



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03509

Date and time of decision: 23 April 2018 12:15:00
Anne-Maree Harrison, 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. On 26 October 2015, the referred applicant (the applicant) applied for a Safe Haven Enterprise (subclass 790) Visa (SHEV). The applicant claimed to fear persecution from Sri Lankan authorities for reasons of being a single Tamil male from Jaffna, a former Liberation Tigers of Tamil Eelam (LTTE) controlled area, for departing unlawfully, and being a Tamil asylum seeker.
2. On 29 August 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the applicant a SHEV because the delegate found the applicant is not of interest to the Sri Lankan authorities and does not face a real chance or real risk of serious harm or significant harm if returned to Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 17 September 2017 and 2 October 2017, the IAA received submissions from the applicant which mostly addresses the delegate's decision and findings. As such, it may be regarded as argument rather than 'information' and I have had regard to those elements of it in making this decision.
5. The submissions also contain information which I consider to be new claims, as follows:
 - a. the applicant's father was killed by the army
 - b. the applicant faces a real and not a remote possibility of serious and/ or significant harm on return to Sri Lanka as a member of a particular social group of failed asylum seekers from Buddhist monks / radical Buddhists, as evidence by an article published in the Times of India after the delegate's decision about a recent attack carried out by Buddhist monks / radical Buddhists against Rohingya Muslim refugees (copy of article provided, dated 26 September 2017).
6. In relation to paragraph a, the applicant previously said his father passed away in 2012, and he died of illness. There was no mention of the applicant's father having been killed by the army or any claim based on the applicant's father. If this information is new to the applicant since the decision was made, he has not explained that or the circumstances in which he became aware of it. Furthermore, no detail has been provided about the circumstances of the claimed death at the hands of the army, or any other supporting information. I am not satisfied that there are exceptional circumstances to justify considering the new claim. Further, the applicant has not satisfied me that s.473DD(b) is met.
7. In relation to paragraph b, I am satisfied this country information and new claim on which it is based could not have been provided before the decision was made given the article from the Times of India was published a month after the delegate made her decision. However, I am not satisfied that exceptional circumstances exist to justify considering the new information. The applicant submits that because the Tamil Tigers / LTTE have been accused of killing Buddhist monks in the past, should the applicant be returned to Sri Lanka, as a failed asylum seeker with the profile he has, he faces a real chance of being harmed by Buddhist monks / radical Buddhists despite anti-discrimination laws in place and the situation in Sri Lanka having

improved. Given, the applicant has not claimed to be a Muslim (he has claimed to be Hindu and / or Catholic) and the attack appears to be motivated by religious tensions between Buddhists and Muslims, and those targeted are Muslim asylum seekers from another country, not failed asylum seekers from Sri Lanka, I am not satisfied exceptional circumstances exist and I have not considered this new information.

8. The submissions also contain the following new country information:
 - a. Committee Against Torture, "Concluding observations on the fifth periodic report of Sri Lanka", Advanced unedited version, 30 November 2016
 - b. UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", Version 5.0, June 2017
 - c. Austrian Red Cross, ACCORD, "Sri Lanka COI Compilation", December 2016
 - d. Joanne Richards, The Centre on Conflict, Development and Peacebuilding, "CCDP Working Paper: An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", November 2014
 - e. Author not stated, "Repeal or reform of Sri Lanka's repressive national security law – a comparative legal analysis", speech given at a the Houses of Parliament, London, 24 June 2014
9. All of it pre-dates the delegate's decision. There is no explanation as to why it could not have been provided previously. The applicant was interviewed on 26 June 2017, and the decision was made two months later. I am satisfied there was ample opportunity for the applicant to put forward all five sources of new information, after the interview, and before the decision was made. These five sources may be described as general country information rather than personal information. The information before me includes similar relevant and credible country information. I am not satisfied there are exceptional circumstances to justify considering this information. Nor has the applicant has satisfied me that it meets the requirements of either s.473DD(b)(i) or (ii).

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan Tamil of the Catholic religion from Jaffna district, Northern Province.
 - Growing up in Jaffna he and his family experienced hardship and severe discrimination due to their Tamil ethnicity, and they were displaced several times due to the war.
 - The LTTE pressured young Tamil males to join them. In 1995, the LTTE took him away, but he managed to escape after two or three days.
 - In 2003, he relocated to Colombo for eight months because the situation in the north had deteriorated. In October 2003, he returned to Jaffna as things had settled down.
 - In mid-2005, the security situation deteriorated again in Jaffna. In December 2005, he went to [Country 1] on a work visa, where he [worked].

- In April 2010, he was convicted of a driving related offence and imprisoned for a month in [Country 1] because he could not pay the fine. After he served his prison sentence, he was removed from [Country 1] as Immigration did not renew his visa.
- In May 2011, he got a job as a [driver], driving between Jaffna and Colombo. Along the [route] he was frequently stopped by the Sri Lankan police at various check points and he had to pay bribes. There were also instances when he was beaten severely by the police when he refused to pay the money they demanded. He was treated this way because he is a Tamil from Jaffna.
- In May 2012, on his way to buy groceries in Jaffna town he was stopped by two army officers, taken to an army camp, detained for two hours, physically assaulted, and interrogated about any involvement with the LTTE, which he denied but was not believed, and asked if he knew others involved in the LTTE. When released he was warned not to tell anyone what had happened. He sought medical attention for his injuries and a doctor had to [give him medical treatment].
- He departed Sri Lanka in early August 2012 and arrived in Australia late August 2012.
- The Sri Lankan authorities have harmed him in the past, and if returned he would face harm at the hands of the authorities as the situation has not changed. The Sri Lankan authorities are concerned about the LTTE regrouping, and young single Tamil males like himself are particularly targeted and persecuted on suspicion they may be former LTTE members or supporters. Persons who were members of violent paramilitary groups have been recruited into the Sri Lankan police force and they pose a risk.
- He will be harmed, possibly killed, by the Sri Lankan Criminal Investigations Department (CID), the police and army because the authorities perceive him to be a member or supporter of the LTTE due to his ethnicity, and because he is a single Tamil man from the north who is middle-aged. He could be imprisoned for a long period for having departed the country illegally. Additionally, because he spent time in prison in [Country 1], he has a sister living in [Country 2], a country where the Tamil diaspora support the LTTE, he has scars [from] being mistreated when detained in 2012, all of this adds to his profile and the cumulative risks for him.
- He does not speak Sinhala and it would be difficult to communicate with the authorities. The Sinhalese would be suspicious of a Tamil moving to their area, and could alert the authorities, and for this reason he could attract adverse attention no matter where he goes in Sri Lanka. He does not have family members outside of the Northern Province of Sri Lanka.

Factual findings

11. I accept the applicant is a Sri Lankan Tamil from Jaffna district, Northern Province, based on his identity documents. When the applicant arrived in Australia he claimed to be of the Hindu faith, and in his July 2013 protection visa application (PV) he said he was a practising Hindu. However, the applicant claimed in his SHEV application to be Catholic. I note the applicant claimed to attend a Catholic primary school, and a Hindu secondary school in Sri Lanka. The applicant has not provided any other information to support his claimed faith and not made a claim to fear persecution based on being a Catholic or being a Hindu. In the absence of any other supporting information, I am not satisfied the applicant is a Catholic.
12. I accept the applicant and his family would have experienced hardship and discrimination due to their Tamil ethnicity during the war in Jaffna, and I accept the applicant and his family were

displaced several times due to the war. The applicant's claims are supported by country information about the internal conflict from 1984 to May 2009, in particular events in and around Jaffna where the applicant and his family lived.¹

13. I also accept the LTTE pressured young Tamil males to join them, as noted in the country information.² I accept that in 1995, the LTTE took the applicant away, but he managed to escape. In his SHEV application the applicant said he managed to escape after two or three days. However, when asked about this incident during the SHEV interview he said he escaped the same night. The applicant said he did not undergo any weapons training with the LTTE, and he was not a member of the LTTE and neither were his immediate or extended family members. The only support he and his family gave the LTTE was when the LTTE was collecting gold from everyone and his father gave them some gold. I find the applicant was not an LTTE member and spent only a few hours with the LTTE in 1995 when he escaped forced conscription.
14. I accept that in 2003, the applicant relocated to Colombo for eight months because the situation in the north had deteriorated, and that in October 2003 he returned to Jaffna as things had settled down. The applicant consistently made this claim, and it is supported by country information about the ceasefire agreement between the Sri Lankan government and the LTTE which was negotiated in February 2002.³ In his SHEV interview the applicant said he went to Colombo with a friend, he did not go out because he did not speak Sinhala and his friends got things for him, and he did not have any troubles with the authorities during this time in Colombo. He also spoke about the incident in 2002-2003, which he mentioned in his entry interview about being arrested because someone accused him of hitting his brother, but he did not state whether this happened while in Colombo or in Jaffna. He was taken to the police, arrested but not charged and then released. I find the applicant spent eight months living in Colombo in 2003, and with the exception of the events involving the accusation of assault, without incident.
15. Noting the country information in the review materials, I accept that in mid-2005, the security situation deteriorated again in Jaffna.⁴ I also accept that in December 2005, the applicant went to [Country 1] on a work visa, where he worked [for a] company. The applicant has consistently made this claim from his arrival interview held on 24 October 2012 through to his SHEV application and interview. The applicant also provided a copy of his passport with work visa for [Country 1].
16. I accept the applicant lived and worked in [Country 1] [for] about five years and that he was convicted of a driving related offence and imprisoned for a month in [Country 1] because he could not pay the fine. The applicant has consistently made this claim. However, whether he was in prison in 2010 or 2011, and returned to Sri Lanka in May 2010 or May 2011, whether his visa was cancelled or not renewed, and whether he was removed or he returned varies in the applicant's evidence from his arrival interview in October 2012, to his July 2013 PV application, his October 2015 SHEV application and his June 2017 SHEV interview. The delegate asked the applicant what he did for a year from when he returned to Sri Lanka in May 2010 to when he commenced work a year later as a [driver], and he said his father was sick during that time and in and out of hospital, so he was committed to looking after him. In his 2013 PV application he said in late 2010 his family in Sri Lanka informed him that his father was ill and he should return home. He made arrangements to finish up his position in [Country 1] and instructed his

¹ UK Home Office, "Sri Lanka: Country of Origin Information (COI) Report", 7 March 2012, CIS29709.

² UK Home Office, "Sri Lanka: Country of Origin Information (COI) Report", 7 March 2012, CIS29709.

³ UK Home Office, "Sri Lanka: Country of Origin Information (COI) Report", 7 March 2012, CIS29709.

⁴ UK Home Office, "Sri Lanka: Country of Origin Information (COI) Report", 7 March 2012, CIS29709.

employer not to renew his visa, and in May 2011 he returned home to Sri Lanka. He also stated in the section about character, that he spent 30 days in prison in 2011 in [Country 1] and after he was released from prison he had to depart because his visa had expired. There is evidently some confusion in the recollection and recording of the dates and events in 2010 and 2011. Taking into account the passport and visa evidence, which forms part of the SHEV application, which includes what looks like an airport departure stamp from [Country 1] for 8 May 2011, and a cancelled work visa, I find the applicant departed [Country 1] on 8 May 2011, and returned to Sri Lanka as he no longer had a legal right to remain in [Country 1]. I also find that before departing [Country 1] he spent a month in prison in 2011 because he was not able to pay a fine resulting from a traffic offence.

17. I accept that in May 2011, the applicant got a job as a [driver], driving between Jaffna and Colombo, and that along the [route] he was frequently stopped by the Sri Lankan police at various check points and he had to pay bribes; there were also instances when he was beaten severely by the police when he refused to pay the money they demanded; and he was treated this way because he is a Tamil from Jaffna. I accept the applicant worked as a [driver] and was harassed and had to pay bribes to police.
18. I accept that in May 2012, when the applicant was on his way to buy groceries in Jaffna town he was stopped by two army officers, taken to an army camp, detained for two hours, physically assaulted, and interrogated about any involvement with the LTTE, which he denied, and when released he was warned not to tell anyone what had happened. The applicant has consistently made this claim in his 2013 PV application, his SHEV application and SHEV interview. The delegate asked the applicant why he did not raise this incident in his arrival interview, and he said he was not well at the time, and argued that it was consistent with the rest of the claims made in the arrival interview. I accept the applicant was stopped in May 2012 as claimed, assaulted, interrogated about the LTTE and released. The applicant spoke convincingly about his experience during the SHEV interview, and he said he was only asked if he was involved with the LTTE or if he supported the LTTE, they did not ask him about anyone else, and I am satisfied this was the case. He spoke about how [he was injured] during the beatings, and I accept the doctor he saw had to [to give him medical treatment] afterwards. I am also satisfied that in May 2012, if the authorities had a real interest in the applicant for his connections to the LTTE he would not have been released that same day. The applicant said he continued to drive [after] this incident until he departed Sri Lanka in August 2012, and now and then the police would stop him. I am satisfied that the applicant was released after being detained for two hours, questioned about his involvement and support for the LTTE, mistreated and then released because the police were no longer interested in the applicant for any reasons in connection with the LTTE.
19. I find the applicant is a middle-aged single Tamil male from Jaffna, Northern Province, who departed Sri Lanka unlawfully by boat in early August 2012. While noting the delegate said in her decision that she did not witness any discernible scars or [at] the SHEV interview, I am prepared to accept the applicant has scars [from] being mistreated when detained in 2012. I also accept the applicant has a sister living in [Country 2], and that she moved there in early 2016 when she got married, as he explained during the SHEV interview. I also note the applicant said in his SHEV interview that he has a brother living in Colombo, Sri Lanka.

Refugee assessment

20. 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

21. 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.

22. I accept the applicant is a middle aged Tamil male from Jaffna who was subject to an attempt by the LTTE in 1995 to forcibly recruit him, but he escaped within a few hours, and he was never a member or supporter of the LTTE. The applicant lived and worked in [Country 1] from December 2005 until May 2011, and spent one month in prison in [Country 1] for not being able to pay a traffic related fine. I find that when the applicant departed Sri Lanka in August 2012 he was not of any real interest to the Sri Lankan authorities in connection with the LTTE beyond being subject to mistreatment, harassment and bribery in 2011 and 2012, including the incident in May 2012 when he was detained for two hours, while working as a [driver], because of his Tamil ethnicity and because he was living in Jaffna.

23. It is now approximately nine years since the war ended in Sri Lanka in May 2009, and the situation for Tamils has changed significantly in this time. According to DFAT the security situation in the north and east of the country is significantly improved, and the monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government, and Tamils now have a substantial level of political influence and their inclusion in political dialogue has also increased since Sirisena came to power in 2015. However, DFAT noted that ethnicity, along with communal issues surrounding language and religion, are a source of division in Sri Lanka, and are defining features of day-to-day life in Sri Lanka and fundamental to the reconciliation process.⁵

24. While the country information before me provides credible evidence of continued incidents of torture in Sri Lanka since the end of the war, mostly related to cases from the period immediately following the civil conflict, and involving people with imputed links to the LTTE (but not exclusively) according to DFAT, the incidence of torture has reduced in recent years, and allegations of torture pertain to a relatively small number of cases compared to the total population. Furthermore, DFAT assesses that the number of incidents of extra-judicial killing,

⁵ DFAT, “DFAT Country Information Report Sri Lanka”, 24 January 2017, CISED50AD105.

disappearances and abductions for ransom, has significantly reduced since the end of the conflict.⁶

25. The applicant argued that the 2017 DFAT report evidences that the Sri Lankan Police maintain an additional 8,600 member paramilitary Special Task Force and the majority of Sri Lankan Police members were recruited and gained their experience during wartime and this poses a risk of harm for the applicant. This is correct, the 2017 DFAT report does state this, as well as stating that significant institutional changes are required during the Sri Lankan Police forces transition to a community policing framework. The report goes on to state that police officers are not generally well paid and there have been reports of petty corruption such as issuing traffic fines to supplement the income of individual officers,⁷ which was the experience of the applicant in 2011 and 2012. However, DFAT does not indicate that Tamils are targeted by the Special Task Force or the rest of the Sri Lankan Police for such instances of petty corruption over other ethnicities in Sri Lanka.
26. In its March 2017, report the UK Home Office opined that a person being of Tamil ethnicity would not in itself warrant international protection, and neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it, or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state. Further, mere participation in diaspora activities, such as attending demonstrations, is not in itself evidence that a person will attract adverse attention on return to Sri Lanka. In relation to scarring, the country information indicates that scars, like an LTTE tattoo, may increase suspicion during an interrogation.⁸ However, there is no evidence before me of the applicant attending or actively engaging in Tamil separatist or diaspora activities while in Sri Lanka, [Country 1] or since he has been in Australia. Nor is there any evidence before me that the applicant's sister, who lives in [Country 2], has engaged in Tamil separatist or diaspora activities. There is also no medical evidence before me in relation to the applicant's [scars], although I accept these exist and are as a result of mistreatment while detained in 2012, but not that these scars would cause suspicion of LTTE involvement.
27. I have found the applicant was subject to mistreatment, harassment and bribery in 2011 and 2012, while working as a [driver], because of his Tamil ethnicity and because he was living in Jaffna. I have also found the applicant was not of any interest to the Sri Lankan authorities in connection with the LTTE when he departed Sri Lanka in August 2012. The applicant has not claimed to engage in any Tamil separatist activities since departing that may alter his profile. While I appreciate that being a single Tamil male may have been reason for suspicion of LTTE involvement in the past, taking into account country information about the improved situation for Tamils in the north, I find that if returned to Sri Lanka there is not a real chance the applicant would be imputed to be an LTTE member or supporter. I am not satisfied there is a real chance he will be targeted for any harm by Sri Lankan authorities, including Sri Lankan Police Special Task Force, for reasons of being a single middle-aged Tamil man from Jaffna with some scarring.
28. The evidence before me does not support a finding that a person will face harm for the reason that they are a Tamil asylum seeker. DFAT is aware of a small number of unverified allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka. However, DFAT reports that thousands of asylum seekers have returned to Sri Lanka since

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

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

⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, OG6E7028822.

2009, including from Australia, the US, Canada, the UK and other European countries, with relatively few allegations of torture or mistreatment. DFAT assessed that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce.⁹ I find there is not a real chance of harm for the applicant in connection with being a Tamil asylum seeker.

29. Information from DFAT, and the UK Home Office (in particular the information from the International Organisation for Migration (IOM)),¹⁰ about the processing by officials, and the offences under the Immigrants & Emigrants Act (I&E Act) does not support a finding that the applicant will face a real chance of persecution because he departed the country unlawfully.
30. The applicant will likely experience a brief period of detention and questioning by Sri Lankan immigration and law enforcement officers at the airport. DFAT information is similar to the IOM information, which is that the investigative process for those returning concentrates on confirming the persons' identity and any outstanding criminal matters, including the existence of court orders and arrest warrants.¹¹ There is no evidence before me that the applicant has any outstanding criminal matters, court orders or arrest warrants.
31. The applicant may be charged with an offence under the I&E Act for departing Sri Lanka unlawfully. If charged, and depending on how he pleads, the applicant may spend 24 hours in police custody at the airport, or several days in prison depending on the availability of a magistrate, if this occurs over the weekend. If he pleads guilty he will be fined and free to go. If he pleads not guilty, he will likely be released on bail without conditions and reporting requirements until the matter is resolved by the courts. Given there is no evidence the applicant was a people smuggler, it is highly unlikely he will be given a custodial sentence if found guilty of unlawful departure.¹²
32. According to DFAT,¹³ prison conditions in Sri Lanka in general do not meet international standards because of a lack of resources, overcrowding and poor sanitary conditions. However, Sri Lankan authorities have been taking steps to address prison overcrowding. DFAT also refers to the International Committee of the Red Cross visiting prisons and remand centres. I accept that if the applicant were charged with an offence, there is a possibility he would be detained in these conditions for up to a few days. I am not satisfied this detention, and the imposition and questioning the applicant is likely to face on return amounts to serious harm. Furthermore, the evidence before me does not indicate that the processes and penalties imposed as a consequence of the I&E Act are discriminatory on their face or in their application. I am not satisfied they amount to persecution.
33. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

34. 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).

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; 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 Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112.

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

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

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

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

Complementary protection assessment

35. 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

36. 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.

37. I accept the applicant is likely to be questioned, detained for a short period of time, possibly in a prison, and fined on arrival or soon after arrival for having departed Sri Lanka unlawfully by sea in August 2012. In relation to the possible period of detention in a prison, country information indicates that the poor prison conditions are due to overcrowding, poor sanitation and a lack of resources. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture for his unlawful departure by sea. Further, evidence does not suggest that the treatment and penalties for unlawful departure under the I&E Act are intended to inflict pain or suffering, severe pain or suffering, whether physical or mental, or cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment.¹⁴ I find there is not a real risk of significant harm on this basis.

38. I have concluded there is not a real chance the applicant will face any harm from Sri Lankan authorities because he is a single middle-aged Tamil man from Jaffna with scarring, for being a Tamil asylum seeker, who does not speak Sinhala, and a sister who lives in [Country 2], or as a result of his previous experiences in Sri Lanka and [Country 1]. I am similarly not satisfied that there is a real risk of any harm, including significant harm on these bases.

39. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk he will suffer significant harm.

Complementary protection: conclusion

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

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

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.