



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02703

Date and time of decision: 2 August 2017 12:51:00
Lorraine Hill, 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 citizen of Sri Lanka. He applied for a Safe Haven Enterprise Visa (protection visa) [in] November 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] May 2017.
2. The delegate accepted that the applicant was a Tamil from the Northern Province who was detained by the Sri Lankan Army (SLA) on one occasion because they found a photo of the applicant with an LTTE member when searching the applicant's family home. However, the delegate found that there was not a real chance or real risk the applicant would be harmed on return to Sri Lanka for reasons of his ethnicity, his real or imputed political opinion, the Department's data breach, as a failed asylum seeker or his illegal departure from Sri Lanka.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The applicant provided a statement to the IAA on 5 June 2017. The statement contains discussion on why the applicant does not agree with the delegate's decision. To that extent those parts may be described as argument rather than new information. It also refers to a number of claims made by the applicant to the delegate which are already before me.
5. In the statement the applicant also contends that:
 - [Mr A] began to send the applicant SMS messages to his phone. The applicant did not respond as at the time he was worried about his safety. He was unable to go to the police as he was frightened that the police would inform the CID about him as they were all connected.
 - When the CID approached his [sibling] at the airport it was clear they had the applicant's and his family members' information and this clearly indicates that he is still of interest to the Sri Lankan authorities. His [sibling] now lives in fear.
 - It is widely known that anyone can safely leave the airport by bribing airport officials and arrangements he had been told arrangements had been made for the application to safely board the plane.
 - When the applicant was in [Country 1], the UNHCR informed him that he may be resettled in [Country 2]. There was no timeline given. The applicant was already depressed about his uncertain life and he learned that the [Country 1] government does not allow refugees to reside within [Country 1] for more than [number] years. He saw many people living there far longer than he had and without any hope of resettlement and so he decided to leave [Country 1].
6. These claims were not made to the delegate and I consider them to be new information. The information adds to the basis on which the applicant's claims were initially made before the delegate. The applicant provided no explanation as to why these claims were not provided to the delegate; rather he stated he was clarifying matters the delegate had stated as being the basis for the refusal. At the protection visa interview, the applicant was given an opportunity to provide details of the events he claimed to be involved in. The applicant was asked specific

questions about each of his claims and the delegate clearly outlined to the applicant the aspects of his claims that he had concerns about and gave him an opportunity to respond. The applicant provided his responses. The applicant was asked at the end of the protection visa interview whether he had anything else to add and whether he had put forward all his claims for protection. No further information was provided by the applicant before the delegate's decision was made. I am satisfied the applicant has had an opportunity to present his claims orally at the protection visa interview. Having regard to all the circumstances, I am not satisfied that there are exceptional circumstances to justify the consideration of this new information.

7. [In] June 2017, the applicant email the IAA a hyperlink for article <http://theconversation.com/not-all-is-forgiven-for-asylum-seekers-returned-to-sri-lanka-73361> stating this article "can help my claim". This information was not before the delegate and is new information. The article post-dates the delegate's decision. I am satisfied it could not have been provided to the Minister before the delegate made her decision. Having regard to the nature of the applicant's claims, the contents and date of the report, I am satisfied that there are exceptional circumstances to justify the consideration of this new information.
8. I have obtained the following country information:
 - [information deleted].
 - [information deleted].
9. These reports contain information on Sri Lankan government's response to [an asylum-seeker boat] in 2009. The applicant has made claims that he fears harm on the basis that the Sri Lankan government believes all former passengers of the [boat] are LTTE. The delegate did not make an assessment of this aspect of the applicant's claims. In these circumstances, and in the absence of any country information before the delegate on this matter I am satisfied there are exceptional circumstances to justify the consideration of this new information.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - The applicant is a male Tamil who was born in [Jaffna District] in the Northern Province of Sri Lanka.
 - In November 2005, the applicant played in a [sporting event associated with] the LTTE and his photograph was taken with an LTTE member.
 - [In] November 2006, the SLA attended the applicant's home and questioned him about [an incident]. The SLA searched the applicant's home and located the photograph of the applicant and an LTTE member. The applicant was taken to the SLA camp where he was detained, questioned and physically assaulted on suspicion that he undertaken training with the LTTE. While detained he was forced to sign two documents before being released [days] later.
 - In January 2007, the applicant applied for permission to leave Jaffna but it was refused by the Commanding Officer.
 - In February 2007, there was a bomb blast in the applicant's home area. The President of [a club] was asked to attend the SLA camp for questioning. At the camp the President was shot. The applicant was then asked to attend the SLA camp for questioning but

instead went into hiding at his [relative's] house. While in hiding it was arranged with the EPDP for the applicant to [go] to Colombo.

- While in hiding in Colombo the applicant started to receive phone calls and was visited by a person named [Mr A]. [Mr A] repeatedly asked the applicant for help but said he would only tell the applicant what sort of help after the applicant said yes. The applicant became scared and decided to leave Sri Lanka.
- Between 2007 and 2009, the applicant resided in [Country 3]. The applicant registered with the UNHCR and in April 2009 was recognised as a refugee by the UNHCR.
- In [2009], the applicant went to [Country 1] on [an asylum-seeker boat]". [The] applicant remained on the [boat] while it was detained by the [Country 1 authorities]. The applicant was then transferred into Immigration Detention in [Country 1].
- Between 2009 and 2013, the applicant resided in [Country 1]. The applicant registered with the UNHCR and in August 2010, the applicant was recognised as a refugee by the UNHCR.
- In 2011, the applicant's friend who he had been residing in [Country 3] with was stopped and questioned by the CID at the airport on his return to Sri Lanka. The CID looked at the photographs his friend had and asked who was in the photographs and where were the people now. The applicant was in some of the photographs and told the CID the applicant was in [Country 3]. The applicant has since been told his friend is now missing.
- Since the applicant's arrival in Australia, the applicant has been told that his [sibling] was stopped at the airport and prevented from travelling because the CID believed that [the sibling] was going to [Country 4] to visit the applicant.
- The applicant fears on return to Sri Lanka he will be harmed on the basis of his ethnicity, his perceived political opinion as a male Tamil from the Northern Province, the perception by the Sri Lankan authorities that he was involved with the LTTE, the disclosure of his details on the Department's website, as a former passenger of [an asylum-seeker boat] and because he will be returning to Sri Lanka after seeking asylum in Australia.

Refugee assessment

11. 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

12. 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.
13. I accept the applicant's identity is as claimed. I accept the applicant is a male Tamil from the Jaffna District in the Northern Province of Sri Lanka, and a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this assessment.
14. I accept that in November 2005, the applicant played in a [sporting event associated with] the LTTE. I accept the applicant was selected as the best [player] and his photograph was taken with an LTTE member.
15. I accept that [in] November 2006 the SLA went to the applicant's home to question the applicant about [an incident]. I accept the applicant was questioned by the SLA because he held a position on [a] committee. I accept as part of the questioning of the applicant, the SLA searched the applicant's family home and located the photograph of the applicant and an LTTE member from the year before. I accept the applicant was taken to the SLA camp where he was detained, questioned and physically assaulted on suspicion that he undertaken training with the LTTE. I accept while detained he was forced to sign a document written in Sinhalese and told if the same thing happens again he would be detained. I accept the applicant was released by the SLA [days] later and he returned to his family home. The applicant's evidence regarding these events has been consistent between the entry interview, protection visa application and interview and with the country information which indicates under the Rajapaksa government (prior to January 2015) the security and intelligence forces in the north and east were known to monitor any possible LTTE activity and military officers and personnel took a visible and active role in aspects of civilian life.¹
16. However, I do not accept that while detained by the SLA the applicant was forced to sign a blank document and told that the two documents he had signed would be used as a confession for any future crimes committed by the LTTE. These claims were not made at the applicant's entry interview, rather the applicant's claims were that he signed a "document written in Sinhalese" and "told he would be arrested if the same thing happened again". I have considered the written record of the entry interview and I am satisfied that the applicant had the opportunity to include such claims and he did not. I am satisfied these claims are not true and find that they have been provided in order to enhance the applicant's claims for protection.
17. Nor do I accept the applicant's claims that in January 2007 he sought permission to leave Jaffna and that it was not given, in February 2007 there was a bomb blast and the applicant was requested to attend the SLA camp or that while staying in Colombo the applicant was approached for help by a person named [Mr A].
18. The applicant's claims regarding these events were not made at the applicant's entry interview. While I acknowledge the entry interview is not for the purpose of an assessment of

¹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

the person's protection claims, the applicant was asked why he had left Sri Lanka and in response, the applicant made mention of his participation in [a sporting event], the photograph with the LTTE member and the detention by the SLA after they discovered the photograph. In contrast there was no mention of these events which were said to have occurred shortly thereafter. I do not accept that the applicant would fail to mention these claims emanating from bomb blast given that his later evidence was that it was this event which was the catalyst for him going into hiding and his move to Colombo prior to his departure from the country.

19. At the protection visa interview, the delegate questioned the applicant further about the events which he claimed to have occurred from January 2007 onwards. The details provided by the applicant were generally consistent with his protection visa statement however I am not satisfied that consistency alone is sufficient for a conclusion that these claims are true.
20. The delegate asked the applicant whether the village or district officers from whom he sought permission to travel were connected to the authorities; he stated yes they were government officials. The delegate asked the applicant if he believed the SLA was interested in him why he registered with the government. He stated after the incident in November 2006 he was let go and that is when he applied but it was not until after the bomb blast that he did not feel safe and decided to leave. He stated that after his application for permission to travel was denied he sought help from the EPDP and it was with the EPDP protection he [went] from Jaffna to Colombo. I have considered the applicant's explanation but I remain unconvinced that the applicant was being targeted by the authorities at this time. I consider it not plausible that had the applicant been of adverse interest to the Sri Lankan authorities as claimed that he would go to government officials and advise them of his plans to travel from Jaffna.
21. The delegate asked the applicant if anything had happened to him while he was staying in Colombo. He stated he started to receive phone calls from a person call [Mr A]; and asked him for help and only if he said yes he would be told what sort of help. He stated [Mr A] then visited him at his [relative's] home in Colombo and "kind of threatened" using harsh words that he needed to help him. The delegate asked the applicant who [Mr A] was, he stated he didn't know him but [Mr A] told him that he had seen him with his parents in Jaffna. The delegate asked how [Mr A] would have the applicant's phone number and address if he did not know him. He stated it was not hard to get someone's phone number through friends or maybe the EPED passed his phone number.
22. The delegate put to the applicant that his statements regarding [Mr A] had not been mentioned before in either his entry interview or in his protection visa application. He stated that the incident with [Mr A] happened and this scared him and had this incident not happened he would have stayed in Colombo longer.
23. I find the applicant's claims regarding [Mr A] to be convoluted and implausible. The applicant has previously made no mention of anything happening to him when he was in Colombo, including in his protection visa application. At the protection visa interview, the applicant was unable to explain who [Mr A] was and offered only speculation on how [Mr A] obtained his phone number and his [relative's] address in Colombo.
24. The applicant's evidence is that he departed Sri Lanka legally using his own passport and travelled to [Country 5] by plane on a tourist visa in 2007. At the protection visa interview, the delegate asked the applicant why the Sri Lankan authorities allow him to leave if had he been a person of interest as claimed. He stated that he went through an agent and he arranged it and told him to go to a particular counter at the airport.

25. The country information before the delegate indicates that the Sri Lankan authorities collect and maintain a 'stop' and 'watch' electronic database and the names of those whom they consider to be of interest for both separatist and criminal activities can be added. I accept the applicant's travel may have been arranged through an agent, however I am satisfied that had the applicant been of interest to the Sri Lankan authorities as claimed the applicant's name would have been added to this database and he would have been stopped at the airport.
26. Having regard to the evidence as a whole, including the absence of the claims from his entry interview, the implausibility of the claims and a consideration of the country information before the delegate, I am not satisfied these claims are true. I do not accept that in January 2007, the applicant's application for permission to travel was ever denied; rather I accept it was granted and he later travelled from Jaffna to [Colombo]. I do not accept that in February 2007, after a bomb blast the President of [a club] was killed and the applicant was requested by the SLA to go to the camp. I do not accept the applicant went into hiding in order to avoid being questioned by the SLA about the bomb blast. I do not accept the events involving [Mr A] ever occurred. I do not accept the applicant was of interest to the Sri Lankan authorities, any other groups or individuals for any reason at the time of his departure from Sri Lanka in 2007.
27. The applicant claimed that in 2011, when he was residing in [Country 3], his friend was stopped and questioned by the CID at the airport on his return to Sri Lanka. He claimed that the CID looked at the photographs that his friend had asked who was in the photographs and where they were. The applicant claimed he was in some of his friend's photographs and that his friend told the CID that the applicant was in [Country 3]. He claimed that after this incident he was unable to contact his friend and other friends have told him that his friend has gone missing and that he may have been kidnapped by the CID or other military groups.
28. The applicant's claims regarding his friend have been consistent throughout his interactions with the Department, and while I accept that these events may have occurred, I have found that the applicant was not of interest to the Sri Lankan authorities when he departed Sri Lanka in 2007 and find that the applicant's claims that his event is indicative of the Sri Lankan authorities interest in him is speculative. The applicant's own evidence is that in 2007 he departed Sri Lanka using his own passport and therefore it would have already been known to the Sri Lankan authorities that he was no longer in Sri Lanka; and while I accept this event occurred, I am not satisfied that it indicates the applicant is now wanted by the Sri Lankan authorities.
29. The applicant claimed that in February 2015, his [sibling] sought to travel to [Country 4] but [was] stopped at the airport and prevented from travelling because they believed [he/she] was going to [Country 4] to visit the applicant. He claimed that the CID confiscated [the sibling]'s Sri Lankan National Identity Card (NIC) and told [him/her] to tell the applicant to return to Sri Lanka.
30. At the protection visa interview, the applicant stated that when the CID took his [sibling]'s NIC at the airport they [said] that if the applicant returns they would give [the sibling the] NIC. He stated his [sibling] is also required to sign in every two weeks at the office where [he/she] lives. The delegate asked the applicant where his [sibling] lives and works now. He stated his [sibling] works as a [Occupation 1 for] a government [employer] in [Town 1] and has held this job since 2006. The delegate asked the applicant whether his [sibling]'s interactions with the CID had affected [their] government employment, he stated it hasn't as [he/she] is still a [Occupation 1] and the CID have taken [the] NIC and [he/she] can't travel anywhere. I have found that the applicant was not of interest to the Sri Lanka authorities when he departed Sri Lanka in 2007

and it follows that I do not accept the applicant's [sibling] has been prevented from travelling as a consequence of the applicant's whereabouts or circumstances.

31. The applicant claimed that on return to Sri Lanka he will be harmed including being arrested and physically assaulted and/or murdered by the Sri Lankan authorities because he is perceived to have been involved with the LTTE on the basis of his Tamil ethnicity, his past circumstances and because he was a former passenger on [an asylum-seeker boat].
32. On the information before the delegate, the overall situation for Tamils in Sri Lanka has improved considerably in recent years. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the Sirisena government came to power in 2015.² Under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life has significantly decreased.³ The UNHCR no longer refers to a presumption of eligibility for protection simply on the grounds of Tamil ethnicity.⁴ DFAT reporting that there is no evidence of official laws or policies that discriminate based on ethnicity or language, including in the context of access to education, employment and housing.⁵
33. Country information indicates that the focus of the Sri Lankan government in power at the time of the applicant's departure⁶ and of the current Sri Lankan government is the prevention of the resurgence of the LTTE and any actions towards Tamil separatism.⁷ In these circumstances, it is people with links or perceived links to the LTTE who may have a need for international protection, however being Tamil and coming from the North or the East is not, of itself, sufficient to warrant international protection.⁸ The UNHCR and the UK Home Office identify that it is persons suspected of certain links with the LTTE who may be in need of international refugee protection, depending on the individual circumstances of their case.⁹
34. The material before me indicates that the Sri Lankan authorities alleged they had visually identified a small number of [asylum-seeker boat] passengers as known LTTE combatants or supporters, and asserted the importance to the Sri Lankan government of containing illegal migration of such people in order to avoid a resurgence of the LTTE.¹⁰ The statements do not allege that all passengers were considered LTTE supporters because they were Tamil.
35. I accept the applicant was a former passenger of the [boat in question]. However I do not accept that that the Sri Lankan government has ever imputed actual LTTE involvement to all or most or many [boat passengers] in 2009 or since. Rather, I have found that the applicant was not of interest to the Sri Lankan authorities when he departed Sri Lanka in 2007, and I am satisfied that the chance of the Sri Lankan authorities visually identifying the applicant as a

² DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015, CISEC96CF14143.

³ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015, CISEC96CF14143 and DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

⁴ UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015, CISEC96CF14143 and DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

⁶ UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁷ UNB0183EA8 and UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8 and UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism", 1 August 2014, CIS29809.

¹⁰ [information deleted].

known LTTE combatant or supporter from any visual media footage to be remote. While I accept that there may be a possibility that the applicant's name may have appeared on a list held by the Sri Lankan authorities regarding [an asylum-seeker boat], I do not accept that this would alter knowledge or perception of him by the authorities, or compound the risk to him.

36. I accept the applicant is a male Tamil from the Northern Province of Sri Lanka, who has previously on one occasion been detained, questioned, and physically harmed. The applicant's own statements are that he does not have any links or involvement with the LTTE or political organisations. The applicant has made no mention of his family members having any links or involvement with the LTTE or political organisations, or of himself being imputed with any links because of familial connections. I am satisfied that the applicant will not be imputed with any type of profile arising from his past circumstances on his return to Sri Lanka.
37. I accept there is credible evidence of serious harm being perpetrated against Tamils associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka.¹¹ However, on the evidence before me, I am not satisfied the applicant has such a profile, nor would one be imputed to him on return. I am not satisfied the applicant faces a real chance of serious harm as a male Tamil from the Northern Province, as a former passenger on [an asylum-seeker boat], who may be perceived to have links with the LTTE on his return to Sri Lanka now or in the reasonably foreseeable future.
38. The applicant claimed to fear harm on return to Sri Lanka because he has come to Australia and applied for asylum and because his personal information was made available on the Department's website.
39. Based on the applicant's own statements, I am satisfied that he left Sri Lanka lawfully using his own passport and that this passport expired in 2011. I accept the applicant would return to Sri Lanka on a temporary travel document, and that as such he may be identifiable as a person who has sought asylum in Australia. I accept that in 2014, some of the applicants' personal information was inadvertently published on the Department's website for a short period of time. This information included: the applicants name; date of birth; nationality; gender, the reason for and location of their detention; and whether they had any family members in detention.
40. DFAT advice is that persons returning to Sri Lanka on these documents are subject to police investigations to confirm the person's identity, to address whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants.¹²
41. DFAT and other sources considered by the delegate advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing. I have also considered the article submitted to the IAA by the applicant and not that it reports a recent statement by Sri Lanka's Prime Minister which urged Sri Lankan asylum seekers to return and that it was "quite safe for them to come back".¹³
42. The information indicates that the authorities do not perceive former asylum seekers, even those that are Tamil from former LTTE controlled areas, as being LTTE members or supporters on return.; I am not satisfied that having now lived outside Sri Lanka for a number of years, or

¹¹ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

¹² Ibid.

¹³ The Conversation, "Not 'all is forgiven' for asylum seekers returned to Sri Lanka", 10 March 2017, CXC9040663397.

seeking asylum in Australia there is any basis to the applicant's claims that on return the authorities would perceived him to have an LTTE connection or other profile.

43. There is also nothing before me that would indicate that the applicant would be imputed with an adverse opinion or profile by the Sri Lankan authorities as a result of the release of his details on the Department's website or because he was a former passenger on the [boat].
44. Reports indicate that as the LTTE is now considered a spent force, the Sri Lankan government's objective has shifted to identifying activists in the Tamil diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state.¹⁴ On the evidence before me, I am satisfied the applicant has no such profile, nor would one be imputed to him on return.
45. I accept he may be detained en masse with other returnees for several hours, but given his lawful departure and as I have found he has no adverse profile, I am satisfied that this will be temporary and he will face no additional detention or adverse treatment once he is processed and cleared. I do not accept that this brief detention and any related questioning would constitute serious harm.
46. I am satisfied there is not a real chance of the applicant being seriously harmed by the Sri Lankan authorities, or any other group or person on return to Sri Lanka on the basis of his ethnicity, as a male Tamil from the Northern Province of Sri Lanka, his past history or profile, on the basis of any actual or imputed political opinion or profile, the disclosure of his details on the Department's website, as a former passenger on the [boat], as a returning asylum seeker from Australia, or for any of the reasons claimed.

Refugee: conclusion

47. The applicant does not meet the requirements of the definition of refugee in s.5H(1) of the Act. The applicant does not meet s.36(2)(a) of the Act.

Complementary protection assessment

48. 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

49. 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.

¹⁴ UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism" 1 August 2014, CIS29809.

50. As the applicant would be returning to Sri Lanka on a temporary travel document, I have accepted he may be detained en masse with other returnees for processing on return. I have found he has no adverse profile and would not face any additional detention or adverse treatment and after the processing is complete he will be cleared. I am satisfied that the treatment as part of the processing of his return would not constitute significant harm. I do not accept it would amount to the death penalty, or result in an arbitrary deprivation of life, or torture. It does not amount to the death penalty; arbitrary deprivation of life or torture. It does not constitute pain or suffering that could be considered cruel or inhuman in nature, severe pain or suffering or extreme humiliation. I am not satisfied he faces a real risk of significant harm on return to Sri Lanka on this basis.

51. I have otherwise found the applicant does not otherwise face a real risk of significant harm by the Sri Lankan authorities or any other group or person on return to Sri Lanka on the basis of his ethnicity, as a male Tamil from the Northern Province of Sri Lanka, his past history or profile, on the basis of any actual or imputed political opinion or profile, the disclosure of his details on the Department's website, as a former passenger on the [boat], or as returning asylum seeker. Based on the same information, and for the reasons set out above, I am also not satisfied that there is a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

52. 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.