



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03175

Date and time of decision: 4 May 2018 10:29:00
Scott MacKenzie, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of 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 Tamil from Batticaloa District, Eastern Province, Sri Lanka. The applicant arrived in Australia on 8 June 2013 as an unauthorised maritime arrival. On 14 October 2016 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 17 July 2017, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
4. On 4 August 2017, the IAA received a submission from the applicant (IAA submission). The submission in part comprises argument on issues before the delegate and also refers to claims and evidence that was before the delegate, and are part of the referred material.
5. In the IAA submission, the applicant indicates that he has not been given an adequate chance to present his claims for protection. He claims that in the “first interview” he told the officer that he was “in fear” and that he did not want to say anything. He also claims that he was told by the officer that he could tell his story later but was not given an opportunity to do so. The applicant further claims that while in immigration detention he was told that the information he provided to the Department would be shared with the Sri Lankan authorities. He also states that the interpreters used by the Department “tended” to be either Tamil Malays or Tamils born in Australia, and therefore did not have a proper understanding of his dialect. He claims that the interpreters did not interpret properly.
6. I have before me audio recordings from three interviews conducted with the applicant and have listened to them all. The first interview was conducted on 9 July 2013 (entry interview part one). At the beginning of that interview the applicant was advised that the information he provided the Department would not be shared with the authorities in Sri Lanka. The applicant also confirmed that he could understand the interpreter.
7. The second interview was conducted on 12 July 2013 (entry interview part two). At the beginning of that interview the applicant was reminded about the Department’s privacy obligations and use of his information. The applicant again confirmed that he could understand the interpreter.
8. The third interview was conducted with the delegate on 28 March 2017 (SHEV interview). At the beginning of that interview the applicant was advised that his personal information, including the information he provided during the interview, would not be made available to the authorities in Sri Lanka. The applicant also confirmed that he had received an information sheet about how his information was used and that he understood the information contained within that document. The applicant further confirmed that he understood the interpreter and agreed that he would raise his hand if he did not understand the interpreter, or if he thought that the interpreter did not understand him.

9. I note the applicant made similar claims in his written statement of claims, dated 5 September 2016 (SHEV statement). In his SHEV statement, he stated that when he was first interviewed he was told to keep his answers brief. He also stated that he believed that whatever answers he provided might be given to the Sri Lankan authorities, and so he was hesitant to provide detail that might incriminate him. He further stated that he believed that the interpreters (in previous interviews) got a lot of “things” incorrect, and that there were numerous corrections made to information provided.
10. The applicant’s claim that he told the Departmental officer that he was “in fear” in the first interview (which I infer to be entry interview part one or part two) and that he was told by the officer that he could tell his story later, is not supported by the audio recording of those interviews. As noted above, I have listened to the audio recordings of all interviews and at no time did the applicant indicate that he had concerns with the competence of the interpreters or that he otherwise had difficulty understanding them, or the interviewing officers’ questions. I also note that at no point did the interpreters raise a concern with the interviewing officers that they were unable to understand the applicant’s dialect. Further, I consider that all of the interviews were quite fluid, and find that the applicant provided quite detailed responses where appropriate.
11. Significantly, the applicant has not specified in the IAA submission (or in the SHEV statement) as to what interpreting errors were made in the interviews, or what information he did not advance due to fear of it being shared with the Sri Lankan authorities.
12. Having regard to the above, I am not satisfied that the applicant had difficulty with interpreters and I am satisfied he was given an opportunity to fully present his claims for protection, and respond to relevant issues. I also note that the applicant was legally represented in terms of preparing his SHEV application and that his representative was present in the SHEV interview. I do not accept that the applicant’s claims of interpreting issues, or that he was not given adequate opportunity to put forward his claims for protection, have any credible basis. I am not satisfied that there are exceptional circumstances to justify considering this information.
13. As part of his submissions to the IAA, the applicant provided and/or referred to country information not before the delegate that pre-dates the delegate’s decision. It is new information. The applicant states that some of the information could not have been provided earlier because it had only recently come into his possession. However, I note that all of the new information is available in the public domain, some of it for many years. In the circumstances, I am not satisfied that this information was not, and could not have been, provided to the Minister before the delegate made their decision. I am also not satisfied that as general country information, it is credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant’s claims. I am not satisfied that there are exceptional circumstances to justify consideration of this information.

Applicant’s claims for protection

14. The claims outlined in the applicant’s SHEV statement can be summarised as follows:
 - The applicant is a Tamil male from Sri Lanka;
 - In 1990, the applicant joined the Liberation Tigers of Tamil Eelam (LTTE);
 - In 2003, the applicant left the LTTE and started a business;

- [In] May 2009, the government security forces took control of the applicant's area. There was an announcement that anyone involved with the LTTE should surrender, so the applicant surrendered;
- The applicant was detained at [a] camp from May 2009 until October 2010. He was interrogated about his involvement with the LTTE and tortured;
- In October 2010, the applicant was transferred to [a second] camp. He was again interrogated and mistreated;
- In 2011, the applicant was transferred to a rehabilitation camp. He was released [in] March 2012;
- Following his release, the applicant and his family moved to India;
- In May 2013, the applicant departed India for Australia;
- If returned to Sri Lanka, the applicant fears harm from the Sri Lankan government, security forces and militant groups on account of:
 - his Tamil ethnicity
 - his age
 - his former place of residence in the north of Sri Lanka
 - his actual and imputed support of the LTTE, including his previous detention
 - his illegal departure from Sri Lanka
 - his asylum application abroad
 - his time spent outside of Sri Lanka with a large Tamil diaspora.

15. In the SHEV interview, the applicant provided the following additional information and/or claims:

- The applicant worked as a driver for the LTTE, transporting [goods];
- Following his release from rehabilitation, the applicant was required to remain in the same area, sign every week, and to make himself available should he be asked to report for further questioning;
- The applicant never signed/reported because he fled to India four days following his release from rehabilitation;
- A week after he arrived in India, the applicant's mother was arrested by the Sri Lankan authorities. She was asked about his whereabouts.

Refugee assessment

16. 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

17. 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.
18. The applicant claims to originate from Batticaloa District, Eastern Province. Since 1990, he lived in the north of Sri Lanka. The applicant has provided some evidence of his identity, and on the basis of his evidence, I accept that he is a Tamil male from Sri Lanka.

Events in Sri Lanka

19. I accept the applicant's evidence in respect of his involvement with the LTTE between 1990 and 2003, and that he was detained and underwent rehabilitation at the end of the conflict. Since his arrival in Australia, the applicant has consistently claimed that he joined the LTTE in 1990, that he worked for the LTTE in a non-combat role, that he stopped working for the LTTE in 2003, that he was detained in May 2009 at the end of the conflict, that he was later transferred to the [second] camp, and that he was later sent to a rehabilitation facility. I also accept that the applicant was mistreated by the authorities while detained. Overall, I find these claims, including the documentation provided, supported by the country information before me. I further accept that about four days following his release from rehabilitation in March 2012 he travelled to India with his family, and has not returned to Sri Lanka.
20. In his SHEV statement, the applicant claimed that he travelled to India due to the experiences he suffered while in detention and because he feared that he would be arrested again. Although not mentioned in his written claims, he advised the delegate in the SHEV interview that a condition of his release was that he could not move out of the local area, that he was required to sign each week, and that if requested he must report to the authorities. The applicant also advised the delegate that he never signed, and nor was he ever requested to report – he departed for India within four days of his release. He further claimed that about one week after he arrived in India, his mother was arrested by the Sri Lankan authorities after they had come looking for him.
21. County information in the review material indicates that former LTTE members released from rehabilitation may have been subjected to monitoring and reporting requirements and had their movements restricted; the level of which depended on whether they were low-profile or

high-profile former members.¹ However, the applicant's evidence was that he did not have a high-profile role in the LTTE and nor was he a combatant. I also note his evidence in entry interview part two, where he advised that following his release from rehabilitation he obtained a Sri Lankan passport and a three month tourist visa for India, and departed Sri Lanka legally by air. In his SHEV application, the applicant recorded that the passport was issued in his own name. Country information before me indicates that there are thorough procedures in place at Colombo airport to identify persons of interest, including former LTTE members.² I consider the ability of the applicant to obtain a passport and depart Sri Lanka on this document in April 2012 to undermine his claims that at this time his movements were restricted, that he had to report weekly, and that he was a person of adverse or ongoing interest to the authorities at that time. I also find the applicant's failure to mention his reporting requirements and his mother's arrest in his otherwise detailed SHEV statement not insignificant. For these reasons, I conclude that those claims raised, for the first time in the SHEV interview, were advanced to enhance his claims for protection. I prefer the applicant's evidence in his SHEV statement, that he departed Sri Lanka in April 2012 due to his experiences while in detention and because he feared re-arrest. I do not accept that following the applicant's release from rehabilitation he was required to stay local and report each week. Nor do I accept that his mother was arrested by the Sri Lankan authorities when they came looking for him about one week after he departed Sri Lanka.

22. In support of his SHEV application, the applicant submitted a letter from PA, [an official in] Batticaloa District, dated [in] July 2013. The letter states that the applicant and his family could not live in Sri Lanka "because of the unknown militant group threat". The applicant also submitted a letter from ES, [an official], dated [in] July 2013. The letter states that the applicant and his family travelled to India due to "the threat of the unidentified armed group". While the applicant claimed in his SHEV statement that he feared harm on return to Sri Lanka from the "Government forces / police / security forces / militant groups" due to his prior involvement with the LTTE, he did not claim to have received any specific or direct threats by unidentified armed or militant groups. In the SHEV interview, the applicant confirmed that he never had contact with any paramilitary groups in Sri Lanka. He advised the delegate that the "threats to [his] life" related to the suspicion cast upon him from the military, the police, and the armed groups operating in Sri Lanka, due to his prior LTTE involvement. He said that these entities could use the Prevention of Terrorism Act to do anything to anybody.
23. Country information from the UK Home Office assesses that international protection is not warranted in cases where a person evidences past membership or connection with the LTTE, unless they had a significant role in it (i.e. LTTE's former leadership (combat or civilian) and/or former members who were suspected to have committed terrorist or serious criminal acts during the conflict, or who have provided weapons or explosives to the LTTE), or if they are, or perceived to be, active in post-conflict Tamil separatism.³ Similarly, DFAT assess that high-profile individuals with links to the LTTE would continue to be of interest to the Sri Lankan authorities, and indicate that aside from the LTTE leadership former members who have committed terrorist or serious criminal acts during the conflict, or who provided weapons or explosives to the LTTE, may be considered high-profile.⁴ While I have accepted that the

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.37; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779, p.8

² UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779; DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.29, 5.16, 5.19

³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779, p.13

⁴ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.31, 3.38

applicant was a driver for the LTTE between 1990 and 2003 and that he came to the adverse attention of the Sri Lankan authorities on that basis, in the applicant's circumstances, I am not satisfied that, in 2018, he is a person who is of ongoing interest to the Sri Lankan authorities, or any associated paramilitary group, due to any actual or imputed LTTE links.

24. In 2017, the UK Home Office reported that being of Tamil ethnicity does not in itself warrant international protection.⁵ In 2012, the UNHCR determined that there was no longer a presumption of a requirement for protection for reason of being a Tamil from a former LTTE controlled area,⁶ and more recent reports do not mention that Tamils are at risk of harm based on their prior place of residence.⁷ I have also considered the country information from DFAT and other sources which indicate that Tamils are not being systematically targeted and subjected to serious harm because of their race. For example, the UK Home Office states: "Simply being a Tamil does not of itself give rise to a well-founded fear of persecution or serious harm in Sri Lanka. The onus will be on the person to demonstrate that they will face on return ill-treatment from the current, as opposed to the previous, government."⁸
25. Country information indicates that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009.⁹ There are several Tamil political parties in Sri Lanka, with the largest alliance of parties operating under the umbrella of the Tamil National Alliance (TNA). The TNA currently has 16 members of parliament and holds the majority of seats in the Northern Provincial Council. The TNA leader Sampanthan is leader of the Opposition.¹⁰ More generally, DFAT advises that there are no official laws or policies that discriminate on the basis of ethnicity or language in Sri Lanka, which includes education, employment or access to housing and the report also suggests that implementation of laws and policies by the current Sirisena government is generally without discrimination.¹¹ There is no evidence before me that indicates that the applicant has or will experience any barriers to accessing education, employment or any government services in Sri Lanka.
26. In support of his SHEV application, the applicant provided numerous sources of country information about the treatment of 'young' persons in Sri Lanka. I note that the applicant is [age]. I accept that during the conflict many Tamils in the north and east of Sri Lanka were harassed and detained by the Sri Lankan security forces. The US Department of State reported that in 2015 security forces and paramilitary groups frequently harassed young and middle-aged Tamil men, especially in the north and east of Sri Lanka.¹² In 2017, DFAT assessed that the

⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779, p.13

⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779; US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka", 3 March 2017, OGD95BE926876; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017, OGD7C848D112

⁸ UK Home Office, "Country Information and Guidance Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17, p.5

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; *US Department of State*, "Country Report on Human Rights Practices 2016 – Sri Lanka", 3 March 2017, OGD95BE926876; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017, OGD7C848D112

¹⁰ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.6

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.4

¹² US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p. 1, 33

harassment of Tamils had decreased significantly under the Sirisena government, noting that members of the Tamil community have described a positive shift in the nature of their interactions with the authorities, and feel able to question the motives of, or object to, monitoring or observation activities.¹³ DFAT also noted that since the end of the conflict there had been a reduction in the military's involvement in civilian life and that military checkpoints on major roads leading to the north were removed in 2015.¹⁴ I am not satisfied that the applicant faces a real chance of serious harm in Sri Lanka due to his age.

27. Having regard to the above, I am not satisfied that the applicant faces a real chance of serious harm from the Sri Lankan security forces, militant groups, or any other arm of the Sri Lankan government, due to his Tamil ethnicity, his age, his former place of residence, his actual or imputed LTTE profile, his previous detention and rehabilitation, or for any other reason, upon his return to Sri Lanka now, or in the foreseeable future.

Returning asylum seeker / Tamil diaspora / Illegal departure from Sri Lanka

28. I accept that if the applicant returned to Sri Lanka he would do so as a failed asylum seeker returned from Australia.
29. Having regard to the country information before me, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities by virtue of him being a Tamil asylum seeker. Sri Lanka's Constitution entitles any citizen to 'the freedom to return to Sri Lanka'¹⁵ and I note that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia.¹⁶ Although there have been reported instances of returnees being harmed, DFAT assess the risk of mistreatment for the majority of returning asylum seekers to be low and continues to reduce.¹⁷
30. DFAT indicate that returnees will be processed by the Department of Immigration and Emigration, the State Intelligence Service and the CID based at the airport who check travel documents and identity information of returnees against the immigration database and intelligence databases, as well as determining whether a returnee has any outstanding criminal matters. Processing arrivals at the airport can take several hours, primarily due to the administrative processes and staffing constraints at the airport.¹⁸ I am satisfied on the information before me that the applicant has no identification concerns and, while I have accepted that the applicant came to the adverse attention of the Sri Lankan authorities between 2009 and 2012 on account of his prior LTTE profile, I am not satisfied that he is a person with a criminal or security record that would now raise the concern of these authorities. Further, I am not satisfied that any processing delays to which the applicant may be subject to would constitute serious harm as defined by the Act.
31. DFAT assess that some Tamil diaspora groups continue to hold public demonstrations in their countries of residence to support a separate Tamil state in Sri Lanka, and that high-profile leaders of pro-LTTE diaspora groups may come to the attention of Sri Lankan authorities as a result of their participation in such demonstrations.¹⁹ The Home Office also assess that participating in diaspora activities is not in itself evidence that a person will attract adverse

¹³ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.9

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.39

¹⁵ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.17

¹⁶ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.22, 5.27

¹⁷ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.21-4.22

¹⁸ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.19

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.45

attention on return to Sri Lanka.²⁰ The applicant has not claimed, and nor is there any evidence before me that indicates, that he has been openly critical of the Sri Lankan authorities or that he has engaged in any activities individually with the Tamil diaspora abroad that would elevate his profile or bring him to the adverse attention of authorities.

32. For these reasons, I am not satisfied the applicant faces a real chance of serious harm due to being a failed asylum seeker from Australia now, or in the reasonably foreseeable future, if he returns to Sri Lanka. Nor am I satisfied that the applicant faces a real chance of serious harm in Sri Lanka for reason of him spending time in a country where there exists a large Tamil diaspora.
33. In his SHEV statement, the applicant claimed that he faced harm in Sri Lanka for departing Sri Lanka illegally. However, as noted above, the applicant's evidence in the entry interview part two, which I accept, was that he departed Sri Lanka legally by air in April 2012. Even if he did depart Sri Lanka illegally, on the country information before me²¹, I am not satisfied he would face harm on return to Sri Lanka on that basis. I am not satisfied that the applicant will be subject to any penalty, process, or harm, on account of his legal departure on return to Sri Lanka.
34. I accept that the applicant departed India illegally. However, there is no information before me to indicate that departing India illegally would attract adverse attention on return to Sri Lanka. According to the TNA, 200,000 recognised Tamil refugees have returned to Sri Lanka from India and there have been no reports of ill-treatment on return.²²
35. After having regard to the applicant's claims individually and cumulatively, I find that he does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

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

Complementary protection assessment

37. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

38. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person

²⁰ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779, p.13

²¹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

²² UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017, OGD7C848D112, p.13

- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

39. I have concluded that the applicant is not of interest to the Sri Lankan security forces, militant groups, or any other arm of the Sri Lankan government, on account of any actual or imputed LTTE links and does not face a real chance of serious harm on this basis. I have also concluded that the applicant does not face a real chance of serious harm for any other reason including his ethnicity, his former place of residence, his age, his previous detention and rehabilitation, his departure from Sri Lanka or India, or for being a returning asylum seeker. Based on the same information, and for the reasons set out above, I find that the applicant does not have a real risk of suffering significant harm on return to Sri Lanka.

40. The country information confirms that the trend of monitoring Tamil civilians in day-to-day life has eased since 2009. Having considered the applicant's own circumstances and evidence discussed above I am not satisfied that any treatment the applicant may face amounts to significant harm as defined in the Act. I am not otherwise satisfied he faces a real risk of significant harm as a Tamil from the north or east.

41. While I accept the applicant may be subjected to questioning on return to Sri Lanka, I am not satisfied that this amounts to significant harm. I find that the questioning and the potential of the arrivals process taking several hours, individually or cumulatively not to amount to the death penalty, arbitrary deprivation of life, torture or that there is an intention to inflict pain or suffering, severe pain or suffering or cause extreme humiliation. I am not satisfied this amounts to significant harm as defined by the Act.

42. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

43. 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.