with an offence under the I&E Act because he departed Sri Lanka illegally and fined. He may be remanded in custody for a short period either at the airport or at a prison, while waiting to be brought before a magistrate who will most likely quickly grant bail. I do not accept that there are any particular aspects of the applicant's profile that would result in his being detained for a longer period or subjected to more intensive interrogation that might give rise to significant harm. I am not satisfied that there is a real risk that the applicant will be subject to the death penalty or that he will be arbitrarily deprived of his life, or suffer torture. I do not accept that the process and penalties outlined above amounts to significant harm, or that the applicant would be exposed to significant harm during this process. I am not satisfied that there is an intention to inflict pain or suffering, severe pain or suffering or cause extreme humiliation. I am not satisfied that there is a real risk that the applicant will face torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment.
41. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to a receiving country, namely Sri Lanka, there is a real risk he will suffer significant harm. Accordingly, I find that the applicant does not satisfy the requirements of s.36(2)(aa) of the Act.

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.

...

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.