



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06377

Date and time of decision: 22 March 2019 14:58:00
G Deal, 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 (the applicant) claims to be a Tamil from [Town 1], Sri Lanka. [In]2012 he arrived by boat in Australia. On 1 September 2016 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now part of the Department of Home Affairs.
2. On 13 February 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. While the delegate accepted most of the applicant's claims in relation to having been harassed and extorted by the Tamil Makkal Viduthalai Pulika (TMVP) and one of their members, "S", he found issues experienced with S to be of a personal nature and those experienced with the TMVP to have been opportunistic and given the conditions for Tamils had improved and the TMVP no longer presented a real threat he found the applicant did not meet the relevant definition of refugee, did not face a real risk of significant harm and that he was not a person in respect of whom Australia had protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Tamil Hindu from [Town 1], Sri Lanka.
 - In about 1990 he was rounded up, detained and mistreated by the army.
 - His home was damaged and possessions were lost in a tsunami in 2004.
 - In about 2005, S threatened to harm him if he did not put S's [Relative A] on a list for assistance after the tsunami, which he helped administer as president of a community group in his area. He believes S and the TMVP subsequently caused him lots of problems because of this.
 - In about 2007 the TMVP detained him for three days, beat him and accused him of taking bribes while helping to administer the tsunami relief.
 - He fled to [Country 1] in fear of his safety in [2008] and returned to Sri Lanka in - [2010].
 - He was a member of a Hindu [society] and in [2011] he was threatened by S and the TMVP in connection with a land dispute.
 - From [between] 2011 [and] [2012] while running his [business] he was extorted by S and the TMVP as they believed he had money.
 - After returning from [Country 1] in 2008 he was the victim of on-going harassment, detention, severe mistreatment and threats to his life by the TMVP. He fled Sri Lanka in fear of his safety for Australia in [2012].

- Since being in Australia the TMVP have harmed and harassed his family about his whereabouts.
- He believes he will be harmed by S and the TMVP as he failed to report to the TMVP offices and they believed he supported Pillyan and S wants to seek revenge. He is a member of a group not aligned with any Tamil group. He left Sri Lanka illegally and will be a failed asylum seeker.

Factual findings

6. The applicant lodged an application for a Protection Visa (Class XA) in September 2013 including a statement setting out his claims dated 1 September 2013. This application was later deemed invalid. However, in the SHEV interview the delegate referred to this earlier application and asked the applicant if he still relied on that application, noting the applicant had not included any identity documents in his 2016 SHEV application but that the delegate was able to obtain these from his 2013 visa application and the applicant said that he did. In a post interview submission the applicant's then migration agents also said that they reaffirmed all previous statements made by or on behalf of the applicant. I also note the statement accompanying his 2013 visa application is almost identical in content to that accompanying his 2016 SHEV application.
7. Based on the applicant's evidence, including his documentary evidence, I accept the applicant is a Tamil of Hindu faith from [Town 1]. I have found the applicant's evidence about his education and work history highly consistent, particularly when compared with some of his other claims, and based on this and the documentary evidence before me (for example, a marriage certificate which indicates he was an [occupation] at that time) I accept he completed schooling up to [a level], and has undertaken [various] courses [and] worked in various [capacities]. I also accept his wife (who he married in [year]), [family and relatives] all live in [Town 1]. I accept his family home was damaged and his belongings washed away in a 2004 tsunami based on the consistency of the claim and the documentary evidence before me.
8. The applicant claims he was rounded up and detained and mistreated by the army in 1990. While this claim was briefly mentioned at the conclusion of the arrival interview it was not subsequently mentioned in any visa applications or interviews. Various letters including from a Justice of the Peace and his wife also briefly mention an incident in 1990 referring to it as a "weapons disaster". However the applicant did not marry his wife until some 16 years after this claimed incident and neither she nor the Justice of the Peace have claimed to have had firsthand experience of these events. I place no weight on these documents. I also note that in 1990 the applicant was about [age] years old. The applicant has consistently said that in 1990 he relocated with his family to a refugee camp in [Town 1]. In the SHEV interview the applicant said neither he nor his family had any involvement with the LTTE during the conflict. I am willing to accept his family may have been placed in a refugee camp by the army at that time due to fighting in their area however I do not otherwise accept he was detained or mistreated by the army.
9. The applicant claims he was threatened by S in 2005 after he refused to place S's [Relative A] on a list for tsunami relief and that his subsequent harassment by S and the TMVP largely stemmed from this earlier dispute. While the applicant did not mention this specific incident in the bio-data interview, only stating he was harassed by armed groups, I do not draw an adverse inference from this given the limited time available in that interview. He also did not mention it in the arrival interview, although again, I do not draw an adverse inference from this given he was focused on more recent events in that interview. The applicant has consistently

claimed to have been [an organiser] that helped administer the tsunami relief and that S had threatened him in connection with this all of which I accept. In the SHEV interview the applicant said that S told him he could no longer live in the area and that his life would not be guaranteed if he did not comply with the demand to place his [Relative A] on the list and that he swore at the applicant which given the detail provided I am also willing to accept. However given the applicant continued to live in [Town 1] without incident until 2007 despite refusing S's request, I find that these threats were hollow and not acted on.

10. The applicant claims that in about 2007 the TMVP detained him and mistreated him accusing him of taking bribes while helping to administer the tsunami relief and he was only released after his family pleaded with them, three days later. However I have a number of serious concerns about his evidence in relation to this claim and do not accept this incident occurred. In the arrival interview the applicant said that in 2007 the police detained him for about three days at the [Town 2] police station and the Criminal Investigation Division (CID) detained him for about two or three days at the CID office in [Town 1] and when they realised they had the wrong person they released him. He did not subsequently mention these incidents again. In his visa applications he said that the TMVP detained him in 2007 and severely mistreated him and accused him of taking bribes in connection with the tsunami relief and that he believed S had caused this trouble for him because of their earlier dispute. However when the delegate asked him about the problems he experienced with the TMVP in 2007 in the SHEV interview the applicant appeared to confuse this event with other incidents he otherwise claimed occurred some four years later after his return from [Country 1]. When asked why they detained him at TMVP offices the applicant indicated it was S's office, that he worked there, and they took him directly there to him. However in his visa applications he indicated the TMVP offices were that of a man other than S who was a senior TMVP member and who interrogated him and threatened him. In the SHEV interview he said they severely mistreated him, [injuring him], blindfolded him and tied his hands. In support of this claim the applicant provided a number of letters, including one from his [wife], a [Doctor 1] and [Doctor 2] at [Town 1] hospital. However the letters from his wife do not mention this 2007 incident and I place no weight on them regarding this claim. While the [Doctor 1] states the applicant sustained [an injury] from an assault in 2007 [Doctor 1] did not claim to have had first hand experience of the claimed event and I place no weight on it regarding the cause of the [injury]. Another letter dated in 2012 with a stamp stating it is from [Doctor 2] at [Town 1]-hospital and a signature is not on letterhead. It also states that the applicant was assaulted by unknown persons in 2004 (not in 2007 and I note he has not otherwise claimed to have been assaulted in 2004). In light of the above and given the prevalence of document fraud in Sri Lanka I do not accept it as genuine.¹
11. Given the detail provided and that it was in the lead up to the end of the conflict in May 2009 and the country information before me indicates that many human rights abuses, including arbitrary arrest and detention, were committed by the security forces during this period, I consider it more plausible that the applicant was briefly detained and mistreated by the authorities in a case of mistaken identity in 2007, as was claimed by him in his arrival interview and I accept this occurred, although I consider that on his release he was no longer of interest to them.²
12. Based on the consistency of the claim and the documentary evidence before me I accept the applicant legally travelled to [Country 1] in [2008] on a working visa and returned to Sri Lanka in [2010]. He has broadly claimed to have fled in fear of his safety. In his visa applications he

¹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

² UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

said he was not targeted by S or the TMVP in between his claimed release by the TMVP in 2007 and [2008] when he left but that he was living in constant fear during this period. In his SHEV interview when questioned about what precipitated his departure from Sri Lanka in 2008 he appeared to confuse this event with events he otherwise claimed occurred in about 2012. When asked again why he left for [Country 1] in 2008 the applicant said that he was continually facing problems and there was a constant threat to his life and they would come to ask him to go to the office all the time for questioning and after that he would be beaten and so he got a visa to go to [Country 1]. Given the significant inconsistencies and that I do not accept the TMVP detained and mistreated him in 2007 I do not accept the applicant fled Sri Lanka in fear of his life, or that the TMVP would harm him or were continually after him, asking him to go to their offices to question him and beat him and consider these belatedly raised details, fabrications intended to strengthen his claims for protection.

13. The applicant claims that on his return from [Country 1] the TMVP continued to harass, question, detain and severely mistreated him and extorted him when he opened his [business] and that this was what precipitated his departure from Sri Lanka for Australia in 2012.
14. I accept the applicant's broad claim to have been extorted by the TMVP as he was perceived to have money after he opened his [business] and that the TMVP harassed him in an effort to force him to support them in the lead up to 2012 elections as these broader claims have been highly consistent, particularly when compared to some of his other claims, and accord with the country information before me which indicates the TMVP operated like a criminal gang in the east around this time seeking to solidify its territory and revenue sources which included seeking protection money from businesses.³
15. However on the evidence before me I have found the applicant's claim to have been personally targeted by the TMVP and because of his history with S and the claimed level of his harassment by the TMVP and their on-going interest in him exaggerated. In his 2013 visa application the applicant mentioned, for the first time, that he had been a member of a Hindu [society] and that some of their land had been taken and that after approaching the person who took the land (who was linked to the TMVP) the TMVP demanded they attend their offices. At those offices S accused the applicant of provoking the committee to recover the land and threatened him and the committee. An identical claim was made in his 2016 SHEV application. However, in his SHEV interview when the delegate asked him when this occurred he said it was between 2007 and 2011. When the delegate queried whether he could recall when, the applicant said he could not but then, in contrast to his visa applications, he said that it happened before he went to Qatar in 2008. He also provided very little detail about this claim in the SHEV interview. I am willing to accept the applicant may have been a member of a committee that had some land appropriated given its plausibility and the country information before me that indicates many land disputes and issues arose during the conflict.⁴ However, given its belated mention (particularly given the recency of the claimed event), his confusion in the SHEV interview and that I do not accept he had an ongoing dispute with S or the TMVP I do not accept any such dispute concerned the TMVP and S, that they were required go to TMVP offices, that S accused the applicant of inciting the group or that the applicant was otherwise personally targeted by anyone in connection with such as dispute. I also do not find this was a religious dispute.

³ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

⁴ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

16. In his 2013 visa application the applicant claimed that in 2012 members of Pillyan had put up posters near his [business] which attracted the adverse attention of the TMVP who accused him of supporting the opposition and eventually sent him a letter requesting him to go to their offices in connection with this but that he fled to his wife's [relative's] place instead. While there, he learnt that the TMVP had looked for him at his home several times and he fears he will be harmed because he failed to report to them. In his 2016 SHEV application he clarified that when he referred to the TMVP he meant the Karuna faction and in both visa applications he clearly indicated that the TMVP (Karuna) and Pillyan factions were rivals at that time which is confirmed in the country information before me.⁵ In his SHEV interview he said it was the TMVP who had put up posters near his [business] which had caused him problems. He did not want to be seen as supporting the militants but he did not mention any Pillyan posters. In contrast with his visa applications, in his SHEV interview, and only when the delegate expressed some reservation about the applicant's claimed harassment by the TMVP, the applicant indicated that he had gone to the TMVP offices on multiple occasions and been beaten and that sometimes his family would wait for him in the waiting room at the TMVP offices while this was happening. He said he was targeted because of S and the 2005 incident. In a post interview submission the applicant's then migration agent also said that the applicant feared harm as a Tamil who was "not aligned with one of the Tamil political parties".
17. In support of these claims the applicant provided a copy of letter from a Member of Parliament in [Town 1] stating the applicant was a strong supporter of the Tamil National Alliance, who he had worked for in the lead up to the 2010 parliamentary elections and had to leave Sri Lanka because he was targeted by opponents in connection with this. Given the inconsistencies and that the writer has not claimed to have had firsthand experience of the claimed events, while I am willing to accept the applicant may have supported the TNA at that time, I place little weight on the letter regarding the applicant's claimed harassment. A letter purportedly from the TMVP dated in 2012 was also provided however this was written in Tamil or Sinhalese and no English translation was provided. I find this surprising given he has provided translations of other documents and particularly given the apparent importance of this letter in the context of his claims.
18. In an email dated in January 2019 from the applicant's then migration agent, just prior to the SHEV interview, the Department were also advised that the TMVP had harassed the applicant's family repeatedly since he had left Sri Lanka. However given the applicant left Sri Lanka in 2012 I am surprised the claimed on-going earlier harassment of his family was not mentioned in his earlier interviews or visa applications. His then migration agent also advised the Department that the applicant's [sibling was injured] in 2016 and the applicant's wife had been most recently harassed about the applicant's whereabouts in September 2018. I find it surprising his family's claimed harassment in connection with the applicant would escalate in this fashion so many years after his departure.
19. On the evidence before me, including the conflicting accounts and that I do not accept the applicant was being pursued by S and the TVMP in connection with the 2005 incident, while I am willing to accept he may have been harassed by the TMVP in the lead up to the elections, as was not unusual for business owners in the electorate at that time, I do not accept his claims regarding the political posters or that he was otherwise harassed or threatened or asked to go to TMVP offices or that they sent him a letter demanding he report to their offices or that he failed to report to their offices or that they visited his home looking for him several times after

⁵ Austrian Centre for Country of Origin & Asylum Research and Documentation "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; Home Office UK Border Agency, "Sri Lanka: Country of Origin Information (COI) Report", 7 March 2012, CIS29709.

he left his home.⁶ I also do not accept he was detained and severely mistreated by the TMVP multiple times during this period as belatedly claimed in his SHEV interview. It follows that I do not accept he was genuinely wanted by the TMVP when he left Sri Lanka in 2012 or that they or those associated with them have harassed or otherwise harmed the applicant's family in connection with him since he has been in Australia.

20. I also note that an affidavit by the applicant's wife dated in 2013 states that the applicant has not found any work in Sri Lanka and because of harassment by paramilitary groups he is trying to secure a positive future for their family and appears to mention a past attempt to kidnap the applicant and phone messages he received from unknown people. However he has not otherwise claimed this and given his wife has not claimed to have had firsthand experience of these events I place little weight on the affidavit in this regard and do not accept these events occurred.

21. I accept the applicant left Sri Lanka illegally and will be identifiable as someone who has attempted to seek asylum in Australia.

Refugee assessment

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

Well-founded fear of persecution

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

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

24. I accept the applicant is a Tamil Hindu from [Town 1] who has had a number of unfortunate events befall him namely the more recent passing of [a family member] and historically, displacement due to the conflict, the 2004 tsunami, wrongful detention by authorities in a case

⁶ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

of mistaken identity and harassment and extortion by the TMVP and those associated with them some seven years ago, which was not unusual for businesses and in the lead up to the elections at that time, but I do not accept the applicant was otherwise targeted by S and the TMVP or detained and severely mistreated by the TMVP or that they were pursuing him in this regard when he left Sri Lanka in 2012.

25. The country information before me indicates that conditions in Sri Lanka have improved since the applicant left in 2012, particularly after the election of the Sirisena government in 2015, which has since engaged constructively with the United Nations, established the Office of Missing Persons, removed military checkpoints on major roads and returned some confiscated land in the north and east and reviewed cases of those held under the *Prevention of Terrorism Act (PTA)*, among other things.⁷ However, the current government's progress has been slow, and a number of human rights challenges remain, including continued reports of the PTA being used to arrest and detain suspects, torture and other ill-treatment in detention.⁸ While the applicant's migration agents pointed to the recent appointment of Mahinda Rajapaksa as Prime Minister in Sri Lanka and the fears this aroused within the Tamil community of a return to the conditions that existed under his presidency immediately after the conflict, he was subsequently removed as Prime Minister and nothing before me indicates he has been re-appointed or that these fears have since been realised.⁹
26. The country information before me indicates that the government's current objective is to identify Tamil activists and those working to destabilise the unitary Sri Lankan state.¹⁰ In line with this the government holds sophisticated intelligence on those who continue to be of interest, such as those with an extant court order, arrest warrant, order to impound their passport or those suspected of separatist or criminal activities or close relatives of high profile former LTTE members.¹¹ The country information before me indicates that if an individual is detained in these circumstances they may be severely mistreated.¹²
27. DFAT reports that the influence and inclusion of Tamils in the political dialogue has increased in recent years and that Tamils in the north still report of monitoring by the authorities although the Tamil community feels more empowered to question this. While Tamils report systemic discrimination in certain areas of employment, education and in accessing justice DFAT assesses that the risk of this official and societal discrimination is low. Consistent with this the UK Home Office has noted that being of Tamil ethnicity, in itself, does not warrant international protection.¹³
28. I have accepted the applicant was extorted and harassed by the TMVP in the lead up to 2012 elections, which was not uncommon for businesses in the east at that time. The applicant also claims he fears harm as a Tamil not aligned with any Tamil political party. The country information before me indicates that there were frequent reports of extrajudicial killings,

⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; Amnesty International, Amnesty International Report 2017/18 - Sri Lanka, 22 February 2018; Taylor Dibbert "Sri Lanka Failing on human rights" 31 July 2018.

⁹ Human Rights Watch, "Human Rights Watch World Report 2018", NGED867A63; Taylor Dibbert "Sri Lanka failing on human rights" 31 July 2018.

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

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

¹² Human Rights Watch, "Human Rights Watch World Report 2018", NGED867A63; Taylor Dibbert "Sri Lanka failing on human rights" 31 July 2018.

¹³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

disappearances and abductions for ransom by various groups including paramilitary until about 2011 but that these incidents have significantly decreased since the end of the conflict.¹⁴ Originally a breakaway group from the LTTE, the TMVP was subsequently disarmed and worked for the government (although there are reports this was not entirely successful and that they continued to act criminally at that time) they eventually registered as a political party and formed part of the United People's Freedom Alliance, a party coalition led by the Sri Lankan Freedom Party.¹⁵ Further, the leader was more recently arrested for the murder of a Member of Parliament, and was still incarcerated as at January 2018, and the country information before me indicates the TMVP no longer politically dominate [Town 1] (although they would like this restored).¹⁶ Recent local elections held in 2018 were described as the most peaceful in Sri Lanka's history, which was largely attributed to education and the effective enforcement of election laws by the government.¹⁷ DFAT assesses that no laws or official policies discriminate on the basis of political opinion, and that there is no systemic political discrimination against any political group.

29. The country information indicates that while the conditions in Sri Lanka have greatly improved in recent years including more peaceful and fairer elections, issues remain. In particular close relatives of high profile former Liberation Tigers of Tamil Eelam (LTTE) members or those who have engaged in separatist or criminal activities are at risk of being detained and in these circumstances they may be severely mistreated. However the applicant's profile does not meet this description and I am not satisfied the applicant faces a real chance of harm by reason of his origin, ethnicity, political opinion or past experiences in Sri Lanka.
30. DFAT reports that Hindus face a low risk of official discrimination. While I have accepted the applicant is a Hindu and was a member of a Hindu [committee] that may have historically been involved in a dispute over land, given the prevalence of land rights issues in Sri Lanka, I have not accepted this involved the TMVP or S or the applicant personally and I do not consider it was a religious dispute.¹⁸ The applicant has not otherwise specified any claims in relation to his faith and based on his profile and the country information before me I am not satisfied the applicant faces a real chance of harm by reason of his faith.
31. I accept the applicant will be a returning asylum-seeker. DFAT states that the biggest problems facing returnees are bureaucratic inefficiencies and social stigma which can affect a returnee's ability to secure employment and housing and that many have to meet the costs of their boat journey. In his arrival interview the applicant indicated his trip to Australia had been paid in full. Given his education and extensive work history there is no credible evidence before me to indicate he would not be able to work on his return. DFAT also notes of reports of returnees to the north being monitored by authorities, although it also notes that evidence of this is only anecdotal and I note the applicant is from the east and he has not said he would not return there. While there is a report before me of a Tamil returnee from Australia being detained,

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁵ Austrian Centre for Country of Origin & Asylum Research and Documentation, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; International Crisis Group, "Sri Lanka Between Elections – Asia Report No 272", 12 August 2015, CISEC96CF13069.

¹⁶ Colombo Gazette, "Pillayan's TMVP contests LG polls in bid to regain lost ground", 21 January 2018, CXBB8A1DA32838; International Crisis Group, "Sri Lanka Between Elections – Asia Report No272", 12 August 2015, CISEC96CF13069; Austrian Centre for Country of Origin & Asylum Research and Documentation, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; Wikipedia "2018 Sri Lankan Local elections" 10 February 2018.

¹⁷ Colombo Page, "Most peaceful election in history of Sri Lanka - election monitors", 10 February 2018, CXBB8A1DA22040.

¹⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

questioned and then monitored by Sri Lanka authorities it also indicates he was a former LTTE member.¹⁹

32. While a 2018 article referred to in the applicant's post interview submission asserts that a Tamil recently forcibly removed from Australia had been detained, questioned and monitored since returning to Sri Lanka it also reports he was a former LTTE member. As a Tamil asylum seeker returning to the east the applicant may face some initial reintegration issues but I am not satisfied this amounts to serious harm.
33. I accept the applicant left Sri Lanka illegally. The country information before me²⁰ indicates that following arrival at the airport, returnees will be processed in a group by a number of government agencies and this process can take several hours. If returning on a temporary travel document, police will undertake further investigations in particular to ensure an individual does not have a criminal or terrorist background or an outstanding court order or arrest warrant. Overall, DFAT understands returnees are not mistreated during processing at the airport. Those who departed illegally by boat may be found to have committed an offence under the *Immigrants and Emigrants Act 1949* (I&E Act). If arrested they will be photographed, fingerprinted, a statement will be taken they will be transported to the closest magistrate's court where the next steps will be determined. If a magistrate is not available, for example on a weekend or public holiday, they may be held for up to two days in an airport holding cell. They must also appear in court when their case is being heard or they are summonsed as a witness in a case. The offence will be heard in, and they must attend, the court closest to the occurrence of the offence which involves legal and transportation costs. Cases are only heard when all members of a people smuggling venture have been located, which can result in long delays. Penalties can technically include imprisonment however no mere passenger has been given a custodial sentence and the fines are relatively low (starting at 3,000 rupees) and able to be paid in instalments. A fine will generally be issued and the person will be free to go immediately, if they plead guilty. If not pleading guilty they will likely be granted bail on the basis of personal surety or guarantee by a family member and so will have to wait for a family member to pick them up. DFAT also notes that the cumulative costs for returnees associated with the court process can be high.
34. There is no credible evidence before me that suggests the applicant has a criminal or terrorist background or outstanding court orders or arrest warrants or is otherwise wanted by the authorities. He has not said he was anything other than a passenger on the people smuggling boat that took him to Australia. Based on the country information above I accept the applicant may be detained at the airport for processing and may be briefly (up to two days) held in a holding cell if a Magistrate is not available, as part of the usual procedures for those who left illegally but I am not satisfied there is a real chance he would be otherwise detained. If the applicant pleads guilty, he has not indicated he would do otherwise, after being issued with a fine he will be free to leave immediately. Given his family support in Sri Lanka, his ability to work and option to pay the fine in instalments I am not satisfied that he would not be able to pay the fine or that there is a real chance this would threaten his capacity to subsist. If he does not plead guilty he would likely be granted bail on certain condition, such as personal surety or guarantee by a family member and would be released once his wife, [parent] or a sibling picked him up, and the evidence before me does not indicate one of these family members would be unable to unwilling to do this if required. While he may have to meet costs associated with the court process given his family support and ability to work I am not satisfied

¹⁹ The Guardian "Tamil asylum seeker deported by Australia 'harassed by Sri Lankan security forces'", 1 March 2018.

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

there is a real chance this would threaten his capacity to subsist or would otherwise amount to serious harm.

35. I accept the applicant, as a consequence of his illegal departure, may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this, but I do not accept these experiences would amount to 'serious harm'. Furthermore, I am not satisfied that the relevant laws and procedures dealing with those who depart Sri Lanka illegally are discriminatory, or intended to apply or are applied or enforced in a discriminatory manner.
36. I am not satisfied the applicant faces a real chance of persecution because of his illegal departure.
37. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

38. 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

39. 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

40. 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.
41. For the reasons already discussed, I accept the applicant may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this. However, I am not satisfied that these circumstances amount to 'significant harm' as defined for the purposes of s.36(2A). There is not a real risk the applicant would be arbitrarily deprived of his life or subject to the death penalty on his return or be subject to torture. Furthermore, the evidence before me does not support a conclusion that there is an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman in nature or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of significant harm as a consequence of his illegal departure.

42. I accept that the applicant may face some initial reintegration issues. I am not satisfied that these circumstances, even when coupled with what he may experience for having departed Sri Lanka illegally, would amount to 'significant harm'. The harm does not include arbitrary deprivation of life, the death penalty, or torture; nor am I satisfied he will be subject to cruel, inhuman or degrading treatment or punishment, as defined. I am not satisfied the applicant faces a real risk of significant harm as a returning asylum seeker.
43. In considering the applicant's refugee status, I have otherwise concluded that there was no 'real chance' the applicant would suffer harm on his return to Sri Lanka for the other reasons claimed. 'Real chance' and 'real risk' involve the same standard.²¹ For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

Complementary protection: conclusion

44. 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.

²¹ *MIAC v SZQRB* [2013] 210 FCR 505.

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.