



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/04156

Date and time of decision: 29 March 2018 13:35:00
Jane Bishop, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) is a [man] that claims to be a national of Sri Lanka and identifies himself as a Hindu Tamil. He arrived in Australia by boat on 17 August 2012. On 8 August 2016 the applicant applied for a Safe Haven Enterprise Visa (SHEV).
2. On 10 January 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the applicant's visa. The delegate accepted that the applicant was a Tamil Sri Lankan that was born in India and resided there until 2000 and then from 2004 – 2005 and then from 2006 – 2010. The delegate did not accept that the applicant or his family were persons of adverse ongoing interest to the Sri Lankan authorities at the time of – and since – he departed Sri Lanka. The delegate accepted that the applicant left Sri Lanka without the knowledge of the Sri Lankan authorities and would be returning to Sri Lanka as a failed asylum seeker.
3. The delegate determined that the applicant does not have a profile of interest with the Sri Lankan authorities and that he does not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Sri Lanka. Likewise, the delegate determined that the applicant does not have a criminal background and was not of interest to the authorities when he left Sri Lanka. The delegate was satisfied that the applicant does not hold a well-founded fear of persecution on account of being a failed Tamil asylum seeker who departed Sri Lanka without the knowledge of the Sri Lankan authorities.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). The applicant provided no additional information to the IAA.

Applicant's claims for protection

5. I accept the following of the applicant's claims:
 - He is a national of Sri Lanka and Tamil.
 - He was born in [year] in [Tamil Nadu] and spent the first seven years of his life there before returning to Sri Lanka.
 - In 2004 the applicant and his family left Sri Lanka and went to India. The applicant and his family returned to Trincomalee, Sri Lanka in 2005.
 - During the conflict the Sri Lankan army (SLA) would stop the applicant – because he was a Tamil, - question him about his links to the Liberation Tigers of Tamil Eelam (LTTE) and beat him. The SLA told the applicant that all the problems in Sri Lanka were because of Tamils.
 - He had no involvement with the LTTE.
 - The applicant and his family left Sri Lanka and went to India in 2006. The applicant and his family returned to Sri Lanka in February 2010. The applicant was stopped and beaten while travelling to and from school because he was a Tamil. He did not know if

the people that beat him were Sinhalese civilians or from the Central Investigations Department (CID).

6. The applicant's other claims as outlined in his Statutory Declaration dated 25 July 2013 are:

- In 2005 (when the applicant was about [age] years old) he participated in a hunger strike to protest against the Sri Lankan Government's treatment of Tamil people. SLA officers beat the applicant and hit him with a gun. He has a scar [from] the incident.
- In 2011 the applicant's mother's brother P was killed by the SLA because he was a senior member of the LTTE. His uncle was forcefully recruited and the applicant does not know the extent or nature of his role. He found out about his uncle's death in 2013.
- In 2011 the SLA questioned the applicant about his uncle's role in the LTTE.
- In September 2011 the applicant and his friends were approached by the CID while they were at [a location]. The CID asked the applicant if he was selling drugs and beat him. The CID told the applicant that he had to help them find the people that were selling drugs and, if he didn't, he would face trouble in the future. He believes he was targeted because he was a young Tamil man.
- The CID handcuffed the applicant and he was detained for about one hour.
- In March 2012 the applicant and his friend D were [at a location] and approached by four CID officers. The CID officers breathalysed the applicant, interrogated the applicant and accused the applicant of selling drugs. The CID officers discovered that the applicant and his friend had been drinking. The CID told the applicant and D that because they were Tamils and drinking they must know who was responsible for dealing drugs in the area. The applicant and his friend were handcuffed and taken to a CID vehicle.
- The CID took the applicant and D away. The CID told the applicant and D that they had to help them find out who was selling drugs and who was associated with the LTTE in the area. The CID took the applicant and D's telephone numbers. When the CID released them they were told that they had not done as promised (which was to provide information about drugs smugglers and those associated with the LTTE) and when they saw them next they would be kidnapped and killed.
- The applicant feared that the CID officers would kidnap and kill him and made arrangements to come to Australia.
- The applicant's brother told the applicant that in September 2013 a Sinhalese person came to their house and demanded to know the whereabouts of the applicant. They had found D and taken D to the applicant's house as part of their investigation. He suspects it was the CID.
- The applicant fears harm and mistreatment from the CID because he didn't help them. He fears harm and mistreatment from the CID, the Sri Lankan authorities and the Sinhalese people because he is a Tamil.

Factual findings

7. During the SHEV interview the applicant first said that his brother started having problems because of the applicant's issues and had to go to India two or three months ago. Later in the SHEV interview the delegate asked the applicant why his brother had to move to India two or three months ago and the applicant responded that he fell in love with a Sinhalese lady and

had some problems. The delegate put to the applicant that, at the beginning of the interview he had stated that his brother went to India because of issues associated with the applicant and he responded that he was forgetful and didn't remember what he said at first. Given the applicant left Sri Lanka in 2012, I do not accept that his brother would have to go to India because of issues associated with applicant. I accept that the applicant's brother went to India because of his relationship with a Sinhalese lady.

8. In the applicant's Statutory Declaration dated 25 July 2013 he stated that his uncle had been forcefully recruited into the LTTE and was a senior figure in the organisation. He did not know the details of his role but he was killed by the SLA in and around 2011. [Details deleted]. In 2011 the applicant was questioned about his uncle's role in the LTTE and he suspects those people were from the SLA. In the applicant's Supplementary statement of the same date he stated that his uncle joined the LTTE in and around June 1986. His uncle decided to surrender to the SLA to receive less punishment and was shot. He has a photograph of his uncle with his hands tied behind his back along with other prisoners. He obtained the photograph from a Sri Lankan news website. His mother told him about his uncle's death in and around 2013. He didn't mention his uncle's death during his arrival interview because he didn't know about him at that time. However, during his SHEV interview, the applicant said he found out during the recent Martyr's Day celebrations that his uncle had died in 2009 when a photograph of his uncle was released with that date on it. His uncle surrendered to the SLA with 10 to 15 other LTTE fighters. [Details deleted]. The delegate asked the applicant when he first learnt that his uncle had been killed and he responded that he was not sure but around 2013/2014. The delegate asked the applicant when he first knew his uncle was involved with the LTTE and he responded that it was after his death that he found out it was his mother's brother but he knew he had an uncle in the LTTE. He knew his uncle because he would go around with him to the temples. The last time he saw his uncle was in 2002 or 2003. He said the CID came to his grandmother's house (where the applicant and his family lived in Sri Lanka) in search of his uncle's family in 2011/2012 and talked to his mother and sister. The applicant said he and his family were threatened with harm if they didn't tell the CID where his uncle's family were. The last time the CID came to his grandmother's house was in 2011. He said photographs and videos of his uncle have been on television. His aunt told him recently that his uncle was an LTTE [official] for [a certain] district and was shot by the SLA.
9. The applicant said that his uncle died in 2011 and then said that he died in 2009. [Details deleted]. He claimed to have a photograph of his uncle with his hands tied behind his back but has not provided it. Notwithstanding those inconsistencies, I am prepared to accept that the applicant's uncle was fighting for the LTTE and, at some point in time during the conflict, he was shot by the SLA. However, based on the evidence before me, I am not satisfied that the applicant's uncle died in 2009 or that he was [an official] of [a certain] district. I do not accept that the CID went to the applicant's home in 2011 threatening to harm the applicant and/or his family if they didn't tell them where his uncle's family were. This finding is consistent with the applicant stating during the SHEV interview that he and his family have never been questioned, arrested or detained because of his links to his uncle. I find that the applicant fabricated that claim and this raises doubts about his credibility. I do not accept that the applicant has ever been the subject of adverse attention from the SLA and/or the CID because of his uncle.
10. In the applicant's SHEV interview he said he was at [a location] with his [friends] in and around February/March 2011 and a policeman asked them if they were taking marijuana. The applicant and his friends were strip searched, handcuffed and questioned for about one hour. The applicant was slapped and sexually assaulted. He did not disclose being strip searched and sexually assaulted prior to the SHEV interview because he was embarrassed. When the delegate asked the applicant how many police were there he responded that they were not

the police but the CID because they were not in uniform. He said the CID obtained their telephone numbers and asked them to identify who was supplying drugs. In the applicant's arrival interview he stated that in and around August 2011 he went to [a location] with his friends and some policemen came and asked them whether they were smuggling drugs. He was arrested and slapped.

11. The applicant has been more or less consistent about being stopped by the CID and/or police in 2011. He described that interaction as being slapped in his arrival interview, beaten in his written statement and strip searched, slapped and sexually assaulted in his SHEV interview. I accept that because the applicant was a young Tamil male he was stopped in 2011 by the police and/or the CID. I accept that the applicant was questioned about being involved with drugs, asked to help identify people in the area that were smuggling drugs, handcuffed, beaten and/or slapped, strip searched and sexually assaulted during this interaction.
12. During his arrival interview the applicant said he was stopped again when he was waiting for his friend. The police asked the applicant why he was standing at the gate and slapped him. However, in the applicant's written evidence he stated that in March 2012 the applicant and his friend D were [at a location] and approached by four CID officers. The CID officers breathalysed the applicant, interrogated the applicant and accused the applicant of selling drugs. The CID officers discovered that the applicant and his friend had been drinking. The CID told them that because they were Tamils and drinking alcohol they must know who was responsible for dealing drugs in the area. The applicant and his friend were handcuffed and taken to a CID vehicle. The CID obtained the applicant and his friend's telephone numbers. During the SHEV interview the applicant stated that in 2012 he and one of his friends were at [a location]. He said two of the people from the CID that stopped them in 2011 remembered them and again asked the applicant and his friend to identify 'people'. The CID threatened the applicant to provide the information about drug smugglers and people associated with the LTTE. He feared he would be killed. After he encountered the CID the second time he decided to leave Sri Lanka. The delegate asked the applicant if the CID had ever contacted him on the telephone and he responded no.
13. The applicant has given three different descriptions of his second interaction with the CID and/or police. I accept that, because the applicant was a young Tamil male, he had a second encounter with the CID and/or police. I accept that he was slapped and asked why he was standing where he was. However, in the context of inconsistent evidence, I do not accept that he was breathalysed, handcuffed or taken to a CID vehicle. I do not accept that he was threatened to identify people that were smuggling drugs and people that were involved with the LTTE. I do not accept that the applicant was required to give the CID his telephone number. Based on the evidence before me, I am not satisfied that the applicant left Sri Lanka because he feared the CID would kidnap and kill him. Likewise, I am not satisfied that the CID came to the applicant's house more than a year after the applicant left Sri Lanka with the applicant's friend D asking about his whereabouts.
14. In the context of inconsistent evidence and concerns about the applicant's credibility, I am not satisfied that the applicant participated in a hunger strike to protest against the Sri Lankan Government's treatment of Tamil people in 2005, that SLA officers beat the applicant and hit him with a gun or that the applicant has a scar [from] the incident.

Refugee assessment

15. 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

16. 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.

Tamil and/or real or perceived links to the LTTE

17. I accept that the applicant is a Hindu Tamil from the Northern Province of Sri Lanka and that the area had been under the control of the LTTE during the civil war. The most recent DFAT report¹ states at paragraph 3.8 that:

...During the civil conflict more Tamils were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the conflict and the Rajapaksa Government. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity... Since 2015 the Sirisena Government has reviewed and released some PTA detainees, including Tamils. DFAT assesses that there are currently fewer individuals detained under the PTA than there were during the conflict.

DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. The Sri Lankan police are now responsible for civil affairs across Sri Lanka. While a sizeable (and largely idle) military presence remains in the north and east, armed forces personnel are generally restricted to their barracks. While some cases of monitoring continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. Members of the Tamil community have also described

¹ DFAT, “Country Information Report Sri Lanka”, 24 January 2017, CISED50AD105

a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities...

18. The UK Home Office Report² on Tamil separatism states at paragraphs 3.1.2 and 3.1.3 that:

- A person being of Tamil ethnicity would not in itself warrant international protection.
- 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.

19. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE in Sri Lanka³. In this regard, the UK Home Office report⁴ identified four categories of people at risk of persecution or serious harm in a 2013 Upper Tribunal (Immigration and Asylum Chamber) decision. Those included individual who have, or are perceived to have, a significant role in post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, journalists or human rights activities who have criticised the Sri Lankan government about its human rights record or are associated with publications that are critical of the Sri Lankan government, individuals that have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan forces (SLF) or Sri Lankan authorities in alleged war crimes and persons whose name appears on a computerised “stop” lists or where there is an extant court order or arrest warrant. There is no credible evidence before me to indicate that the applicant is on a computerised stop list, that he has given evidence to the Lessons Learned and Reconciliation Commission, that he has a significant role in post-conflict Tamil separatism or that he has criticised the Sri Lankan government. I have accepted that the applicant’s uncle was a fighter for the LTTE and was killed at some point during the conflict. I was not satisfied that the applicant’s uncle died in 2009 or that he was an LTTE [official]. I did not accept that the applicant has ever been the subject of adverse attention from the SLA and/or the CID because of his uncle. I have accepted that the applicant and his family had no involvement with the LTTE. I accept that, because the applicant was a young Tamil male, he was stopped on two occasions by the police and/or the CID. I accept that the applicant was questioned about being involved with drugs, asked to identify people in the area that were involved in selling drugs, handcuffed, beaten and/or slapped, strip searched and sexually assaulted during his first interaction with the CID and/or the police in 2011. I accept that the applicant had a second encounter with the CID and/or the police and was slapped and asked why he was standing where he was. I did not accept that the CID went to the applicant’s home in 2011 threatening to harm the applicant and/or his family if they didn’t tell them where his uncle’s family were. I did not accept that the police/CID breathalysed, handcuffed or threatened the applicant to identify drug smugglers or those involved with the LTTE in 2012. I did not accept that the applicant was taken to a CID vehicle or that the CID ever obtained the applicant’s telephone number. I was not satisfied that the CID came to the applicant’s house more than a year after the applicant left Sri Lanka with the applicant’s friend D asking about his whereabouts. I was not satisfied that the applicant left Sri Lanka because he feared the CID would kidnap and kill him. I was not satisfied that applicant participated in a hunger strike to protest against the Sri Lankan Government’s treatment of Tamil people in 2005, that SLA officers beat the applicant and hit him with a gun or that the applicant has a scar [from] the incident.

² UK Home Office, “Sri Lanka: Tamil separatism v 4”, 31 March 2017, CISED50AD3779 at 12. The delegate noted in the text of his decision that he used this report. However he footnoted another report dated June 2017. I have had regard to the March report as noted in the delegate’s decision.

³ DFAT, “Country Information Report Sri Lanka”, 24 January 2017, CISED50AD105, at 3.29.

⁴ UK Home Office, “Sri Lanka: Tamil separatism v 4”, 31 March 2017, CISED50AD3779 at 2.4.

20. The two interactions that the applicant had with the police and/or CID were indicative of the arbitrary targeting of people based on their age, gender and ethnicity at that time. That is young Tamil males. The applicant was not targeted because the Sri Lankan authorities had any adverse interest in him. Given the findings of fact, and having regard to the more recent country information that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government., I am satisfied that the chances of the applicant having similar incidents if he returned to Sri Lanka are remote.
21. Based on all the information before me, I am satisfied that the applicant's profile of a young Hindu Tamil male from the Northern Province that had no involvement with the LTTE and whose deceased uncle fought for the LTTE during the conflict would not give rise to any adverse interest in him by the Sri Lankan authorities. I am satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm by any of the Sri Lankan authorities.

Returning as a failed asylum seeker and/or a person who departed illegally

22. I accept that the applicant left Sri Lanka illegally in and around July 2012. I also accept that by the manner of his return, the Sri Lankan authorities may know or infer that he made a claim for protection in Australia, and that he will be subject to background checks on arrival. DFAT advises that a returnee like the applicant will be processed at the airport by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the Sri Lankan CID who check for identity and any outstanding criminal matters. DFAT is aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka but cannot verify these reports given that many allegations are made anonymously, often to third parties and sometimes long after the torture is alleged to have occurred. DFAT also reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, with relatively few allegations of torture or mistreatment. Although it does not routinely monitor the situation of returnees, DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce. In his SHEV application the applicant stated that he had never been charged, convicted or wanted for an offence in Sri Lanka. I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the concern of the authorities. I am satisfied that the applicant would not be at risk of serious harm during, or as a consequence of this routine investigation. The evidence before me does not suggest that failed asylum seekers, including Hindu Tamil asylum seekers from the Northern Province, face a real chance of harm for that reason. I am not satisfied, having regard to the applicant's profile, that he faces a real chance of any harm as a returning asylum seeker.
23. Information in the DFAT report states that after processing at the airport, persons who departed illegally are charged under the Sri Lanka's Immigrants and Emigrants Act (I&E Act), fingerprinted and photographed, and then transported to the closest Magistrate's Court at the first available opportunity once investigations are completed, at which point responsibility shifts to court or prison services.⁵ Because the applicant departed illegally he may be arrested and charged under the I&E Act. When brought before a court, a person who pleads guilty will most likely be fined and discharged. While penalties can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees (SLR), DFAT advises that no returnee who was merely a passenger on a people smuggling venture has ever been given a custodial sentence for departing Sri Lanka illegally. Fines are imposed on a discretionary basis, are generally between 5 and 50 thousand SLR, and may be paid by instalment. As the applicant

⁵ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105., 5.21

was not involved in organising or facilitating people smuggling, I find that there is no real chance that the applicant will be given a custodial sentence.

24. Based on DFAT's advice I find that if the applicant were to plead not guilty, he would either be immediately granted bail on personal surety, or wait to be collected by a family member if required to have a family member act as guarantor. DFAT advises that if bail is granted there are rarely any conditions. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to police or police stations between hearings. I am not satisfied that the imposition of any fine, surety or guarantee would of itself constitute serious harm in this case. As DFAT advises that there are usually no reporting requirements attached to the grant of bail, I do not consider that there is a real chance the applicant would be required to report regularly to local police. There is no information before me to indicate that the applicant would be unable to post bail.
25. On the basis of DFAT's advice, I accept that on return the applicant may be detained for a short period during investigation and while waiting to be taken before a court. I find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution. In this case, the evidence does not suggest that the I&E Act is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be pursuant to a non-discriminatory law of general application and does not amount to persecution within the meaning of s.5J (4). I am not satisfied that it involves systematic and discriminatory conduct.
26. Having regard to all the material before me, I find that the applicant does not face a real chance of persecution on returning to Sri Lanka.

Refugee: conclusion

27. 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

28. 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

29. 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.

30. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

Is there a real risk that the applicant will suffer significant harm?

31. I have considered the applicant's claims individually and cumulatively and found that the applicant does not face a real chance of serious harm if he returned to Sri Lanka for reason of his ethnicity, area of residence, relatives connected with the LTTE, his prior encounters with the Sri Lankan authorities or having sought asylum in Australia. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear"⁶.

32. I accept that, on return to Sri Lanka, the applicant will be subject to a series of administrative processes (as outlined above) and identified as a person that departed Sri Lanka illegally and is a returning asylum seeker. I have found that the applicant is not a person of interest to the Sri Lankan authorities and, upon his return, I am not satisfied that the applicant faces a real risk of being arbitrarily deprived of his life; of facing the death penalty or of being subjected to torture. I am not satisfied that the acts or omissions of the Sri Lankan authorities during this administrative process are intended to inflict pain or suffering, severe pain or suffering or to cause extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment. I am therefore not satisfied that there is a real risk that the applicant will suffer significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Sri Lanka. Likewise, I do not accept that having a fine imposed upon the applicant under the I&E Act for his illegal departure amounts to suffering significant harm within the meaning of s.5 (1) and s.36 (2A).

33. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka (the receiving country), there is not a real risk that he will suffer significant harm now or in the foreseeable future.

Complementary protection: conclusion

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

⁶ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

Decision

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

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.