



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02456

Date and time of decision: 2 November 2017 19:07:00
Joanne Jennings, 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 [City 1], Sri Lanka. [In] September 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He was subject to ongoing extortion by the authorities in Sri Lanka and fears he will be similarly harmed on return. He also fears harm from the authorities because of his Tamil ethnicity.
2. [In] April 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in 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. On 26 May 2017 the IAA received a submission from the applicant comprising a statement, extracts of country information and a number of links to websites. In his statement the applicant reiterated his claims regarding extortion in Sri Lanka and his fears of harm as a Tamil. This information was before the Minister and is not new information.
5. In his statement the applicant also referred to heightened activity due to the Liberation Tigers of Tamil Eelam (LTTE) reforming and racial tensions due to the actions of Sinhalese racist elements. This information and the extracts of country information and websites links, was not before the Minister and is new information. The IAA notified the applicant by letter dated 5 June 2017 that the IAA can only consider new information in limited circumstances and that if he wanted to provide new information he must provide an explanation as to why the information could not have been given to the Department before the decision was made or why it is credible personal information which was not previously known and may have affected consideration of his claims. The applicant has not responded in this regard and there is no information before me to explain why the information cited by the applicant could not have been made available to the Minister or that it contains credible personal information. I am not satisfied that the country information cited contains credible personal information, nor has the applicant satisfied me it could not have been provided before the delegate's decision was made. Furthermore, I am not satisfied that any exceptional circumstances exist that justify the IAA considering the new information.
6. The IAA received a further submission from the applicant on 21 June 2017 containing two letters and English translations. Both letters are dated 16 June 2017 and refer to the applicant's situation and experiences in Sri Lanka, and on that basis could be considered to contain credible personal information. These documents post-date the delegate's decision and on that basis could not have been provided to the Minister. While I accept the documents themselves were not in existence at the time of the delegate's decision, I note the information contained in each of these documents refers to events in the past. Each of the documents appears to have been sought by the applicant in support of his claims. There is no reason to believe that the applicant could not have sought letters of support earlier. The applicant was put on notice by the delegate notice of the limitations of providing further material after a

decision had been made. I am not satisfied that there are exceptional circumstances that justify the IAA taking into consideration the new information and I have not had regard to it.

Applicant's claims for protection

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

- The applicant is a Tamil from [City 1], Eastern Province, Sri Lanka.
- The applicant's father disappeared in 1984 and is presumed dead. The applicant does not know what happened to his father but he is aware that around this time the army was active in the area and murdered Tamils.
- The applicant's brother was detained and imprisoned from 1986 to 1989. The applicant has provided documents and English language translations from the Minister of Internal Security and the Army Detention Camp Boosa relating to his brother's detention under the Prevention of Terrorism Act (PTA).
- The applicant's mother was killed in an army atrocity in 1990. As her body was not recovered there was no funeral and the applicant is sad about this. The applicant has provided a copy of her death certificate and reports of the massacre in which she was killed.
- The applicant's brother-in-law was killed by the army while living in a temporary refugee camp in 1992/1993.
- The LTTE was active in the [City 1] area and the security authorities harassed and mistreated the general Tamil population with impunity. The applicant provided a number of reports of incidents of mistreatment of Tamils during the civil war and in Joseph camp between 2009 and 2014. The applicant was held with other Tamils on a number of occasions in round up exercises conducted by the authorities.
- The applicant had a [stall] at the local market. His stall was destroyed in the 2004 tsunami and he did not receive any government compensation to assist with the repairs, although his aunt was provided some food rations.
- In 2008 the applicant was stopped with others in a round up exercise and taken by the army to a military camp with a number of other Tamil men, mostly youths. He was questioned in the camp about any LTTE links and shown pictures of people and asked to identify any LTTE members. He was beaten and kicked while detained. He was asked to bring Tamil girls to the camp. The applicant was asked to sign a confession written in the Sinhala language. The applicant refused to sign the confession and was assaulted as a consequence. A Muslim person in the camp acted as interpreter during the questioning. This person was known to the applicant from the market and he confirmed with the authorities that the applicant was a stall holder and not linked to the LTTE. The applicant was released the next day. The applicant heard that the other Tamils taken at the same time as him were not released.
- The applicant took a few days to recover from his injuries and his assistant managed his stall in his absence. The Criminal Investigation Department (CID) visited the market during his absence and asked about the applicant's whereabouts. After the applicant had returned to work at his stall the CID visited again and threatened that they could detain the applicant again if he did not make regular payments to them. The CID demanded regular payment of [amount] rupees per month. The applicant told them he could not meet such a high payment and agreed to pay a lesser amount. From this time

the CID visited weekly and collected money from the applicant. As a result of the extortion payments the applicant had little money left over but he was concerned for his safety if he did not continue to operate his stall and make the payments. These payments continued until 2013 when the applicant decided to leave Sri Lanka. The police and paramilitary groups also took items from his stall and refused to pay.

- The applicant left Sri Lanka illegally in March 2013. Because he left illegally and claimed asylum the authorities will suspect he was involved with the LTTE. His siblings may not have faced any abuse from the authorities because they are married.
- After the applicant's departure the CID visited the applicant's assistant at the stall and his assistant has since closed the stall.
- The military and paramilitary groups continue to be active in Sri Lanka and threaten and extort Tamils. Victims of the threats and extortion are too frightened to report these incidents and no one knows what is happening in Sri Lanka. Military camps are expanding and the military continue to occupy and administer the Eastern Province. There is crime and the military are involved in drug dealing in Tamil areas.
- The applicant's fear extends to all of Sri Lanka and he cannot obtain protection from the authorities. The applicant provided a copy of the February 2017 report released by the Office of the UN High Commissioner for Human Rights on Sri Lanka which assess the progress made with the implementation of the Human Rights Council resolution promoting reconciliation, accountability and human rights.

Refugee assessment

8. 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

9. 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.

10. The applicant has consistently claimed to be a Tamil from the Eastern Province and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
11. The applicant's account of the deaths of his parents and his brother-in-law is consistent with country information that reports large numbers of Tamil civilian deaths by the army during the Sri Lankan civil war¹. The detention of the applicant's brother is also consistent with reports of the detention of many young Tamil men under the provisions of the PTA². Although the delegate accepted the claim that the applicant's brother was detained until 1989, in the SHEV interview she noted that the detention documents date from 1987 only and refer to detention for three months only. I note that the document from the Minister of Internal Security refers to extending the order of custody for a further three months and this is consistent with the provisions of the PTA under which detainees could be held without charge for periods of three months before review of their detention was required³. Noting country information that reports extended periods of detention of Tamils in Boosa prison under the PTA⁴, I accept that the applicant's brother was detained from 1986 to 1989 under the PTA. However I note that he was released and there is no indication he was prosecuted for security offences and he was able to return to his home and resume his work fishing and has not come to further attention in the ensuing years. The applicant was only a young child at this time and there is no indication he has come to attention, or any harm, because of the past suspicions of the authorities about his brother.
12. I accept that as a Tamil the applicant may have concerns for his safety on return to Sri Lanka and he referred to reports of human rights abuses of Tamils. I accept that he lost both parents at a young age and that this may add to his fear and concerns. I accept that he was rounded up by the army on occasions during the civil war and detained and questioned in 2008 and beaten and kicked while detained. I accept that his experience during the civil war has added to his subjective fear, however I find that the objective evidence does not support his fear as being well-founded. Throughout the war the Tamil population was subject to scrutiny, monitoring, harassment and ongoing checks for links with the LTTE and it was in this environment that the applicant's parents were killed and his brother detained and the applicant was held with other Tamils on a number of occasions in round up exercises, and taken by the army to a military camp with a number of other Tamil men where he was questioned and physically assaulted. I note his contention that his siblings may not have been subject to such attention because they were married and therefore not suspected by the authorities. However I am not satisfied that this treatment points to the authorities having an adverse interest in the applicant beyond him being a Tamil male; rather I find it is indicative of the general monitoring of the population, particularly young Tamil men, at the time. However, there has been a significant change in the country circumstances since the end of the war and the defeat of the repressive Rajapaksa government in 2015⁵. The election of the Sirisena government in 2015 has led to greater political cooperation and the new government has adopted a more proactive approach to human rights and reconciliation and has been engaging constructively with the Tamil political parties.

¹ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

² ibid

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

⁴ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁵ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320;

13. The Emergency Regulations that provided the security authorities broad powers to arrest and detain suspects have been lifted. Although the Prevention of Terrorism Act remains in force, and there remain credible reports of ongoing arrests and disappearances in Sri Lanka, I note that the Department of Foreign Affairs and Trade (DFAT)⁶ reports the improvement in the security situation has resulted in a decrease in Tamils held in detention. The monitoring of Tamils from the former LTTE areas has decreased and Landinfo reports that compulsory registration of the general Tamil population eased from 2012 after the Attorney General ordered the termination of registration procedures following a petition to the Supreme Court by the Tamil National Alliance⁷. The monitoring and harassment of Tamils has decreased under the Sirisena government which has taken steps to remove checkpoints.⁸
14. I note the applicant's concern about the military presence and administration in the Eastern Province and while the military maintains a strong presence in the east of the country the armed forces personnel are generally restricted to their barracks. The Sri Lankan police are now responsible for civil affairs across Sri Lanka and military governors in the Northern and Eastern Provinces have been replaced with civilians. Some of the land held by the military since the war has been returned to its former owners⁹. Overall the Sirisena government has taken steps to curb the excesses of military power exercised under the authoritarian Rajapaksa government and DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly. I have had regard to an article submitted by the applicant reporting the deployment of Intelligence Officers in [City 1] in August 2015, however I note that the report indicates the increased deployment occurred at the time of the Sri Lankan elections, and while the local population expressed their concerns and reported being monitored as they went about their business, there is no indication that any abuse of the civilian population occurred as a result of this presence.
15. The Office of the UN High Commissioner for Human Rights on Sri Lanka (OHCHR) report provided by the applicant notes that the government has openly and regularly engaged with the OHCHR. While indicating that there is more work for the government to do and expressing concern about slow progress in some areas, such as land restitution and the repeal of the PTA, the OHCHR welcomes progress in a number of areas, including national consultations on reconciliation mechanisms and legislation to establish an Office of Missing Persons.
16. I accept that there continue to be reports of arbitrary detention and harm perpetrated by the security forces in Sri Lanka, particularly of Tamils. The Freedom From Torture report¹⁰ builds on the data and analysis provided in that organisation's 2015 report, "Tainted Peace: Torture in Sri Lanka since May 2009", which highlighted that the majority of the 148 people in that study had described an association with the LTTE. Similarly the International Truth and Justice Project report noted that human rights violations by the security forces continue with impunity and Tamils with tenuous links to the LTTE or low-level cadres continue to be targeted, along with their families¹¹. Reporting in 2016 the UK Home Office noted that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The UK Home Office reported the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism,

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁷ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

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

⁹ *ibid*

¹⁰ Freedom From Torture, "Sri Lanka – Update on torture since 2009," 6 May 2016, CIS38A8012881

¹¹ International Truth and Justice Project, "Silenced: survivors of torture and sexual violence in 2015", CIS38A801275

journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a “stop” list of those against whom there is an extant court order or arrest warrant¹². Considered overall I find that the country information does not support a finding that the applicant would be harmed on return to Sri Lanka for reason of being a Tamil from the Eastern Province. The applicant does not have a real or imputed LTTE profile and has not been involved in Tamil separatist activities.

17. I accept that the applicant operated a [stall] in [City 1] and from 2008 he was subject to regular extortion demands from the CID and that the police and paramilitary groups pilfered goods from his stall. I accept that the CID came to his stall on one occasion after his departure from Sri Lanka and that his assistant closed the stall shortly after. From the applicant’s account many other market stall holders were extorted in a similar manner, although they did not talk openly about their experiences because they were warned to keep silent. An article dating from June 2012 submitted by the applicant reports that resettled Tamil families were coerced to sell their fish to paramilitary groups at significantly low rates, and a further article from July 2011 reports extortion of traders. At his SHEV interview the delegate put to the applicant that while extortion was a problem during the period cited by the applicant, recent reporting does not support a finding that it is a wide-spread problem currently in Sri Lanka. The applicant responded that people cannot report these incidents to the police because of fear of reprisals and no one knows what is truly happening in Sri Lanka. I accept that Tamils have in the past had concerns about engaging with the authorities; however I place significant weight on the improved security situation. I note the applicant’s comments about the ongoing presence of paramilitary groups but the indications are that the paramilitary groups have renounced their paramilitary activities although DFAT noted in 2015 credible reports that these groups continue to be active in criminal activity¹³. Country information indicates that the police are pursuing criminals from the disbanded Karuna group and other criminal groups involved in extortion¹⁴ and pursuing prosecution of crimes of extortion and related threats and kidnappings; Vavuniya police arrested two armed gangs involved in abductions and ransoms¹⁵.
18. I note the report from 2013 that extortion of businessmen in Sri Lanka had become a serious problem¹⁶ and the DFAT reference in 2015 to paramilitary group criminal activity. However recent country information does not point to widespread extortion of businessmen, and the recent DFAT report published in 2017 does not report any criminal activity by paramilitary groups¹⁷. I place significant weight on the fact the information provided by the applicant in support of his claimed fear of ongoing extortion dates from 2012 or earlier. The information before me does not support a finding that the applicant’s fear of ongoing extortion by the authorities and paramilitary groups is well-founded. Should the applicant recommence a [stall] or similar business on return, considering the curbing of the excesses of military power and the weakening of the paramilitary groups and their renunciation of paramilitary activities, and the prosecution members for crimes I find there is not a real chance that the applicant would suffer harm on return to Sri Lanka as a business operator.

¹² UK Home Office, “Sri Lanka: Tamil separatism. Version 2.0”, 19 May 2016, OGD7C848D17

¹³ DFAT, “DFAT Country Information Report – Sri Lanka”, 18 December 2015, CISEC96CF14143

¹⁴ Sri Lanka Watch, “2 Extortion Gangs arrested”, 26 May 2016, CX6A26A6E4621; adaderana.lk (Ada Derana), “Police hunt kidnappers of Vavuniya businessman’s son”, 11 June 2015 CXBD6A0DE18346

¹⁵ Sri Lanka Watch, “2 Extortion Gangs arrested”, 26 May 2016, CX6A26A6E4621

¹⁶ Colombo Telegraph, “Wide Spread Incidents Of Extortion Taking Place Throughout The Country – LfD”, 20 July 2013, CXC28129415103

¹⁷ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105

19. I accept that the applicant's stall was destroyed in the tsunami and I accept as plausible that he did not receive any compensation to assist with the repairs to this. However I am not satisfied that this points to the applicant experiencing serious harm, or that he would experience serious harm on return. I note that his aunt was provided food rations, indicating that the authorities provided assistance in the form of basic sustenance. He has not claimed any fears of future harm in this regard and there is no indication that on return to Sri Lanka he would experience threat to his life or liberty, or physical harassment or ill treatment, or significant economic hardship, denial of access to basic services or the capacity to earn a livelihood that threatens his capacity to subsist, or other form of harm that may be considered serious harm.
20. The applicant is concerned about crime in Sri Lanka, including drug dealing. DFAT reports that crime rates vary across Sri Lanka, but are highest in Colombo District and the Western Northern Provinces, and that rates of serious crimes have either remained steady or increased slightly. Substance abuse has reportedly risen in the Northern Province and high unemployment, especially amongst the youth population, has contributed to the increase in substance abuse in general¹⁸. I accept that crime and drug dealing are present in Sri Lankan society and I cannot entirely discount that the applicant may be the victim of a crime, however I find that the chance in this regard to be remote. The information before me does not support a finding that there is a real chance the applicant would face harm in Sri Lanka on this basis.
21. I accept that the applicant departed Sri Lanka illegally and has claimed asylum. Penalties for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 2,000). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine¹⁹.
22. For returnees travelling on temporary travel documents, such as the applicant would, an investigative process to confirm identity is conducted on arrival and may take several hours to complete. As involuntary returnees are processed en masse further delays may occur until all returnees are processed. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport²⁰.
23. As a returnee, I accept that the applicant may be questioned by police at the airport and charged under the Immigrants and Emigrants Act 1949 (I&E Act). As part of this process, most returnees will be fingerprinted and photographed, then transported to the nearest Magistrates Court at the first available opportunity. However, returnees may be required to remain in police custody at the CID Airport Office for up to 24 hours if a Magistrate is not available before this time, such as a weekend or public holiday, and may be held at a nearby prison²¹. The applicant may be detained in crowded and unsanitary conditions while on remand. The evidence before me is that this treatment arises from the application of Sri Lankan law and that the prison conditions in Sri Lanka are poor due to gross overcrowding and poor sanitary conditions.²²
24. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis and payable by instalment if the returnee faces difficulty with payment.

¹⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

¹⁹ *ibid*

²⁰ *ibid*

²¹ *ibid*

²² US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

25. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, although DFAT understands that conditions are rarely applied, and a person will only need to return to court when the case against them is being heard. DFAT assesses that ordinary passengers, such as the applicant, are generally viewed as victims²³.
26. The applicant was only a passenger on the boat. Based on country information I find that the applicant may be detained and questioned at the airport for up to 24 hours, be fined for breaching the I&E Act and, may face a period of time held in prison.
27. The High Court endorsed in *MIBP v WZAPN*²⁴, that whether a risk of loss of liberty constitutes serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied the applicant would face only a brief period in detention. Even having regard to general poor prison conditions, I do not consider that a brief period in detention would constitute the necessary level of threat to his life or liberty, or to significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.
28. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm under s.5J(5) of the Act.
29. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the I&E Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
30. There is no indication on the evidence before me that the applicant's status as a failed asylum seeker would bring him to adverse attention on return to Sri Lanka or that he would be suspected of being linked to the LTTE, or otherwise be considered a security concern, because of his illegal departure from Sri Lanka. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of LTTE links, but I do not accept the applicant has such a profile or would be perceived as such. DFAT reports that it is not aware of specific monitoring of returned asylum seekers on the basis of their profile as failed asylum seekers²⁵.
31. I have considered whether on the basis of his ethnicity, being a businessman, his links to his brother who was detained under the PTA, together with his illegal departure from Sri Lanka and asylum claim, if the applicant would face harm and I am satisfied that there is not a real chance he would experience harm in the foreseeable future in Sri Lanka.

²³ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

²⁴ *MIBP v WZAPN*; *WZARV v MIBP* (2015) 254 CLR 610

²⁵ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

Refugee: conclusion

32. 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

33. 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

34. 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.

35. I have noted the applicant's claims about the lack of compensation to assist with repairing his stall after the tsunami and I have not accepted that this would give rise to a real chance of serious harm on return to Sri Lanka. Similarly I am not satisfied that there is a real risk of significant harm to the applicant on this basis. There is no indication he would face deprivation of life, the death penalty, nor am I satisfied he will be subject to cruel, inhuman or degrading treatment or punishment as defined.

36. I have found that there is not a real chance that the applicant faces harm on the basis of being a Tamil businessman and asylum seeker from the Eastern Province whose brother was detained under the PTA in the past and who was held in round ups and detained, questioned and mistreated during the civil war. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test,²⁶ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

37. I accept that the applicant will be identified on return as a person who departed illegally and an asylum seeker and that there is a real risk that the applicant will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I am not satisfied that this treatment, either during the investigation process or while being held at the airport, amounts to significant harm. As noted above returnees may, in some circumstances, be held for a short time in prison while waiting to appear before a magistrate. However, even if the applicant is required to spend a period of time in prison while waiting to appear before a magistrate, I am not satisfied that he will face significant harm as defined.

²⁶ *MIAC v SZQRB* (2013) 210 FCR 505

38. I accept that the applicant may be subjected to poor prison conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources. I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally but that he is unlikely to face a custodial sentence. This does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that questioning, or the imposition of a fine, or the poor prison conditions to which the applicant may be subject constitute significant harm as defined under ss.36(2A) and 5 of the Act. Accordingly, I am not satisfied the applicant will face a real risk of significant harm during any possible brief period in detention.
39. I accept there are reports of mistreatment of asylum seekers who have been returned to Sri Lanka, however DFAT reports that the risk of torture or mistreatment for the majority of returnees is low including for those suspected of an offence under the I&E Act²⁷. I have found above the applicant is not a person of interest to the Sri Lankan authorities. I am therefore not satisfied that there is a real risk that the applicant would be subjected to mistreatment during any possible brief period in detention on return to Sri Lanka.

Complementary protection: conclusion

40. 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.

²⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

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.