



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02634

Date and time of decision: 8 February 2018 15:48:00
Fiona Kerr, 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 Sinhalese Catholic from Sri Lanka. [In] December 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). [In] May 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 21 July 2017 the applicant's representative forwarded to the IAA information on behalf of the applicant. The information was a copy of a statement dated 21 July 2017 by Ben Emmerson, United Nations Special Rapporteur on human rights and counter terrorism on his preliminary findings following a visit to Sri Lanka from 10 July to 14 July 2017. The UN Special Rapporteur's statement was not before the delegate and is new information. The information is country information and does not relate to the applicant personally. Given the publication date, I accept that the UN Special Rapporteur's statement could not have been provided to the delegate before the decision was made. I have taken into consideration that the UN Special Rapporteur's statement is from a credible, authoritative source and that it includes information gathered first-hand on a visit to Sri Lanka during which the Special Rapporteur met with a range of people, ordinary civilians as well as government officials to gain on-the-ground knowledge of the current situation there which, on its face, may have relevance for the applicant's claims. I am satisfied there are exceptional circumstances to justify considering the UN Special Rapporteur's statement.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He returned to Sri Lanka in 2008 after working in [Country 1] and commenced working in [Shop 1] in [Town 1].
 - In 2010 he had a problem with Tamil underworld people extorting money from him. The underworld people threatened to kill him if he did not pay them. The underworld people knew that the applicant had money because they knew of his previous employment in [Country 1] whereby he worked for [a number of] years at [a particular location].
 - He gave money to the underworld people on [a number of] occasions. The amounts ranged between [amounts]. The applicant did not wish to pay any money to the underworld group anymore and so he went into hiding.
 - He did not seek protection from the police because he does not trust them. Prior to him departing for [Country 1], army intelligence came to his home and threatened to shoot him, however, they ended up shooting and killing his Tamil friend who was visiting at the time. They subsequently took the dead body and the applicant to the police station. The applicant attempted to lodge a report in relation to the incident and the police refused to accept the report. The police suspected that the applicant was involved with

the LTTE. In his home area the applicant was the only Sinhalese person in a predominantly Tamil area. At the same time the LTTE suspected the applicant was an army intelligence informer and that he had tipped off the Sri Lankan army in relation to his Tamil friend's death. The applicant was therefore suspected by both the LTTE and the Sri Lankan army and therefore he departed for [Country 1] in 1993.

- Fellow passengers on the boat trip to Australia, who have returned to Sri Lanka, have told the CID that the applicant is the 'people smuggler' behind the trip to Australia. He will be detained and investigated for that on return.
- The CID has been twice to the applicant's family home in [Town 1] to investigate these claims. The applicant is scared that if he is deported to Sri Lanka, the CID will arrest him at the airport, detain him for interrogation and then charge him as a smuggler.
- He also fears harm from 'R', the people smuggler who arranged his trip to Australia, if he is returned to Sri Lanka. R is a prominent people smuggler and he has killed many people before. He is quite powerful and bribes all the police and other Sri Lankan security agencies. The applicant had a deal with R in that the applicant would be responsible for the boat charges in relation to the applicant's other family members. After reaching Australia, the other family members have not paid the applicant the remaining fees for the boat journey. R has visited the applicant's wife and asked her for the outstanding boat fees. If the applicant does not pay R the outstanding boat fees, R will kill him and the Sri Lankan police would be unable to prevent this from occurring. R is a leader of a terrorist group, used to be an LTTE member and later worked for army intelligence against the LTTE.

Refugee assessment

5. 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

6. 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.

Applicant's background

7. The applicant claims to be an ethnic Sinhalese of the Christian faith (Roman Catholic) from [Town 1] in the Eastern Province of Sri Lanka. He has provided documents in support of his claimed identity. I accept his identity is as claimed and that Sri Lanka is the applicant's receiving country.
8. The applicant states that his father moved his family to [Town 1] in 1983 for work. The applicant did a series of odd jobs in Sri Lanka after leaving school, then worked in [Country 1] [for a number of years] at a [particular location] as [occupations]. His family remained in Sri Lanka. He has a wife and [children]. His family continues to reside in Sri Lanka. As he provided generally consistent details about these matters since his entry interview, except as noted, I accept his address, education, work and family history as set out in his SHEV application and at his SHEV interview. However, as discussed below, I have serious concerns about the truthfulness of other parts of the applicant's evidence.

Death of friend

9. The applicant claimed in his SHEV interview that the reason he decided to go to [Country 1] to work was because people came to his home to shoot him but instead shot his friend. His claims about his friend being shot have, however, evolved over the course of the protection process. He has variously stated:
 - One of his friends was killed in his house; they came in a white van in 1988. He didn't know who killed him (screening interview);
 - Before he went to [Country 1] some people in a white van killed his friend (arrival interview);
 - There had been a bomb blast in [Town 1], the CID came in a white van, he was standing outside and they pointed a weapon at him. His friend was in the house, they asked who he was, he stood up because he was scared as he was Tamil and they shot him. They took the body and the applicant to the police station, he told the police he wanted to make a complaint but they told him he couldn't and chased him away. This happened in 1992 and that's why he decided to go to [Country 1] to work (SHEV interview).
10. When the delegate put to him that he hadn't previously mentioned that it was the CID who killed his friend, he explained that it was only when the CID took him to the police that he found out they were CID. He was unresponsive when the delegate pressed him for why he nonetheless hadn't mentioned after he arrived in Australia that it was the CID who shot his friend. I do not consider it plausible that the applicant would not have mentioned earlier something as significant as the killing of his friend by the CID particularly if, as he claimed, it was the catalyst for his decision to go to [Country 1] to work. Further, in his SHEV interview he did not refer to the claims in his written statement that the police refused to take his statement because they suspected he was involved with the LTTE; that at the same time, the LTTE thought he was working for army intelligence and that he tipped off the army to kill his Tamil friend; and because he was suspected on both sides he left for [Country 1].
11. The applicant has been consistent in claiming that he had a friend who was shot and killed and I accept that this was the case. However, in view of the unsatisfactory nature of the evidence he provided at his SHEV interview about the death of his friend, I prefer his earlier evidence and I find that his friend was killed in 1988 by unknown persons and that he has fabricated the

other aspects of his claims concerning the death of his friend including that he was suspected by either the police/army intelligence or the LTTE of working for the other side. It follows that while I have accepted that he went to work in [Country 1] in 1993, I am not satisfied that it was the death of his friend that prompted him to go there to work.

Extortion by underworld group/in hiding

12. The applicant's claims for protection rest to a large extent on his claim to have been the victim of extortion in 2010 which, effectively, forced him into hiding and led to his decision to leave Sri Lanka for Australia. However, while he has been generally consistent that he was subjected to demands for money and threats, there are significant discrepancies between the accounts he has given at different times. For example, it was only in his SHEV application that the applicant mentioned for the first time that he had actually paid money to the men he claimed came into the shop. In the written statement submitted with his SHEV application he claimed they were underworld people and said in his SHEV interview they were asking for protection money. However, in an earlier interview (arrival and induction interview [in] April 2013) he said they were from groups contesting the election. In earlier interviews he also stated that the incidents occurred in 2008 rather than 2010 as claimed in his SHEV application. In his SHEV interview he also made contradictory statements about whether or not he had seen his manager previously giving the men money and whether or not they were LTTE.
13. The applicant claimed in the written statement submitted with his SHEV application and in his SHEV interview that he was extorted because they knew he had money. However, this is not consistent with information given in an earlier interview that he didn't know why he was asked for money. He also made the new claim that after the second incident he stopped working at the shop, they phoned him and warned him, and then came to his house. I do not consider it plausible that the applicant would fail to mention in any of his previous interviews or in his written statement something as serious as a visit to his home by people who had earlier threatened to kill him.
14. The applicant's claims about the extortion and associated threats have evolved over time. When the delegate put to him that he hadn't previously mentioned paying the men, the applicant denied it. The evidence in his SHEV interview about how he gave the group the money was vague and undetailed and did not persuade me that he had actually met the would-be extorters and handed over money. I have also taken into consideration that he has provided inconsistent evidence about when the threats started, whether or not he paid the men money, how much he paid, and who the people were who demanded money of him.
15. The applicant has provided a letter of recommendation dated [in] November 2013 signed by the manager of [Shop 1]. The letter states an unidentified group came in search of the applicant "very often" while he worked there and states the applicant informed him that he was threatened very often and due to fear he lived hidden in different locations. While the letter confirms some aspects of the applicant's claims (although I note it also relies on what the applicant told the writer) it does not in my view, overcome what I consider to be the very significant other issues discussed above.
16. In view of the not insignificant changes, inconsistencies and discrepancies in his evidence, I have formed the view that the applicant has exaggerated and embellished his claims to have been extorted and I am not satisfied that the applicant paid amounts of between [amounts] on at least [number] occasions to unidentified underworld people who were extorting him and threatened to kill him if he didn't pay.

17. I have taken into consideration that there has been some consistency in his claim to have received threats while working in [Shop 1]. Country information also confirms reports of crime-related activities such as threats and extortion carried out by a number of groups including paramilitary groups who engaged in extortion to fund their activities, including election related activities.¹ There were reported to be many incidents of extortion in the east during the elections; no particular group was targeted.²
18. On the basis of the country information and the consistency with which he has made the claim that unidentified people threatened him in the shop and asked for money and [goods], I am prepared to accept that the applicant was present on [number] occasions when unknown persons came to the shop, asked for money and [goods], and threatened him with a [weapon] for refusing to accede to their demands. However, in view of what I consider to be the unsatisfactory nature of the evidence he gave in his SHEV interview, I prefer his earlier evidence that these demands occurred shortly after he started working at the shop in 2008. I find there were [a number of] such incidents in 2008, that it was associated with criminal activities by groups active at the time, and that the threats were opportunistic and related to the applicant's work in [Shop 1] and the perception that he had access to the till and [goods] rather than being related to him personally.
19. It follows that I do not accept the claim that they continued to extort money from him and as he didn't wish to pay them anymore and feared they'd harm him, he went into hiding in Colombo, [other towns] until leaving for Australia. In his SHEV interview, he claimed he resigned from the shop after [one of the incidents] and went into hiding but returned home to [Town 1] once every two months in secret and would stay for a couple of weeks. He also made the new claim that the last time he came home, they came looking for him but provided no details. I do not consider it plausible that he would fail to mention earlier, including in his written statement, something as serious as people who had threatened his life coming to his home to look for him. Further, the letter of recommendation from the manager of [Shop 1] stated that he worked as a [position] at the shop from [February] 2008 to [December] 2012 which is also consistent with the work history he gave in his SHEV application. In my view, it is not credible that the applicant could be in hiding while continuing to work in [Shop 1], the same place where he claimed to have been targeted for extortion. I am not satisfied that the applicant went into hiding following extortion by an unidentified group and I find the applicant has fabricated the claims of extortion and being forced into hiding to bolster his claims for protection.
20. I have found that the incidents to which the applicant was subject were criminal and opportunistic rather than part of systematic targeting of him personally. DFAT's latest report on Sri Lanka notes the greatly improved security situation since the end of the war. The incidence of homicide has fallen sharply, there had been no recent verified reports of extrajudicial killings, reports of abductions and disappearances had dropped considerably, and the Sri Lankan government exercises effective control over the entire country.³ Previous DFAT reports have included references to paramilitary groups still being active including in criminal activity.⁴ DFAT's most recent 2017 assessment referred to the report of the UN's Office of the High Commissioner for Human Rights following its investigation into Sri Lanka and the

¹ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010 CIS19345

² ibid

³ Department of Foreign Affairs and Trade (DFAT) "DFAT Country Information Report Sri Lanka ", 24 January 2017, CISED50AD105

⁴ DFAT "DFAT Country Report Sri Lanka" 3 October 2014 CIS2F827D91259

involvement of paramilitary groups in incidents of extra-judicial killings, disappearances and kidnappings for ransom but assesses such incidents have significantly reduced since the end of the conflict; its report does not refer to recent any recent incidents involving paramilitary groups.⁵ I have found the incidents to which the applicant were subject occurred nearly ten years ago and the country information referred to indicates a greatly improved security situation since then. While, in my view, it is always possible that the applicant may again be the victim of similar demands with menaces, I am not satisfied that such a possibility rises to the level of a real chance and I am satisfied there is not a real chance that the applicant will suffer harm from unidentified people demanding money or goods with menaces if he returns to Sri Lanka or in the reasonably foreseeable future.

Threats from people smuggler

21. The applicant's evidence about R and the debt he claims to owe him for the boat charges have evolved over time. In his SHEV interview he claimed for the first time that R has asked for more money but his responses to the delegate's questions about why R would be seeking more money were repetitive, vague and frequently nonsensical. He also gave contradictory evidence about R. After initially claiming he was a powerful figure who bribed the police and Sri Lankan security agencies, he stated in his SHEV interview that R had been arrested several times and spent time in prison and as a result, couldn't get involved with the people-smuggling business anymore. He also gave contradictory evidence about R's background. In the written statement submitted with his SHEV application he stated R used to be an LTTE member and later worked for army intelligence against the LTTE. In his SHEV interview he said R was in the Peoples Liberation Organisation of Tamil Eelam (PLOTE), didn't know whether he was still involved with them, and that he didn't know if R was still in prison. The applicant's evidence about the agreement he had with R which he said in his SHEV interview was verbal also contradicted evidence in an earlier interview that they had a written agreement as to the payment of the rest of the money he owed R.
22. The applicant also provided contradictory evidence about whether the other members of his family owed the money to him or to R and said that while they also owed R money, because they got to know R through him, R was coming after him. He also claimed for the first time in his SHEV interview, that after he had arrived in Australia, R had gone to his house with a weapon and threatened his wife over the money he owed. It is simply not plausible that the applicant would fail to mention in his written application something as serious as a person who he claims is above the law, going to his home and threatening his wife over the payment of a debt.
23. In view of the very material changes, discrepancies and inconsistencies in his evidence about R, I have formed the view that the applicant has fabricated aspects of his claims relating to R and I am not satisfied R is a powerful figure who bribes the police and security agencies, that if he doesn't pay him he will kill the applicant and the police cannot prevent it happening, that R is the leader of a terrorist group, that he used to be an LTTE member and later worked for army intelligence against the LTTE, or that he has threatened the applicant's wife with a weapon. I am prepared to accept that the balance of what he claims to owe R remains outstanding and consistently with that, that R has been to the applicant's home and asked his wife for the remaining amount. However, in view of the late raising of this claim and the other problems identified with his evidence, I am not satisfied that R has increased the sum he claims the applicant owes and I find that the applicant has fabricated this aspect of his claim.

⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 4.1

24. I accept that on his return, R may pursue the applicant for the outstanding debt. However, the applicant has consistently indicated that he had the means to pay R through the sale of some land. Although he claimed in his SHEV interview it was insufficient to cover the increased debt, I have not accepted that R increased the sum the applicant owes and I am satisfied that on his return, the applicant is not at risk of harm from R as he has the means to discharge the debt to R through the sale of the land.

People smuggling allegations/illegal departure/returning asylum seeker

25. The applicant claims that people who have been returned to Sri Lanka have told the CID that he is the 'people smuggler' for the boat they came on; they mentioned his surname and he is scared that if he is deported he will be arrested, detained, and charged for an offence he didn't commit. He claimed the CID have gone to his home on [a number of] occasions and spoken to his wife enquiring about his whereabouts.

26. This aspect of the applicant's claims rests on his purportedly having been identified in court documents as one of the persons who collected money from passengers on the boat. At interview, the applicant provided an English language translation of what he claims is a document obtained by his [sibling] from the court in Sri Lanka. He stated he didn't know when his [sibling] obtained it, the court case pertained to [a particular individual] on the boat he came to Australia on, and his name is there on the document so the CID can come and take him into custody on the strength of that allegation. He later provided what appears to be several separate documents in the Sinhalese language which are claimed to be the originals obtained from Sri Lanka.

27. Having reviewed the documents provided, I have a number of concerns about them. Firstly, it appears that the documents relate to two separate court cases, once concerning an individual and the other concerning a group of [persons]. Leaving that issue aside, there are a number of significant anomalies in the documents. In the document bearing a translation date by a NAATI accredited translator [in] February 2017, it refers to previous correspondence dated [in] April 2013, yet appears to have been signed [in] March 2013, some weeks prior to the correspondence referred to. The applicant claims that the document relates to the [occupation of], [Mr A], on the boat he came to Australia on. However, that boat arrived [in] March 2013 whereas the document indicates that [Mr A]'s case was heard and he was remanded in custody [earlier in] March 2013, that is, [before] the applicant's boat arrived in Australia. Further, the document refers to 'this suspect' (that is, [Mr A]) being remanded in custody but indicates that [Mr A] did not arrive back in Sri Lanka on a flight from Australia until approximately a year later [in] March 2014. There are a number of other inconsistencies. Firstly, it states [a number of] people left from [a particular] area whereas the applicant left from [another area]. Secondly, it states they left in the morning of [a date in] March 2014. Having compared this to the corresponding paragraph of the Sinhalese document I have formed the view that this is a typographical error and should read [a date in] March 2013. Notwithstanding this, the applicant's evidence is that he left on or around [a separate date in] March 2013. Finally, R and 'S' ([details of 'S' removed]) are recorded as having collected the money. However, the R referred to does not correspond with the name given for R on the other document provided which I note has been translated by a different NAATI accredited translator and as referred to above, appears to relate to a different court matter. In view of the significant inconsistencies and anomalies in the documents provided and noting the prevalence of document fraud in Sri Lanka,⁶ I do not accept that the documents are genuine and I have formed the view that the applicant has fabricated his claim to be suspected of

⁶ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.38-5.39

involvement in people smuggling operations. It follows that I do not accept that CID officers visited his house [a number of times] to investigate him in [2013].

28. I accept that the applicant left Sri Lanka illegally and that, as he will be travelling on an emergency travel document that the authorities will surmise that he has made a claim for asylum in Australia; both of these matters will have implications for the applicant on his return.
29. It is an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act) to depart Sri Lanka by other than an authorised port of departure (seaport or airport). Returnees who depart the country irregularly are generally considered to have committed an offence under the I&E Act.⁷ On arrival in Sri Lanka, the Sri Lankan authorities conduct a series of administrative checks on involuntary returnees to verify travel documents and identity, and check for any outstanding criminal matters, including checks against immigration and intelligence databases.⁸ The same screening process applies to all persons returning to Sri Lanka regardless of ethnicity or religion.⁹
30. There is information before me that some returnees have been subjected to routine screening for LTTE connections and possible extended detention; there were also reports of abuse and torture of airport detainees with a history of opposing the government.¹⁰ The UN Special Rapporteur's statement also refers to torture as being endemic and routine for those arrested and detained on national security grounds.¹¹ The applicant does not fit this profile. He is Sinhalese, does not claim to have ever been involved with the LTTE and I have rejected as a fabrication his claim that the authorities suspected him of LTTE involvement; nor does he claim to have been involved in activities outside Sri Lanka that could indicate to the Sri Lankan authorities he was involved in anti-government activity.
31. I accept that the fact that he departed illegally will have consequences for him on return and that as a person who departed illegally, he is liable to be charged under the I&E Act and arrested at the airport.¹² Returnees are transported to the closest Magistrates Court at the earliest available opportunity after investigations have been completed although they can remain in police custody at the CID airport office for up to 24 hours after arrival, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held at a nearby prison.¹³ In cases where a returnee pleads guilty, they will be fined and released.¹⁴ If they plead not guilty, returnees are immediately granted bail by the magistrate on personal surety or may be required to have a family member act as guarantor, in which case the person may need to wait until a family member comes to court to collect them.¹⁵ There are rarely any conditions in relation to the bail and if they are, they are imposed on a discretionary basis; the person will only need to return to court when the case against them is being heard (or if required to give evidence as a witness in another case).¹⁶

⁷ *ibid*

⁸ *ibid* at 5.19

⁹ *ibid* at 5.20

¹⁰ UK Home Office, "Sri Lanka - Bulletin: Treatment of Returns", 1 December 2012 CIS28615; Immigration and Refugee Board of Canada, "Treatment of Tamil returnees to Sri Lanka", 1 February 2013 CIS28614

¹¹ Groundviews "Statement by Ben Emmerson, UN Special Rapporteur on human rights and counter-terrorism, at the conclusion of his official visit to Sri Lanka" 15 July 2017

¹² DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.21

¹³ *ibid*

¹⁴ *Ibid*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

32. As discussed above, I have rejected his claims that he has been implicated in people smuggling. I am satisfied therefore that he is not at risk of a custodial sentence and associated risk of mistreatment as submitted by his representative but that he will be subject to a fine which can be paid by instalment.¹⁷
33. I find that if the applicant pleads guilty he will be fined and released. If he pleads not guilty, he will be granted bail and required to return to court at a later time where, if he is found guilty, he will also be fined. The applicant has family in Sri Lanka and there is no information before me that he wouldn't be released on personal surety or that, if required, a family member would be unable to guarantee bail. 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.¹⁸ Given this and the likelihood that he will spend no more than a few days in detention before he can be brought before a Magistrate and bailed, I find the prospect that he will be harmed in prison to be remote. The applicant has a history of employment and did not claim any inability to pay the fine. In the circumstances, I find that the imposition of a fine will not amount to serious harm.
34. His representative submits that during his detention he will face terrible prison conditions; the submission states the [applicant] has personal knowledge of prison conditions including overcrowding and poor sanitary conditions. I accept that prison conditions do not meet international standards.¹⁹ Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.²⁰ In the applicant's case, even considering the possibility that he arrives on a weekend and is detained until he can appear before a magistrate and then until bail is granted, the period of detention will be, at the most, a few days. In my view, this does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm.
35. In considering the totality of the treatment that the applicant will experience including being detained and investigated for several hours at the airport, then potentially being detained on remand for a number of days during which he will be held in overcrowded and unsanitary conditions, and having to pay a fine, I find that this treatment does not amount to serious harm. 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 because the application of such a law does not amount to discrimination.²¹ In this case, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. Accordingly, I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is a returning asylum seeker or an illegal departee.
36. Taking into account those of his claims which I accept and considering them against the applicant's profile and the country information, it is my view that even considered together there is not a real chance of serious harm to the applicant if he returns to Sri Lanka now or in the reasonably foreseeable future.

¹⁷ Ibid at 5.22

¹⁸ Ibid at 4.22

¹⁹ Ibid at 4.25

²⁰ *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

²¹ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

Refugee: conclusion

37. 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

38. 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

39. 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.

40. I have rejected the applicant's claims that he was the victim of extortion by underworld people in 2010 and that because of the extortion and threats to kill him, he was forced into hiding until travelling to Australia. I have similarly rejected his other claims relating to the circumstances of the death of his friend and the decision to travel to [Country 1], threats by R including to his wife, and that he has himself been implicated in people smuggling. Based on the same reasons and country information I am not satisfied there is a real risk of the applicant being subjected to significant harm for any of the claimed reasons.

41. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes and identified as an illegal departee and a returning asylum seeker. He is likely therefore, as discussed above, to be investigated and detained for several hours at the airport, and depending on the availability of a magistrate, may be detained for a number of days pending bail for the offence of illegal departure, and fined accordingly. I am not satisfied, however, that this treatment amounts to significant harm. I have found he is not a person of interest to the Sri Lankan authorities and I do not accept there is a real risk of torture or that he will be mistreated while being held and investigated at the airport or in remand, or face a total period of detention of longer than a few days in the worst case scenario.

42. The conditions to which he may be subject if detained on remand for a few days are likely to be poor. However, I do not accept that amounts to significant harm. The treatment does not consist of the death penalty or arbitrary deprivation of life. I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. Nor am I satisfied that it amounts to serious pain or suffering, pain or suffering that is cruel or inhuman in nature, or extreme humiliation. I similarly find that the

imposition of a fine under the I&E Act for his illegal departure does not amount to significant harm within the meaning of s.5(1) and s.36(2A).

43. I am not satisfied that those of his claims I have accepted, when taken together, mean that there is a real risk of significant harm within the meaning of ss.36(2A) and 5(1) now or in the reasonably foreseeable future if the applicant is returned to Sri Lanka.

Complementary protection: conclusion

44. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

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.