



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/04471

Date and time of decision: 24 May 2018 10:52:00
M Simmons, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sinhalese Pentecostal Christian from Sri Lanka. On 30 June 2017 he lodged an application for a safe haven enterprise visa.
2. The delegate refused to grant the visa on 28 February 2018. They found claims the applicant may be perceived to be the captain of the boat used to travelled to Australia to be implausible. The delegate also found that the applicant was not a credible witness, was not a genuine asylum seeker in fear of persecution, was an economic refugee, and that no risk of harm existed for the applicant in 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 25 March 2018 the applicant's representative provided written submissions to the IAA. To the extent that the submission contains arguments in response to the delegate's decision I have had regard to that information.
5. The submission contains extracts of country information which was not before the delegate and is therefore new information. The applicant has not satisfied me that the extract of the Amnesty International report published on 22 February 2018 could not have been provided to the delegate before their decision. There have been no submissions explaining why it was not possible to provide this information to the delegate in that period of time. I note the applicant has had the same legal representative throughout the protection visa process. No submissions have been advanced arguing that this constitutes credible person information. The applicant has not satisfied me of either aspect of s.473DD(b).
6. The extracts of the Guardian and Time articles postdate the delegate's decision, as such I am satisfied that they could not have been provided before the delegate made his decision. The applicant's representative submits that exceptional circumstances arise because the Guardian article directly addresses the applicant's claim to fear harm as a returning asylum seeker, and because the Times article concerns a significant change in the situation in Sri Lanka. In this particular decision, other than two 2017 Australian Department of Foreign Affairs and Trade (DFAT) reports, the sources of country information referred to by the delegate are from 2016 and earlier. Of those sources referred to, a number focussed more on the situation for Sri Lanka Tamils. Considering the representative's submissions and the limited recent country information referred to by the delegate, in this particular matter to be an exceptional circumstance to justify consideration of this new information.
7. The applicant claimed for the first time to the IAA to be involved with the Tamil community and organisations supporting asylum seekers in Australia. He also submitted photos in support of these claims which appear to show his attendance and public events opposing Australia's asylum seeker policies. The demonstrations depicted occurred between June 2015 and February 2017. The applicant states he believed the photographers at the events he attended were careful to avoid photographing his participation to avoid any adverse attention. The difficulty with this submission is that in a number of the photos the applicant is directly in front of the camera, often looking directly at it. In some photos he is wearing sunglasses, but mostly

it appears he permitted his photo to be taken with minimal or no apparent effort to disguise his identity. I do not accept that the applicant would not have been aware prior to the delegate's decision that he featured extensively in these photographs as claimed.

8. I am also not prepared to accept that the applicant did not previously consider his association with groups supporting asylum seekers and with Sri Lankan Tamils in Australia may have been relevant to his protection visa application. It appears the applicant is well connected to persons and groups in Australia familiar with asylum seekers and the issues they face, and as he has been represented by the same lawyers throughout the protection visa process. I am not prepared to accept that he would not have been aware of the potential for such conduct in Australia to attract adverse attention in Sri Lanka, or that either his acquaintances or representatives would not have made him aware of this until after the delegate's decision. His involvement with the Tamil community and asylum seeker organisations was on going for some time before the delegate's decision but was not raised until the IAA submissions. Both the applicant and his lawyer were advised at the interview that they may not have a further opportunity to provide additional information after the delegate makes their decision. In these circumstances I am not satisfied that there are exceptional circumstances which justify consideration of either the photographs or the claims to have been involved with the Sri Lankan Tamil community or asylum seekers groups in Australia. Accordingly s.473DD(a) is not met in respect of any if this new information.
9. In order to assess whether there is a real chance or risk of harm to the applicant in the foreseeable future I have obtained new information, including on the treatment of persons in custody in Sri Lanka and information sharing between Australia and Sri Lanka on people smuggling.¹ Contrary to findings made by the delegate, I have found that the applicant was a member of the boat crew on which he travelled to Australia. Much of the country information to which the delegate referred either does not consider these matters, and all of it is dated. For these reasons I am satisfied there are exceptional circumstances to justify considering this new information.
10. In his submission the applicant requests that the IAA invite him to an interview to discuss his refugee claims. Part 7AA of the Act does not provide applicants an opportunity to discuss their claims at a hearing. The IAA may conduct an interview in limited circumstances to obtain new information, and may only consider any new information where there are exceptional circumstances to justify this. The applicant has not indicated what new information he has to convey at an interview and has not satisfied me that an interview is necessary.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:

- The applicant is a Sinhalese Pentecostal Christian born in Puttalam, in the North Western Province of Sri Lanka. The applicant had a difficult upbringing and a strained relationship with his parents.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239; Amnesty International, "Amnesty International 2017/2018 State of the World's Human Rights", 22 February 2018, NGED867A612; Colombo Page, "Australia and Sri Lanka sign MoU to reinforce cooperation on counter-people smuggling", 6 September 2017, CXC90406613506; Australian Minister for Foreign Affairs, "Press Conference: Australian Foreign Minister, Stephen Smith and Sri Lankan Foreign Minister, Rohitha Bogollagama, subjects: People smuggling, bilateral relationship. ", Colombo, 9 November 2009; Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants, Colombo, 9 November 2009.

- In Sri Lanka he worked as a fisherman and [another occupation]. In 2008 he tried to obtain a work visa for [Country 1] but an agent took his money without providing the visa.
- In August 2012 the applicant's cousin, 'S', offered the applicant a place as a crew member on a boat to Australia in exchange for his passage. S was to be the captain of the boat. The applicant agreed and in late August 2012 they departed for Australia.
- After arriving in Australia in September 2012, both the applicant and S agreed to voluntarily return to Sri Lanka. S returned to Sri Lanka later that month and was arrested by the Criminal Investigation Department (CID) and interrogated about his role. S informed the CID that it was the applicant who was the captain of the boat and was able to secure bail after convincing them he was not the captain. He warned the applicant not to return as he would be prosecuted for being the boat captain.
- The applicant became worried and [in] September 2012 withdrew his request for voluntary return to Sri Lanka.
- Because S told the CID that the applicant was the boat captain, he fears he will be detained, questioned and imprisoned for breaching s.45C of the Sri Lankan *Immigration and Emigration Act 1948* (I&E Act). He fears torture and cruel and inhuman treatment during this process.
- He may be harmed because he helped Tamils and other asylum seekers to flee Sri Lanka and may be imputed with a pro-Tamil opinion, as a Sri Lankan believed to be involved in people smuggling, as a Sri Lankan asylum seeker who departed illegally and sought asylum in Australia.
- On 10 February 2014 the Department of Immigration inadvertently released information about the applicant on their website. Because of this, the Sri Lankan authorities and other groups may be aware of the applicant's efforts to seek asylum in Australia and seek to harm him for that reason.

Factual findings

Identity and background

12. The applicant has consistently reiterated that he is Sinhalese and that he was born in Puttalam. He has provided copies of his Sri Lankan National Identity Card, Passport and Birth Certificate which corroborate this. I accept the applicant's identity is as claimed. I am satisfied that he is a Sri Lankan national and that Sri Lanka is he receiving country.
13. Shortly after the journey to Australia, the applicant indicated in the arrival interview that a reason for his travel to Australia was that he heard he could make more money and he wanted to be able to buy a house in Sri Lanka. He provided detailed evidence on his background at the interview with the delegate, including discussing his unsuccessful attempt to travel to [Country 1] for work to improve his life. I am prepared to accept that the applicant had a difficult childhood and has experienced financial difficulties, and that this was a motivation for his travel to Australia.
14. While the applicant has indicated he had some difficulties in Sri Lanka, he has not claimed to have experienced any previous harm in that country in the relevant sense. There is no indication that before his departure he was ever of any adverse interest to any entity in that country. After arriving in Australia the applicant initially agreed to voluntarily return to Sri

Lanka. I am satisfied that the applicant did not fear either serious or significant harm from the Sri Lankan authorities or any group for any reason in Sri Lanka at the time of his departure from that country.

Role in boat journey

15. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including provisions of the Immigrants and Emigrants Act 1948 (I&E Act).²
16. Soon after arriving in Australia the applicant made it known that he had helped to facilitate the boat journey. There is reference to the applicant helping to steer the boat and assisting with cooking in his arrival interview. Information put to the applicant at interview, which was not contested by him or his lawyer, was that following his arrival in Australia the Australian Federal Police (AFP) investigated his involvement in crewing the boat, but ultimately decided not to pursue charges. The applicant has consistently claimed that he travelled to Australia after he was offered a position as crew member by S. The applicant disclosed in his arrival interview his cousin S was also on the boat. That he was experiencing financial difficulties and wanted to leave Sri Lanka to pursue better economic prospects, and had previously tried to do so, suggests the offer of passage to Australia in exchange for crewing the boat was an attractive offer. During the protection visa interview he discussed his role on the boat with the delegate, explaining his responsibilities variously included steering, engine repairs, assisting with cooking, helping to load passengers, and assisting families with young children. He explained that due to his previous work on fishing vessels he was one of the more experienced crew members, and that S did not have previous experience with boats. I accept that the applicant was a crew member on the boat as claimed.
17. The delegate found it implausible that the applicant would be regarded as the boat captain and implausible that the Sri Lankan authorities would accept S's assertion that the applicant was the boat captain without further investigation. I have reached a different conclusion.
18. Reports before me indicate that the Sri Lankan authorities distinguish between those suspected of being passengers and those suspected of facilitating or organising the irregular migration of people from Sri Lanka. Facilitators or organisers can be charged with an offence under s.45C of the I&E Act.³ Section 45C(1) of the I&E Act provides that any person who organises one or more persons to leave Sri Lanka in contravention of the provisions of the Act, or, does any act preparatory to or aids or abets any other person to so organise, shall be guilty of an offence, the term for which is either imprisonment for not less than one and not more than five years. 'Organise' is defined to include the transportation of persons by sea without obtaining valid travel documents. Under s.47A(1), bail is not available for persons accused of offences under s.45C, except by a High Court upon proof of exceptional circumstances. The applicant claims that when S returned to Sri Lanka he told the authorities that the applicant was the boat captain and that by doing so he was able to avoid himself being detected as the captain.
19. The applicant initially requested to be returned to Sri Lanka voluntarily then subsequently revoked his request after S had gone back to Sri Lanka. I am prepared to accept this sequence of events occurred as claimed. Information from DFAT indicates that on arrival returnees would be questioned about the circumstances of their departure from Sri Lanka, including

² *Immigrants and Emigrants Act (Sri Lanka)*, No. 20 of 1948 (1 November 1949) (Amended to Act No.31 of 2006), CISBE8E6BE638.

³ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

questioning about the captain and organisers of their boat. I accept that on return S would have been questioned about the boat journey as part of investigations into possible offences.

20. It is difficult to understand why the applicant would initially agree to return to Sri Lanka and then withdraw this request in a matter of weeks, other than because difficulties arose for him following S's return. The applicant is older than his cousin and, unlike S, had previous experience with boats prior to the journey to Australia. I considered these factors would have helped S to attribute greater responsibility for the boat journey to the applicant. It is plausible and I am prepared to accept that when questioned by the Sri Lankan authorities S asserted the applicant was the captain or had a more senior role in the boat journey in an attempt to diminish his own culpability and that he was subsequently able to obtain bail as claimed. I accept that after being advised of this, the applicant rescinded his request to return to Sri Lanka.

Data breach, seeking asylum

21. I accept that the Department published a document on its website in error containing personal details of a number of asylum seekers including the applicant. This included full names, gender, citizenship, date of birth and boat arrival details. As the document was accessed a number of times the extent of the distribution of this information cannot be determine. It is possible that this information may have been viewed by the authorities in Sri Lanka. I am satisfied that the Sri Lankan government may assume that, due to his mode of departure and possibly due to the data breach, the applicant sought asylum from Sri Lanka in Australia. I am not satisfied that the data breach would however have resulted in the details of any claim for asylum being revealed.

Refugee assessment

22. 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

23. 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.

Involvement in boat journey

24. DFAT advises that upon arrival in Sri Lanka, all involuntary returnees are processed by the Sri Lankan authorities for verification of their travel documents, identity and any outstanding criminal matters, which includes checks against immigration and intelligence databases. Part of the investigation would be to ascertain the circumstances under which the applicant left Sri Lanka. A returnee suspected of involvement in the organisation of irregular migration of people from Sri Lanka can be charged with an offence under s.45C of the I&E Act. Some returnees from Australia have been charged and convicted of such offences.⁴ I have accepted that S was returned to Sri Lanka and that he informed the Sri Lankan authorities that the applicant was the boat captain or organiser of the voyage. I consider there is a real chance the applicant will be investigated on suspicion of offences under the I&E Act were he to return to Sri Lanka.
25. If the applicant were removed from Australia, I also consider there is a real chance that the information from the AFP investigation into the applicant's involvement in the boat journey will be shared with the Sri Lankan authorities. The delegate noted at interview that Australia and Sri Lanka work closely on people smuggling issues. The two countries have various agreements concerning cooperation on this matter. In December 2009 they signed the Memorandum of Understanding (MoU) concerning Legal Cooperation against the Smuggling of Migrants, which aimed to maximise opportunities for successful investigation and prosecution of migrant smuggling, and enhance mutual legal assistance between the two countries.⁵ The increased cooperation on information sharing and prosecutions in relation to people smuggling was emphasised by government ministers from both nations at the signing of the MoU.⁶ Another MoU reinforcing cooperation on counter-people smuggling was signed in September 2017 providing for enhanced information sharing on methods for tracking, intercepting and investigating people smugglers.⁷ Given the close cooperation between the two countries and the express agreement to share information on people smuggling investigations I cannot discount the possibility that information from the AFP investigation into the applicant will be shared with the Sri Lankan authorities. That the AFP investigation did not proceed to prosecution under Australian law is not indicative of whether the Sri Lankan authorities would investigate and potentially charge the applicant for offences under Sri Lankan law. These are distinct criminal legal systems considering different offences with different elements and likely have differing prosecutorial policies that determine when a prosecution should proceed. However I consider that information collected by the AFP would be relevant to the Sri Lankan authorities in any such investigations. I am satisfied the applicant would already be considered a person of interest in Sri Lanka for being suspected of offences under the I&E Act due to S making allegations against him. I consider any information sharing would further heighten suspicion of the applicant on his return.
26. I am satisfied that there is a real chance the applicant will be suspected of breaching s.45C of the I&E Act, and that he will be investigated and potentially charged. I consider there is a real

⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

⁵ Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants, Colombo, 9 November 2009.

⁶ Australian Minister for Foreign Affairs, "Press Conference: Australian Foreign Minister, Stephen Smith and Sri Lankan Foreign Minister, Rohitha Bogollagama, subjects: People smuggling, bilateral relationship.", Colombo, 9 November 2009,

⁷ "Australia and Sri Lanka sign MoU to reinforce cooperation on counter-people smuggling", *Colombo Page*, 06 September 2017, CXC90406613506.

chance the applicant will be detained and questioned on arrival in Sri Lanka. I do not consider that he will be regarded as merely a passenger of a people smuggling vessel. The applicant will likely face a period of detention while the circumstances of his departure and involvement in the boat journey are investigated and pending any possible trial. Bail is not available for offences under s.45C unless a High Court finds there are exceptional circumstances.⁸ The Sri Lankan judicial system is generally overburdened and there can be lengthy delays before a case is brought to trial, including due to the limited availability of qualified police, prosecutors and judges.⁹

27. Country information indicates that there is a strong likelihood of persons detained in Sri Lanka's criminal justice system being subjected to serious physical mistreatment. DFAT advises that there have been credible reports from a wide range of actors of torture being carried out on suspects held on criminal charges. The United Kingdom Home Office policy summary notes that there remains a real risk of ill treatment or harm requiring international protection if a person is detained by the Sri Lankan security services.¹⁰ Amnesty International's 2017/2018 State of the World's Human Right report noted that the Human Rights Commission of Sri Lanka continued to document widespread incidents of violence against detainees, including torture and other ill-treatment, which it described as "routine" and practised throughout the country, mainly by police.¹¹
28. Two recent reports from United Nations Special Rapporteurs have also considered the use of torture in Sri Lanka's criminal system following visits to the country. The first rapporteur concluded that torture and ill-treatment still occur, in particular in the early stages of arrest and interrogation, often for the purpose of eliciting confessions. The police resort to forceful extraction of information or coerced confessions rather than carrying out thorough investigations using scientific methods.¹² The second rapporteur concluded that the use of torture is very deeply ingrained, and has been, and remains, endemic and routine.¹³ The United Nations Committee Against Torture expressed similar concerns in January 2017. It noted there remains consistent reports from national and United Nations sources indicating that torture is a common practice carried out in relation to regular criminal investigations, irrespective of the alleged offence. The Committee expressed concern about the ongoing practice of detaining persons while conducting investigations as a means to obtain information under duress.¹⁴
29. The applicant's legal representative, in their submission to the delegate following the protection visa interview, referred to media reports indicating the current Sri Lankan government has publically expressed a desire to be free from UN committee obligations including those relating to torture. A New York Times article states that President Sirisena

⁸ s.47A(1) *Immigrants and Emigrants Act (Sri Lanka)*, No. 20 of 1948 (1 November 1949) (Amended to Act No.31 of 2006), CISBE8E6BE638.

⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

¹⁰ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", version 5.0, June 2017, OG6E7028826.

¹¹ Amnesty International, "Amnesty International 2017/2018 State of the World's Human Rights", 22 February 2018, NGED867A612.

¹² United Nations Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016 CIS38A80123313.

¹³ Office of the United Nations High Commissioner for Human Rights, "Human rights and counter terrorism: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka, Preliminary findings of the visit to Sri Lanka", 14 July 2017, CXC90406610453.

¹⁴ United Nations Committee Against Torture, "Concluding observations on the fifth periodic report of Sri Lanka", 27 January 2017, CISED50AD413.

indicated he wrote to then President-elect Trump seeking help to free Sri Lanka from those obligations.¹⁵

30. Sources including civil society groups advised DFAT that ill-treatment and torture by the Sri Lankan Police continues to occur in non-PTA cases, primarily as a result of out-dated policing methods, and that such treatment is not ethnically biased.¹⁶ As such I consider that as someone who is ethnically Sinhalese the applicant is equally susceptible to harm, and it is not only Tamils who face such a risk.
31. DFAT refers to a October 2016 report from the Human Rights Commission of Sri Lanka to the UN Committee Against Torture that claimed “torture to be of routine nature... practiced all over the country, mainly in relation to police detentions” and that torture is used during interrogation and arrest and is used regardless of the nature of the suspected offence.¹⁷ As such, I consider that such a risk arises in relation to detainees held in relation to people smuggling offences, which I accept there is a real chance the applicant will be suspected of committing.
32. The information before me does not indicate, and I am not satisfied that any mistreatment inflicted on the applicant would be for any of the reasons specified in s.5J(1)(a) of the Act, including the applicant’s membership of a particular social group due to his suspected involvement in people smuggling. The phrase ‘for reasons of’ serves to identify the motivation for the infliction of the harm and the objectives sought to be attained by it.¹⁸ Country information indicates that the risk of mistreatment arises due to poor policing methods and that criminal investigators are motivated to inflict harm in order to extract information or confessions.¹⁹ Therefore I am not satisfied that a risk of harm while detained arises for reasons of any attribute prescribed in s.5J(1)(a), but for the reason of poor police instigation methods. I do not consider that the harm feared is for the essential and significant reason of any attribute prescribed in s.5J(1)(a), as such s.5J(4)(a) is not satisfied.
33. I have found that the applicant’s involvement in the boat journey and his illegal departure suggests he may have committed offences under the I&E Act. The evidence before does not suggest that the I&E Act is discriminatory on its face, or that it discloses discriminatory intent, is applied in a discriminatory way or selectively enforced. Country information indicates that returnees are treated according to these standard procedures, regardless of their ethnicity and religion.²⁰ I am not satisfied that the application of these laws to the applicant would involve systematic or discriminatory conduct, as required under s.5J(4)(c) of the Act, so as to constitute persecution. I am not satisfied that the applicant has a well-founded fear of persecution resulting from any prosecution or conviction under Sri Lanka’s immigration laws, and any penalty of fine that may be imposed as a result.
34. Country information does not support a conclusion that being involved in the transportation of Tamil asylum seekers imputes a pro-Tamil opinion that would be of adverse interest to the Sri Lankan authorities. Reports note that facilitators and organisers of unlawful boat journeys have

¹⁵ Nick Cumming-Bruce, ‘Torture is “Common Practice” in Sri Lanka, UN Panel Finds’, *The New York Times*, 7 December 2016, CX6A26A6E16926.

¹⁶ DFAT, ‘DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka’, 14 August 2017, CISED50AD5239.

¹⁷ DFAT, ‘DFAT Country Information Report – Sri Lanka’, 24 January 2017, CISED50AD105.

¹⁸ *Applicant A v MIEA* (1997) 190 CLR 225 at 284, per Gummow J.

¹⁹ DFAT, ‘DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka’, 14 August 2017, CISED50AD5239.

²⁰ DFAT, ‘DFAT Country Information Report – Sri Lanka’, 24 January 2017, CISED50AD105.

been charged and convicted of immigration offences due to breaching Sri Lankan law.²¹ However, there is no evidence of boat crew members being targeted due to any presumption that they were pro-Tamil because most of their passengers were Tamil. For example, there were no reports of crew members being referred to the Terrorism Investigation Department or of being held under the Prevention of Terrorism Act or otherwise subject to treatment generally applied to persons considered to be involved with or supportive of Tamil separatist groups. There is no indication that the applicant has any links to high profile former LTTE members, including amongst his passengers, or that he was ever involved in any Tamil separatist activities at any time. Further I note that there is no suggestion of S, who has returned to Sri Lanka after transporting the same Tamil passengers, was ever imputed with such a pro-Tamil opinion. I am not satisfied that the Sri Lanka authorities would impute the applicant with a pro-Tamil opinion due to facilitating the passage of Tamil asylum seekers. Therefore I am not satisfied the applicant faces a real chance of harm for that reason.

35. I do not consider that the applicant being a person affected by the disclosure on the Department of Immigration website gives rise to a separate and distinct reason for which there is a real chance the authorities or any other group in Sri Lanka may seek to harm him. The country information before me does not indicate that a person faces a real chance of harm on return to Sri Lanka only because they unsuccessfully sought asylum in another country. I have accepted that the applicant faces a real chance of harm on return while in remand and subject to criminal investigations. I am not satisfied he faces any chance of harm for reasons of having sought asylum.

Refugee: conclusion

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

Complementary protection assessment

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

Real risk of significant harm

38. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- 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.

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

39. I have found above that on return to Sri Lanka there is a real chance the applicant will be investigated for his involvement in facilitating an unlawful boat journey for more than 60 people. There is a real chance he will be detained for a period while under investigation and possibly while awaiting trial, during which there is a real chance he will be subjected to harm. The requirement for there to be a “real risk” of significant harm applies the same standard as the “real chance”,²² and as such, I am satisfied there is a real risk of the applicant suffering such treatment.
40. Torture is defined in s.5(1) of the Act as an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for one or more of a number of specified reasons, including for the purpose of obtaining information or a confession, 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 International Covenant on Civil and Political Rights. Country information indicates there is a real risk that the mistreatment in the nature of torture would be inflicted for the purpose of obtaining information or a confession relating to a criminal investigation. I am satisfied that while the risk of harm arises in the context of the criminal justice system, torture is prohibited under Sri Lankan law and therefore does not arise from and is not inherent in or incidental to a lawful sanction, and irrespective is inconsistent with Article 7 of the Covenant. I find there is a real risk of the applicant suffering harm which amounts to torture within the meaning of s.5(1) of the Act and that it is significant harm as defined in s.36(2A)(c).

Qualifications to the real risk threshold

41. 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.
42. As I have found there is a real chance that the applicant will be held on remand on arrival in Sri Lanka and while he is subject of criminal investigation and that he faces a real risk of significant harm in that period. As the state is the agent of harm, I am not satisfied that relocation is either possible or reasonable. I am not satisfied that effective protection measures are available as the risk of harm arises from the state. I am satisfied that the real risk is faced by the applicant personally.

Complementary protection: conclusion

43. There are 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.

²² *MIAC v SZQRB* (2013) 210 FCR 505.

Decision

The IAA remits the decision for reconsideration with the direction that:

- There are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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.