



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06220

Date and time of decision: 3 April 2019 16:50:00
M Oakman, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil of the Hindu faith from the Eastern Province, Sri Lanka. He arrived in Australia [in] April 2013 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 20 March 2017. On 8 January 2019 a delegate of the Minister (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 30 January 2019 the IAA received an email from the applicant's representative with submissions. The submissions disagree with some of the findings of the delegate, respond to those findings and take issue with the delegate's assessment of the applicant's protection claims. In doing so the submissions discuss evidence which was before the delegate, refer to case law and contain argument, which I consider does not constitute new information, and I have had regard to it.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He fears that he will be arrested and then shot. He doesn't believe there would even be any legal process followed;
 - He believes this is because he is Tamil and they are not afforded a fair process;
 - He cannot hide the fact he is Tamil and as he departed Sri Lanka illegally he will be questioned at the airport upon returning. From those questions they will soon discover he is the same person they want from their questioning in relation to the use of the chemicals;
 - The authorities will not protect him as the authorities are seeking him for using chemicals that they prohibit Tamils to use; and
 - He cannot relocate to any other area as by relocating the authorities are aware of who each person is in the area.
5. In the post-SHEV interview submissions to the delegate he also indicated the essential and significant reasons for his fear of persecution are:
 - Race/Ethnicity – he fears that as a result of his Tamil ethnicity he will be imputed with political opinions that are supportive of the Liberation Tigers of Tamil Eelam (LTTE);
 - Imputed political opinion – he fears that because he was found in possession of illegal [goods] and because he is Tamil the authorities will suspect that he provided weapons to the LTTE, and question, detain and severely torture him to confirm if ever he did so. He attended a Heroes Day commemoration in Australia and fears that this will enhance the authorities' belief that he is supportive of the LTTE; and

- He fears that he will be targeted by the Sri Lankan authorities because he left from Sri Lanka illegally after being found with illegal [goods], and that this will cement the authorities' belief that he was guilty of crimes against the government.

Factual findings

Receiving country

6. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from the Eastern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

Background

7. The applicant was born in [date] in [Village 1], [City 1], Eastern Province, in Sri Lanka. He lived in [Village 1] until 1996 when he moved to [Village 2], also in the [City 1]. He continued to live in [Village 2] until he left Sri Lanka in April 2013, except for the period from 2000 to 2003 when he lived and worked in Qatar. He married in 1996 and has [a number of children]. His wife and children live in Sri Lanka in [Village 2], and his wife's mother lives nearby. His parents live about [distance] from [City 1] town. His siblings, [also] live in Sri Lanka, although some of his [siblings] have also lived and worked overseas at times. He contacts his family in Sri Lanka regularly. He went to school [for a few years completing some qualifications]. He has worked in Sri Lanka as [Occupation 1 between] (1994-1996), a [Occupation 2 between] (1996-2000), and [Occupation 3 between] (2003-2013), including the [Occupation 4 between] (2011-2013). He also worked as a [Occupation 5 in Qatar] between 2000 and 2003. He has worked [in Occupation 6] in Australia.

Problems in Sri Lanka

8. The applicant provided the Department with information about his problems in Sri Lanka during his entry interview (May 2013), his SHEV application and accompanying SHEV statement (March 2017), a post-SHEV application further statement (November 2018), at his SHEV interview (December 2018) and in post-SHEV interview submissions (December 2018).
9. In summary, the applicant claims he and his family were not members of the LTTE; he and his family were not involved with nor did they help the LTTE; and he didn't undertake any LTTE training. Although they lived in the Eastern Province in the [City 1], their village was under army control from the 1990's, with the LTTE sometimes visiting people at night but not his family. He did not have any problems with the authorities in Sri Lanka until shortly before he left Sri Lanka in April 2013. His problems arose in connection [with goods in Occupation 4].
10. In relation to the [Occupation 4] he claims:
 - From about 2003 until he left Sri Lanka he worked [in Occupation 3], [after] he returned from working in Qatar.
 - From 2011 he also started using [goods in Occupation 4 in Town 1]. He met a man in 2011 who said he was able to provide him with [certain goods for his employment]. He had to buy [these goods in bulk as they were illegal].

- He got involved in the business because no other Tamils were doing it in the area, he saw there was an opportunity and he described the business as a profitable one. He said Tamils were not allowed to use the [goods. As they] were operated by Muslims and Sinhalese who were able to obtain permits. He knew it was illegal to use the [goods] without a permit. He said he did not apply for a permit.
 - He would mix the [goods] himself and stored the [products near Occupation 4]. The charges were made up into 5kg parcels of chemical explosives. The applicant used the chemical explosives to blow apart large boulders. He had a four-cylinder compressor, mounted on a trailer and transported using his truck, which he used to drill three-foot holes in the boulders. His offsider, [P] younger man who was about [age] or so, and worked with him for a number of years, would use the compressor to make the holes. He or P would place the charge in the hole and then set off the explosion. They would leave the rock fragments for about a day because of the chemical smell / residue. He would then hire some labourers to break up the fragments into smaller pieces. The smaller pieces were used in the foundations of buildings in the construction industry. He could get around four truck-loads of material per boulder.
11. The applicant claims that in February 2013 two police officers visited [his work premises of Occupation 4]. They were not in uniform but they were carrying pistols. He was not there but P told him about their visit. The officers did not speak to anyone but observed what was occurring from the road. In March 2013, P was alone [when] he again observed two officers watching [the]. Neither the applicant nor P thought much about it at that time as the authorities often monitored the activities of Tamils. On a third occasion, around [March] 2013, P was at the [work premises] using [a piece of machinery] when two officers came into [his work premises] and questioned P. There were [packaged goods] near P. They questioned P about who operated and provided the [goods]. P divulged the applicant's details, including his name and address. They confiscated the packages and left. P called the applicant and told him what had happened and that the officers were probably coming to question him. After the call from P the applicant went into hiding. He hid for about two weeks in a named area, which was mainly farming land, in a hut that was available for farmers if they remained overnight in the area. From that area he went to Colombo and was there a few days before he left Sri Lanka on [April] 2013 [organised] by a smuggler.
 12. The applicant claims that on or around [April] 2013 the authorities raided his home in Sri Lanka. They ordered everyone out of the house and conducted a search. They took [registration] and national identity card. The authorities have not searched the house again but since then they have monitored his house and his family. The authorities told his wife that they know where he is. P has not had any further issues with the authorities. The authorities have not sent any summonses or the like concerning him to his family. While in Australia he attended a LTTE Martyrs' Day on [November] 2018 at [City 2].
 13. The UN High Commissioner for Refugees (UNHCR) confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.¹ DFAT reports that incidents of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, and assesses that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. Many Tamils, particularly in the north and east, reported

¹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

being monitored, harassed, arrested or detained by security forces during the war.² Country information confirms that, 'except with lawful authority', the possession and storage of explosives is illegal in Sri Lanka under the *Offensive Weapons Act 1966* (Sri Lanka) (OW Act) and carries a penalty of up to ten years' imprisonment, a fine not exceeding 10,000 rupees, and may in addition be punished by whipping.³

14. The applicant consistently claimed throughout the visa application process that just before he left Sri Lanka the Sri Lankan authorities started making enquiries in relation to his use of [goods at his work premises]. The details he provided about the claim were also generally consistent, including in his post-SHEV application further statement (further statement) and at the SHEV interview. There were perhaps more discrepancies in his SHEV statement when compared to the rest of his evidence, but he explained in his further statement that some of the details of his claim were missing as it was prepared after a rushed interview with his migration agent. He also provided a generally consistent address, education, family and work history throughout the visa application process. Taking into account the difficulties of recall over time, the scope for misunderstanding in interpreted material, cross cultural communication issues, the problems people who have lived through trauma may experience in presenting their story in a cohesive narrative, and his explanation for the general discrepancies with his SHEV statement, I consider the applicant a credible witness. I accept his claims about the authorities in Sri Lanka making enquiries in relation to his use of [goods at his work premises] and his address, education, family and work history, and, to the extent of any inconsistencies, prefer his evidence in his further statement and at the SHEV interview over the evidence in his SHEV statement.

Asylum Seeker

15. The applicant claims to have left Sri Lanka in early April 2012, to travel to Australia [organised] by a smuggler. The applicant previously had a passport but, as he explained at the SHEV interview, his wife took it from him and destroyed it after he returned from Qatar because she did not want him to leave again. I find that, if he were returned to Sri Lanka, he may be identified as a returning asylum seeker who departed Sri Lanka illegally by the Sri Lankan authorities and, as he does not have a passport, he will be travelling on temporary travel documents.

Refugee assessment

16. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

² DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

³ "Country Information Report No. 321/95. (Source Doc: Explosives: CIS Information Request No.704. Cable...)", Undefined, 18 December 1995, CX12969; "Offensive Weapons Act No. 18 of 1966", CommonLII, 21 June 1966, CIS2D9948018; "Offensive Weapons (Amendment) Act, No. 2 of 2011", Blackhall Publishing, 28 January 2011, CISD9559B12641; and Standard Q&A Report, 'Sri Lanka: CI181204105222626 – Explosives', 5 December 2018.

Well-founded fear of persecution

17. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

18. The applicant fears harm if returned to Sri Lanka on the basis of his Tamil ethnicity, being imputed with political opinions supportive of the LTTE and being suspected of links (supplying weapons) to the LTTE.

19. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.⁴ However, there have been a number of significant changes since the 2015 election of the Sirisena government. The new government quickly abolished surveillance and censorship of media and civil society groups; undertook constitutional reform; initiated a new, more open dialogue with the international community; and signalled a willingness to address long-standing allegations of past human rights abuses and violations.⁵ The Sirisena government implemented a number of confidence-building measures to address grievances of the Tamil community. This includes replacing military governors with civilians, establishing an Office to coordinate reconciliation efforts, promoting social integration, securing language rights and supporting a healing process; during 2017 the Tamil National Alliance and the Defence Ministry initiated a formal dialogue on returning military held lands, with the army chief publicly committed to the military prosecuting personnel who committed criminal acts during and after the war.⁶ The UN observed in 2016 that one of the most important long-term achievements in the past year had been the restoration of the legitimacy and independence of the Human Rights Commission (HRCSL) and noted that the Sirisena government has created a political environment conducive to reforms, significant momentum had been achieved in the process of constitutional reform and it had taken important symbolic steps towards reconciliation and changing the majoritarian political culture.⁷ The US Department of State (USDOS) notes in its report released in 2018 that the HRCSL generally operated independently of, and with a lack of interference from, the Sri Lankan government.⁸

20. The UK Home Office's (UKHO) fact finding visit to Sri Lanka in July 2016 identified a number of ongoing concerns for the Tamil population in relation to human rights and other issues, but a

⁴ USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

⁵ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

⁶ USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

⁷ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

⁸ USDOS, "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333.

number of the sources they consulted conceded that there had been improvements for Tamils since the change of government in 2015.⁹ DFAT has indicated in its two most recent reports that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. DFAT states that Tamils have a substantial level of political influence and their inclusion in the political dialogue has increased under the Sirisena government. DFAT understands that Tamils do not receive unwarranted attention from the authorities because of their political involvement, and assesses that there are no barriers to Tamil political participation. Many Tamils in the north and east reported being monitored, harassed, arrested or detained by security forces under the Rajapaksa government. Members of the Tamil community in the north and east continue to claim the authorities monitor public gatherings and protests, and practise targeted surveillance and questioning of individuals and groups. DFAT assesses that the monitoring of Tamils in day to day life has decreased significantly under the Sirisena government, but surveillance of Tamils in the north and east continues, particularly for those associated with politically sensitive issues.¹⁰

21. In short, this country information indicates that although some monitoring still occurs, overall the monitoring and harassment of Tamils in the north and east has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation for Tamils generally has substantially improved.
22. I am not satisfied that the applicant's fear of harm on account of his Tamil ethnicity, any LTTE links or imputed political opinion is well-founded. DFAT confirms¹¹ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE. While the UKHO 2017 report also notes that persons with an actual or perceived significant involvement with the LTTE or in post-conflict Tamil separatism may be at risk, in its view simply being a Tamil does not give rise to protection claims nor, in general, does a person's past membership or connection to the LTTE.¹²
23. In the applicant's case, neither he nor his family were LTTE members and they did not provide any help to the LTTE. They have no actual LTTE connections. He and his family lived in a province that was controlled by the LTTE at times during the war and they are Tamil. However, as the UKHO notes, residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection. Until the enquiries began in 2013 in relation to the use of [goods at his work premises], the applicant had not received any adverse attention from the Sri Lankan authorities for any reason. Nor does he claim that any of his family members received any adverse attention from the authorities prior to those enquiries about the [goods]. The applicant's representative submitted that the Sri Lankan authorities were, and remain, concerned about LTTE weapons and [goods] and those who supplied them to the LTTE, and as the applicant was being investigated for his use of [goods], they will suspect he supplied [to] the LTTE. The [goods] were clearly being used in an industrial setting, in a [his work premises] and where there were other [companies] in nearby areas also using [goods] (the setting). It took some years of him using [goods] before the authorities showed any interest (the timing). The failure of the authorities to immediately arrest the applicant or P once they were aware of the use of the [goods] at the [his work premises], given their powers of arbitrary arrest under

⁹ UKHO, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112.

¹⁰ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

¹¹ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

¹² UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OGD6E7028826.

the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA), suggests it was not viewed by the authorities as anything other than a breach of the OW Act (no immediate arrests). Although I accept the authorities may remain interested in some suppliers of [goods], those factors – the setting, the timing, no immediate arrests – demonstrate the applicant’s use of [goods] is in a different category to LTTE [goods]. I am not satisfied that his use of [goods] in the [his work premises] will lead the Sri Lankan authorities to suspect him of supplying [to] the LTTE.

24. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE.¹³ The UKHO 2017 report indicates that although the Sri Lankan authorities may monitor overseas activities, they are only interested in significant involvement in pro-Tamil separatist diaspora activities and activity such as attending demonstrations overseas is not in itself evidence that a person will attract interest from the Sri Lankan authorities.¹⁴ DFAT states that high profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and assesses that the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile and that returnees may be subject to surveillance.¹⁵
25. The applicant attended a Martyrs’ Day event in [City 2] in November 2018. He doesn’t claim he was involved in the event in any way other than as an attendee, or that he has otherwise been involved in any pro-Tamil, pro-LTTE or Tamil separatist diaspora events and activities in Australia. I am not satisfied that the applicant’s attendance at one Martyrs’ Day event in Australia is anything more than, or will be perceived by the Sri Lankan authorities as anything but, very low level and limited involvement in pro-Tamil and/or pro-LTTE diaspora activities. I am not satisfied that the applicant’s profile, which as discussed above is not one that gives rise to a well-founded fear of harm, will be increased by the fact that the applicant has spent almost six years, attended one event, and claimed asylum, in Australia. Nor am I satisfied, given his profile, there is a real chance that he will be monitored or subject to surveillance because of his absence from Sri Lanka and/or as a Tamil asylum seeker, if returned.
26. The applicant does not have a profile that country information suggests he has a real chance of suffering harm, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political views and/or his Tamil ethnicity. I am satisfied that the applicant will not face a real chance of persecution on the basis of any links to the LTTE, for any imputed political opinions, and/or because of his Tamil ethnicity, if returned to Sri Lanka, now or in the reasonably foreseeable future.
27. I accept that, on his return to Sri Lanka, the applicant may be identified by the authorities as an asylum seeker who departed Sri Lanka illegally.
28. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. DFAT has been advised by the Sri Lankan government, but cannot verify, that no mere passenger on a boat has been given a custodial sentence. A guilty plea attracts a fine, which can be paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court. Anecdotally, most passengers may spend years on bail and most are free to go

¹³ DFAT, “DFAT Country Information Report: Sri Lanka”, 23 May 2018, CIS7B839411064.

¹⁴ UKHO, “Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0”, 15 June 2017, OG6E7028826.

¹⁵ DFAT, “DFAT Country Information Report: Sri Lanka”, 23 May 2018, CIS7B839411064.

after paying a fine. Although fines are often low, the cumulative costs of attending court over a protracted period of time can be high.¹⁶

29. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service, the Criminal Investigation Department (CID) and, at times the Terrorism Investigation Department, who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed as a group and individuals have to remain until all returnees are processed.¹⁷
30. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.¹⁸
31. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted, photographed and have a statement taken by the police. If former LTTE members, the police will further enquire about their activities abroad. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours after arrival and should a magistrate not be available before this time, for example because of a weekend or public holiday, those charged may be detained for up to two days in an airport holding cell.¹⁹
32. I accept that the applicant may be considered a failed Tamil asylum seeker from Australia on his return. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport. There is country information before the IAA containing reports of some returnees being tortured. DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport. However, as discussed above, on my findings, the applicant is not such a person.
33. Taking into account my findings about his profile and the country information, I do not accept that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka.
34. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. I have found that the applicant's profile is not one that places him at a real chance of suffering harm. The applicant is from [Village 2], [City 1] District, in the Eastern Province, where his wife and children still live, and I am satisfied that this is the applicant's home area to which he will return. As discussed above, I am not satisfied, given his profile, there is a real chance that he will be monitored or subject to surveillance because of

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

his absence from Sri Lanka, any activity in Australia or as a failed Tamil asylum seeker from Australia, if returned.

35. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many face difficulty in finding suitable employment and reliable housing, and refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees may face some societal discrimination upon return to their communities, and that continued surveillance of returnees contributes to a sense of mistrust.²⁰ The applicant has many years of experience working in a number of roles including farmer, driver and cleaner. He has shown himself to be resourceful and resilient by adapting to life in Qatar and Australia. The applicant will be returning to his home area where his immediate family reside, his parents also reside in the [City 1] District, and he has siblings who also live in Sri Lanka. He has remained in regular contact with his family in Sri Lanka. He does not claim that his family have been unable to subsist in Sri Lanka since he has been in Australia. Given those factors, I am satisfied that the applicant will be able to re-establish himself in [Village 2] without suffering harm in relation to any housing and employment difficulties that he may encounter. I accept that he may face some social stigma on his return as a returned/failed asylum seeker. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
36. I am not satisfied that there is a real chance that the applicant would face serious harm as a returned Tamil asylum seeker from Australia. I accept that the applicant may be processed under the IE Act at the airport and may face court action and a fine under the IE Act as well. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport and assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.²¹ In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the processing, investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
37. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a returned Tamil asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
38. I accept that the applicant was being investigated for his use of [goods] at the [his work premises] by the Sri Lankan authorities from about February 2013, and that after he left Sri Lanka his home was searched and documents seized by the authorities around 23 April 2013 and the authorities have continued to monitor and sometimes question his family. I also accept, based on the country information, that his use of [goods] at the [his work premises] without a permit or other lawful permission is a breach of the OW Act; that bail for an offence

²⁰ Ibid.

²¹ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

under the OW Act can only be granted by a High Court; and if convicted under the OW Act he may be liable to penalties including a fine, imprisonment and a whipping.

39. The country information discussed above confirms that as part of the processing at the airport all returnees have their travel documents and identity documents checked against various databases and the records of outstanding criminal matters. Additionally, for those returning on temporary travel documents, which will include the applicant as he does not have a passport, the police undertake an investigation to confirm their identity, which often includes an interview as well as contacting their home area.
40. DFAT assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture.²² However, both DFAT and the UKHO acknowledge reports of ill-treatment and torture by the police continue to emerge in Sri Lanka. DFAT does not consider such incidents to be ethnically based but attributes it to outdated policing methods, the slow filtration of the reform messages from senior police, low capacity, lack of training, poor procedures and poor policing methods that are focussed on extracting confessions rather than undertaking thorough investigations. UKHO identifies such treatment as reportedly common in relation to criminal investigations, regardless of the suspected offence, and the available information does not provide any grounds for departing from a previous UK tribunal finding that there remains a real risk of ill treatment or harm to a person detained by the Sri Lankan security forces, subject to an assessment of the likelihood of the person being detained based on their individual circumstances.²³
41. Given the country information about the investigation process at the airport, together with the continued monitoring and sometime questioning of his family that has occurred since his departure from Sri Lanka, I am satisfied that there is a real chance that through that investigation at the airport the applicant will be identified by the police in his local area as a person of interest in relation to the illegal [goods] at the [his work premises] and that there is a real chance that he will consequently be detained and subject to a police investigation for breaches of the OW Act. In view of the country information about torture in Sri Lanka, I accept that the incidence of torture in Sri Lanka is lower than in the past. However, I am satisfied based on the weight of country information, including the assessments by DFAT and the UKHO, that in the context of an investigation by the police of the applicant's possible breaches of the OW Act, there is a real chance that he will be subjected to significant physical ill-treatment while the police detain the applicant and investigate his use, possession and storage of [goods] at the [his work premises], including seeking to extract a confession from the applicant.
42. However, DFAT advises that incidents of torture in Sri Lanka are not confined to any particular ethnic, religious or political group nor is the torture systemic or state-sponsored.²⁴ Although the country information on torture indicates that police may mistreat persons in their custody while investigating crimes, I do not accept that group meets any of the requirements of s.5L(c) in the definition of a 'particular social group' under the Act. Based on the available evidence I am not satisfied that any torture or mistreatment inflicted on the applicant would be for any of the reasons specified in s.5J(1)(a).

²² DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

²³ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; and UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

²⁴ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; and DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

43. Furthermore, although the applicant may also face penalties under the OW Act, the OW Act applies to all Sri Lankans, without any provisions specifically related to Tamils,²⁵ and is not discriminatory on its terms. As discussed above in relation to the IE Act, case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. The applicant said that Tamils were not allowed to use such [as goods], unlike nearby Muslim and Sinhalese run [companies]. However, besides a lack of other evidence to support this assertion, on his own evidence he was not refused a permit to use the explosive, because he never applied for a permit even though he knew it was otherwise illegal. I am not satisfied, despite the applicant's claim, that the evidence supports a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the punishment of the applicant under the OW Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
44. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

45. 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

46. 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

47. 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.
48. 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 (ICCPR).

²⁵ Standard Q&A Report, 'Sri Lanka: C1181204105222626 – Explosives', 5 December 2018

49. On the basis of the evidence before me, I am satisfied that there is real risk that the applicant will be identified as a person of interest in relation to his use, possession and storage of [goods] at [his work premises] on his return to Sri Lanka; that in those circumstances the applicant will be detained and subject to a police investigation for breaches of the OW Act; and that during such detention and investigation there is a real risk he will be subject to severe pain or suffering intentionally inflicted for the purposes of obtaining information or a confession in the course of a criminal investigation. The evidence before me does not suggest that such treatment arises out of, or is inherent or incidental to, any lawful sanction that is not inconsistent with the Articles of the ICCPR. I find that there is a real risk that the applicant will, on his return to Sri Lanka, suffer harm which amounts to torture, as defined in s.5(1) of the Act, and it is significant harm, as defined in s.36(2A)(c) of the Act.

Qualifications to the real risk threshold

50. 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.

51. As the harm he faces is from the Sri Lankan authorities, and as the applicant is likely to be detained immediately following the initial enquiries at the airport on his return to Sri Lanka, I am not satisfied he could relocate to another part of Sri Lanka in order to avoid harm. Further, he will not be able to obtain protection from the harm from the Sri Lankan authorities because it is the state authorities who would inflict the harm. I am satisfied that the risk of harm to the applicant is one he faces personally due to his possession, storage and use of [goods] at [his work premises], and that it is not one faced by the population generally.

52. I am therefore satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk he will suffer significant harm. Having made this finding, it is not necessary to consider whether the applicant is at risk of significant harm for any other reason on return to Sri Lanka.

Complementary protection: conclusion

53. 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.

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

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.