



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05138

Date and time of decision: 11 September 2018 12:06:00
M Anderton, Reviewer

Decision

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

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

Background to the review

Visa application

1. The applicant is a Tamil male from Northern Province, Sri Lanka, who lived most of his life in Tamil Nadu, India. He departed Sri Lanka by boat and arrived in Australia in October 2012. On 13 July 2017 the applicant lodged an application for Safe Haven Enterprise Visa (SHEV).
2. In summary, the applicant claimed upon his return to Sri Lanka from India in August 2012, he was questioned by authorities at the airport and CID questioned and harassed him continually, so he went into hiding and departed Sri Lanka in September 2012.
3. On 8 June 2018 the delegate refused to grant the visa because he was not satisfied the applicant faced a real chance of persecution or a real risk of significant harm upon return to Sri Lanka.

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).
5. The applicant provided material about his good behaviour in detention and subsequent release on a bridging visa. I have not considered that material because I do not consider that it is relevant. I do not consider it is information within the meaning of s473DC.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is a Tamil Christian born in [Town 1] who lived most of his life in Indian refugee camps.
 - He was displaced from Sri Lanka due to the ongoing conflict from 1990 – 2005 and 2006 until 2012.
 - He lived in [Town 2], which was LTTE controlled, with his father, but returned to India in 2006 to avoid being recruited by the LTTE.
 - [In] August 2012 the applicant and his father returned to Sri Lanka with the assistance of IOM. His father was sick and he intended to take care of him. The applicant's brother, S, worked far away from their father and could not assist him. The applicant's brother also told the applicant that he would arrange for someone to marry him.
 - Upon return the applicant was detained, harassed and abused by authorities at the airport and treated worse than a dog. They questioned him about his activities in 2005, accused him of being involved with the LTTE and LTTE training. He believes he was treated that way because he was Tamil youth, lived in an LTTE controlled area and lived most of his life outside Sri Lanka. He called his brother who was waiting outside and was released that evening. He arrived in [Town 1] [in] August 2012.
 - On 30 August 2012 S received a call from CID who asked whether someone had come to his home. He told them about the applicant. CID demanded the applicant attend their offices for investigation. The next day S took the applicant to CID office in [Town

1]. They interrogated the applicant with the same questions as the airport. The officers demanded he return with a photograph of himself.

- The next day the applicant returned with his photograph. CID demanded he sign documents in Sinhalese. Another officer showed him 30 – 40 photos and asked him to identify the people in the photos. The applicant did not know any of them. They searched his body and found scars. He told them he got them from a bicycle accident. He told them his brother S was a pastor and their family did not have any connections to violent groups. He was released at 2pm. He was warned not to tell anyone and told there was a case against him and needed to come to their office whenever asked.
- Two days later in early September, S received a call from CID asking about the applicant. The applicant was at his sister's house a kilometre away. S told the applicant not to come home and stay at the sister's house for safety.
- The following day CID called S and asked him to bring the applicant to the office. CID called again that afternoon and the brother told them the applicant had gone to a friend's place and would bring him when he returned. Two CID came to S's home that night and were told the same thing.
- After CID left, S and the sister's husband took the applicant to S's friend's church, approximately 14 kms away. The applicant remained in the church for 18 days. While he was hiding CID phoned S many times. He lied and told them the applicant was not in a good mental state and he did not know his whereabouts.
- Following departure, the authorities continued to contact the applicant's brother to ask about his whereabouts. The last contact was March 2013. After the applicant left Sri Lanka, the applicant's father returned to India because he was scared of authorities and the situation in [Town 1]. His brother changed his phone number.
- There is an ongoing dispute in Sri Lanka between S, who is a non-roman catholic pastor and members of the Catholic Church, who in 2011 surrounded the brother's church with weapons, damaged the church and house and told him he could not have his church in Sri Lanka. The applicant fears that members of the Catholic Church, in an attempt to undermine his brother, will provide fake information that the applicant is LTTE to authorities.
- The applicant fears he will not be allowed to leave the airport and will be killed. He fears harm from CID, airport authorities, Sri Lankan armed forces and others associated with the government.
- He will be harmed because of his Tamil ethnicity, imputed with political opinion of LTTE supported and opposition to the government and because he returned to live in an LTTE controlled area in 2005. He fears harm because he left illegally and sought asylum in Australia.
- He claims he will be persecuted due to the immigration 2014 data breach. He will be discriminated because of his Tamil ethnicity, he has no family support and is vulnerable due to his long absence from Sri Lanka.

Refugee assessment

7. 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

8. 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.
9. While the applicant spent most of his life in Tamil Nadu, he was born in Sri Lanka and claimed he was a Sri Lankan citizen. His documentation also confirmed that. I accept the applicant is a Sri Lankan citizen.
10. I accept the applicant is a Christian Tamil male born in [Town 1] who was displaced with his family due to the conflict and lived most of his life in India. Country information indicates that many thousands fled to Tamil Nadu, India for these reasons. The applicant also indicated he had returned in 2002 with his father, but at the protection interview said he was mistaken and only returned in 2005 and 2012. I accept that the applicant returned to Sri Lanka in 2005 for 1.5 years and in August 2012 as his evidence has been overall consistent about this.
11. I accept that the applicant and his father lived in a LTTE controlled area in 2005. However, I do not accept that the applicant's father or brother may have assisted the LTTE. Firstly, the applicant first raised this at the protection interview and his evidence about this was uncertain and unsure, with no details. Secondly, it is inconsistent with his statement that his father returned in 2002 to build houses for the Government and in 2005 to work on building a house for the family. Thirdly, they returned to India to avoid LTTE recruitment and the growing unrest or conflict. Fourthly, the brother remained as a pastor and has not been detained or sent to a rehabilitation camp, which is strong evidence that he was not of interest to authorities or suspected LTTE. I do not accept any of the applicant's family supported the LTTE or were involved with the LTTE.

Applicant's questioning and harassment

At airport

12. In his written statements the applicant claimed he was detained, harassed, accused of being involved in LTTE, interrogated, treated harshly and abused by authorities and treated worse than a dog in 2012 at the airport and refused to give him water.

13. I accept that the applicant was questioned at the airport upon return in 2012 by authorities and that CID checked on him and questioned him when he returned to [Town 1] as this is consistent with country information about returnees. However, I consider the applicant's account at the protection interview of the questioning and treatment lacked details, despite being asked to provide information in detail about the experience. Further, he did not mention that he was accused of being LTTE. Rather, he said he was asked why he had gone to [Town 2] in 2005 and what had happened. Further, he said he gave the authorities his brother's mobile number and address and they allowed him to leave. Further, the applicant's evidence about IOM presence at the airport and his failure to report any mistreatment to them was hesitant and piecemeal, such that I consider he was making up his account as he went along. Given his vague account and failure to report mistreatment and country information that returnees are not mistreated, I do not accept that he was abused or harmed at the airport. Further, I consider if he were accused of being LTTE and consider LTTE, the authorities would not have released him. While I accept he would have been questioned about his past and present circumstances and his identity and what he did when he returned to Sri Lanka in 2005, I consider the applicant has embellished his claims of harm, mistreatment and LTTE accusation at the airport.

Subsequent questioning and harassment

14. Further, for the following reasons, I do not accept that he was detained on a number of occasions in [Town 1] or went into hiding for his safety or of adverse or ongoing interest to authorities.
15. Firstly, the applicant's account of questioning and harassment and being hiding was vague and not consistent at his protection interview. For instance in his statement the applicant claimed the brother received a call from CID [in] August (2 weeks after arrival) demanding the applicant attend. However, at the protection interview, the applicant received the call two days after arriving in Sri Lanka. I consider the applicant's evidence was inconsistent about when the first CID call was made and who received the phone call.
16. Further, at the protection interview the applicant initially claimed he was telephoned twice and was questioned twice. Later he changed his account saying he or his brother were phoned numerous times and the applicant was questioned two or three times. He then added that he was visited and could not eat. However, the applicant had not previously claimed that CID had visited him. I consider the applicant's account was vague and changed at interview.
17. The applicant's account of CID harassment of the brother was also inconsistent. For instance, in his statement the applicant claimed CID phoned and came to the brother's house a number of times and the brother told CID he would bring him later, when he returned from a friend's place. Then later the brother told CID he did not know where the applicant was. At interview the applicant did not mention that the brother told CID he would bring the applicant when he returned from a friend's place. Further, I consider the claim lacked credibility. If CID wanted the applicant or suspected he was LTTE, it is not credible that they would have accepted such an explanation and taken no action to find the applicant or against the family in the claimed circumstances.
18. Further, in the protection interview the applicant stated after he was questioned the first time, he was told everything was in order. This is inconsistent with his written claims that he was told there was a case against him and to report to them whenever asked. Further, he made no claims at interview that he was required to report to CID or that there was an open

case against him. In fact, when asked why he left Sri Lanka in 2012, the applicant raised a new claim of religious problems in the area between Christians and non-Christians. If the applicant feared that he was suspected LTTE and there was a case against him, it is difficult to believe that he would not have mentioned this as the reason he decided to leave.

19. Secondly, the fact that the applicant was released from the airport after questioning indicates the authorities were no longer interested in him and did not suspect he was LTTE. The applicant's father and others returning to Sri Lanka were also questioned. This is consistent with country information that returnees are questioned. Of note is that the applicant and his father were released before 3 or 4 others who were not released. This further reinforces my view that the applicant was not of interest to authorities.
20. Thirdly, I note also that the applicant's initial statement was that he was hiding at his brother's church, but he later amended the statement say he was at his brother's friend's church. While I accept this may have been an error, I consider the applicant's account of where he was hiding was not consistent in other respects also. For instance, while in his statement, the applicant claimed he went into hiding for 18 days at a church, he made no mention of that in his protection interview and said he was at his sister's house. Further, according to the applicant's statement his sister's house was 1 kilometre away from the brother's house, so I do not accept he was in hiding or could not have been found.
21. Fourthly, it is not credible that if authorities had an open case against him as suspected LTTE that they would have released him at the airport or twice in [Town 1]. Further, if he were wanted, it is not credible that authorities could not have found him or that they would not have arrested or detained the applicant's family. Country information indicates that person suspected of LTTE connections were detained and treated badly and sent to rehabilitation camps. Further, the applicant did not mention hiding or living at a different address in his application address history.
22. I do not accept his father returned to India due to safety fears. Rather, I consider it is more likely the father returned to India after the applicant left Sri Lanka because the applicant was not there to look after him. The applicant confirmed that his father looked to him for care and protection, which is why he accompanied him back to Sri Lanka in 2012. He indicated also that the pastor brother was not in a position to care for their father. He indicated at the protection interview that his father returned to India as he did not have the applicant's support.
23. Further, I do not accept as credible the claim that the brother changed his phone number for safety reasons, as I do not consider that would have solved such a problem. The brother was a pastor with a church and therefore would have been known and easily found if anyone wanted to. Changing his phone number would make no difference.
24. I accept the applicant may have been questioned twice upon return to verify his identity and check if he knew anyone in the photos. I do not accept he faced serious harm. I do not accept that he was arrested, required to report, or of adverse or ongoing interest to authorities. I do not accept the applicant's brother was harassed by authorities about the applicant's whereabouts. I do not accept the applicant went into hiding. I do not accept that authorities phoned or harassed or enquired about the applicant since his departure.

Religion

25. The applicant's brother is a Christian pastor. At interview the applicant referred to religious tensions and unrest in 2012 which lead him to leave Sri Lanka. In his statement he referred to conflict in 2011 against his brother and his church. The applicant also claimed that these persons would provide fake information about the applicant to authorities.
26. I do not accept that non-Christians (or Catholics) or persons with an issue with the brother will provide fake LTTE information to authorities. The applicant provided almost no information about this. Further, this claim lacks credibility as the applicant was only in Sri Lanka for a short time and it is not clear who or how such persons would know about the applicant or why they would be motivated against the applicant if they had issues with the brother. Further, I consider the claim is speculative and fabricated.
27. I accept that there may have been religious tensions in 2011 or 2012, but the applicant's evidence was that his brother was given State protection. While he may no longer have that protection, the applicant did not know if there continued to be issues. Further, it was not evident that the applicant was ever targeted for any religious reasons. On the evidence, I am not satisfied that the applicant faces any harm upon return on the basis of his religion or due to his connection to his brother.
28. I accept the applicant was a subject to the immigration data breach in 2014.

Persecution

29. I accept at least until the end of the civil war in 2009 that Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities, particularly in North and East areas. I accept there are continuing detentions and torture against Tamils, who may be suspected LTTE or criminals, even since the end of the war. I am mindful of the information that people with significant links to the LTTE may still face a real chance of harm, if returned to Sri Lanka.
30. However, I do not accept the applicant or his family have an anti-government or Tamil separatist or LTTE profile or activist. While the applicant mentioned a protest in India in relation to a child situation, this was the first time he mentioned this and he provided no information, despite being given the opportunity. I do not consider the applicant has protested against the Sri Lankan government or is anti-government or Tamil activist. I have not accepted that the applicant is wanted by authorities or of any adverse interest. I am satisfied that the applicant does not have any criminal charges, warrants for her arrest, and is not suspected of being anti-government or involved in or interested in Tamil separatism or reviving the conflict.
31. Based on current information I do not accept that the applicant faces a real chance of being detained or coming to authorities' or anyone else's attention as I do not accept he has an LTTE, anti-government profile or links or an imputed political opinion as an LTTE supporter.
32. Further, I do not accept the applicant faces a real chance of any discrimination or other harm as a Tamil. The DFAT reports in the review material indicate that the overall situation for Tamils in Sri Lanka has improved since the end of the civil conflict in 2009. Further, the country information before me indicates that the monitoring and harassment of Tamils in day to day life has decreased significantly under the Sirisena government. Politically, the new government has taken a more proactive approach to human rights and the issue of reconciliation than previous governments. The overall prevalence of monitoring of Tamils has greatly reduced. Members of the Tamil community have described a positive shift in the

nature of the interactions with authorities, including feeling able to question their motives or object to monitoring.

33. UNHCR eligibility guidelines and the more recent credible country information before me also confirm due to the improved human rights and security situation there was no longer a need for group based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity or because they lived in LTTE controlled areas. Based on the country information, I find the applicant does not face a real chance of suffering harm on account of his ethnicity, his background or where he lived.
34. While not claimed, the applicant mentioned differences in dialects between Sri Lanka and India in the protection interview and I have considered the country information about that and returnees from Tamil Nadu. Further, I note the country information about returnees having difficulty finding suitable employment and housing on return and some may face some societal discrimination upon return which may affect ability to secure housing or employment. I have also considered the applicant's claims about difficulties in returning to Sri Lanka as most of his family are in India and he has lived most of his life in India in refugee camps. The applicant claimed he was vulnerable upon return due to his lack of family support and long absence from Sri Lanka. I accept that some of the applicant's family remain in India and he has been absent from Sri Lanka for most of his life.
35. However, the applicant has been educated at [a certain] level and has returned to live in Sri Lanka twice, most recently in 2012. He had returned to look after his father and find a marriage partner. Further, his brother is a pastor in Sri Lanka and his sister also lived in Sri Lanka. He assisted his father in [his work] in 2005/6 in Sri Lanka. The applicant has worked in various jobs since 2006 in India and [Australia]. He has also gained further qualifications [in] Australia. I consider this evidences his adaptability and resourcefulness. Further, he lived with his sister in Sri Lanka in 2012 and had his brother's support. Further, he is contact with his brother in Sri Lanka and mother in India. I do not accept he faces harm upon return or is vulnerable to harm upon return to Sri Lanka for the reasons claimed.
36. I consider the applicant has the education, skills and experience and support to find employment and accommodation upon return to Sri Lanka. I do not accept the applicant faces a real chance of discrimination, or any treatment that threatens his capacity to subsist or any harm upon return due to his background and length of time spent outside Sri Lanka or having lived in a refugee camp in Tamil Nadu. I do not accept he faced harm in India as I note the applicant stated the camp in India was 'not too bad', he was educated and worked there and his mother and other family continued to live there and his father had returned there also.
37. As discussed above, I am not satisfied that the applicant faces any a real chance of harm on the basis of his religion or association with his brother. I consider those claims were speculative and fabricated. Further, I do not accept the applicant faced any harm in the past in that regard. Further, while there have been religious tensions in the past, the country information indicates there is freedom of religion and state protection. The applicant confirmed also that his pastor brother received state protection when there were previous religious tensions.
38. Further, having considered the applicant's circumstances and the country information I do not accept that the applicant faces a real chance of harm because of his age, background or circumstances, having lived most of his life outside Sri Lanka in Indian refugee camps, return to Sri Lanka in 2012, his Tamil race, having formally having lived in an LTTE controlled area,

young age, data breach or ethnicity, political opinion, religion, connection to his brother, or membership of any particular social group.

Failed Asylum seeker

39. I accept that if the applicant returns to Sri Lanka, he would do so as a failed asylum seeker on a temporary travel document. I do not accept the data breach raises his profile as his return on a temporary travel document from Australia would identify him in any event. Further, the data breach did not disclose his claims. I do not accept he faces harm due to the data breach.
40. The DFAT reports indicate that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, and claimed asylum. Although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants and I have not accepted that the applicant has such a profile.
41. I do not accept the applicant's background, prior return from India in 2012 to Sri Lanka, and return to Sri Lanka again under these circumstances raises his profile or means he faces any chance of harm to him. I have not accepted that the applicant was or is of ongoing or adverse interest to authorities.
42. While not claimed specifically, I have considered country information about social stigma for returnees or asylum seekers as people resent the financial support provided to refugee returnees. I consider the applicant has been educated, and has work skills and experience and some family in Sri Lanka. Given his education, previous work and family support in Sri Lanka, I am not satisfied that he faces a real chance of social stigma as a returnee. Further, and in any event, I do not accept social stigma amounts to serious harm.
43. I note while the government has decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and calls by CID to failed asylum seekers in the North in 2017. UNHCR survey reported 49 percent of returnees in the north received a visit in 2015. In any event, while it may be that the applicant receives a visit from CID or police as a returnee or failed asylum seeker, I do not accept he has any profile of interest or is wanted by authorities. Further, I do not accept that such visits amount to harm or serious harm. I am not satisfied that the applicant faces serious harm from such visits or as a returning asylum seeker.
44. Having regard to the country information in the review material and in particular in the DFAT reports, I am not satisfied there is a real chance the applicant would face serious harm upon return by the Sri Lankan authorities or otherwise because of his background or he applied for asylum in Australia, is a returnee or returning on a temporary travel document or on account of the data breach.

Illegal departure

45. I accept the applicant departed Sri Lanka without a passport and therefore illegally. For that reason, he has committed an offence under Immigrants and Emigrants Act ("IAEA") and may face questioning at the airport and may be charged and fined.
46. The country information before me indicates that all returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamils are treated differently. I accept that processing may take several hours

and it may be en masse. However, the country information is that they are not subject to mistreatment during processing at the airport. I do not accept the applicant faces a longer detention than others, as I do not accept he is or will be of adverse interest to authorities.

47. Country information is that bail is usually granted to voluntary returnees. While facilitators and organisers of people smuggling venture can be charged under s45C of the IAEA and are not usually released on bail, there is no evidence or claim that the applicant is of that profile. I find the applicant will be released on bail.
48. Country information is that a guilty plea by a returnee attracts a fine of LKR 3000 (approximately \$25AUD) to LKR 200,000 (AUD\$1670). Country information is that if a guilty plea is made, the returnee is free to go and the fine can be paid by instalments.
49. If they plead not guilty, bail is granted immediately to the returnee on the basis of personal surety or guarantee by a family member. If a guarantor is required, returnees may need to wait for the guarantor come to court.
50. I consider the chance of the applicant being required to have a family member act as guarantor is remote. In any event, I do not accept he would not have family member able to provide personal surety as his brother and sister live in Sri Lanka and he is in contact with his brother. I do not accept he faces any harm if he is required to travel to attend court appearances in the future, or that that amounts to serious harm.
51. While there are reports of arrests and torture, they were of persons known or suspected as former LTTE members. As discussed above, I do not accept the applicant or his family have an LTTE or anti-government profile or is of any interest to authorities now or upon return in the foreseeable future.
52. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish identity, criminal history and possibly bail. Further, I do not accept he faces any harm as a result of authorities checking with his home area about his identity as I have found he is not of adverse interest to CID, police, army, intelligence, the authorities, or anyone.
53. I accept that if the applicant arrives over the weekend he may be briefly held in airport holding cell until he can appear before a magistrate. However, DFAT has assessed risk of torture or mistreatment to detainees is low and considered with the applicant's profile and circumstances I do not accept the applicant faces a real chance of torture, interrogation or mistreatment upon arrival, during questioning or possible brief detention. I do not accept he faces a long detention as I do not accept he is of interest to authorities.
54. I have considered the prison conditions and accept on the basis of country information that they are generally poor, overcrowded and unsanitary. However, I do not consider there is a real chance the applicant will be held in prison. The information is that he may be held in an airport holding cell.
55. Further, the applicant does not have an anti-government or LTTE profile, outstanding charges or is of interest to authorities and do not accept there is a real chance of torture, assault or mistreatment if held on remand, or that any brief detention in these conditions amounts to serious harm for this particular applicant.

56. Furthermore, I do not accept that the IAEA provisions that deal with breach of the departure laws from Sri Lanka are discriminatory on their face, or disclose discriminatory intent or that they are implemented in a discriminatory manner. I find that the Sri Lanka departure laws are laws of general application.
57. I am not satisfied, that questioning, arrest, and the poor conditions in airport holding cell, travel for court appearances and possible associated costs and the application of a penalty for illegal departure amount to systematic and discriminatory conduct as required by s.5J.
58. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution from CID, Sri Lankan authorities, army, police or anyone for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Refugee: conclusion

59. 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

60. 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

61. 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.
62. I have accepted the applicant will be returned as a failed asylum seeker. As discussed above, even if he receives a monitoring visit from authorities because he is a failed asylum seeker or returnee, I am not satisfied that amounts to significant harm.
63. As to treatment for the illegal departure and any questioning and detention the applicant may experience in relation to this. I find the applicant is likely to be issued a fine and released. If he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances. Upon arrival, he may be held in an airport holding cell over the weekend while waiting to come before a magistrate. However, I am not satisfied there is a real risk he would be subject to the death penalty, arbitrarily deprived of her life or

be tortured. I have not accepted that he faces a longer detention or will be held in prison or face in that respect. Having regard to his circumstances, I am also not satisfied that the treatment, travel to court appearances, possible costs and penalties the applicant may face as an illegal departee amount to severe pain or suffering, pain or suffering that is cruel or inhuman in nature or extreme humiliation, intentionally inflicted or caused.

64. I am not satisfied that, individually or cumulatively, any processes or penalties the applicant may encounter under the IAEA or as a returning asylum seeker, would constitute significant harm as defined under ss.36(2A) and 5 of the Act.
65. In relation to the balance of the claims which I have accepted, I have found that the applicant does not have a real chance of harm on any of the bases claimed. For the same reason and applying the authority in MIAC v SZQRB [2013] FCAFC 33, I am not satisfied the applicant will face a real risk of harm if removed to Sri Lanka.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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.