



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06435

SRI LANKA
IAA reference: IAA19/06436

Date and time of decision: 11 April 2019 15:06:00
N Becke, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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 female applicant ('the applicant') and her son ('the applicant son') claim to be citizens of Sri Lanka. On 8 July 2016 the applicants lodged a combined application for Safe Haven Enterprise Visas (SHEVs). On 28 February 2019 a delegate of the Minister for Immigration (the delegate) refused to grant these visas.

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 25 March 2019 the IAA received a submission from the applicant ('the IAA submission'). The IAA submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate, which I have noted.
4. The IAA submission advances the following new information:
 - Very recently the applicant's mother told her that her uncle, who returned from [Country 1] to Sri Lanka, had been taken into the custody of the Sri Lankan Army (SLA) because of his previous Liberation Tigers of Tamil Eelam (LTTE) involvement.
 - The applicant's grandmother made enquiries about the applicant's uncle with a paramilitary, who then began to harass and extort money from her because of the family's LTTE connections.
 - The paramilitary has now abducted the applicant's cousin and she is still missing.
 - The Sri Lankan authorities are aware of the family's LTTE past and have questioned applicant's grandmother many times about this. The authorities are also aware that the applicant was raped by the SLA and have threatened to destroy her life and arrest her and her mother should they return to Sri Lanka.
 - The applicant's grandmother became ill so was uncontactable for some time, and the paramilitary also locked her inside her house.
5. The applicant claims her mother and grandmother gave her this new information after the SHEV interview on 12 February 2019 (at which she was represented), and had she been aware of it at the time, she would have advised the department accordingly. Furthermore, the IAA should consider the new information because it is credible, and if the delegate had known it, she would have made a favourable decision. However the applicant has not specified when her uncle's return to Sri Lanka, or subsequent events, took place. Apart from a brief reference in the IAA submission to the paramilitary locking her grandmother inside her house at an unspecified point in time, the applicant has not given a reason as to why her family did not advise her of the new information prior to the SHEV interview.
6. On 22 February 2019 the applicant's then representative sent the delegate a lengthy written submission ('the post SHEV interview submission'). None of these matters were mentioned. While not outside the realms of possibility, I find it difficult to accept that these events could have taken place in the week between the post SHEV interview submission and the delegate's decision. Given that one of the applicant's central claims is that her family were

involved with the LTTE, and that the Sri Lankan authorities and Karuna Group paramilitary targeted her mother for ten years, I also find it difficult to accept that she was unaware that the authorities have questioned her grandmother many times and threatened to arrest the applicant upon return. The applicant has not provided any corroborating material or substantive detail to support her claims in this regard and I have significant doubts regarding the veracity and timing of the new information. The applicant has not satisfied me that the new information is credible. Given the circumstances overall, I am not satisfied exceptional circumstances exist to justify consideration of the new information contained in the IAA submission.

7. The IAA submission also refers to several sources of country information which were not before the delegate and which pre-date the delegate's decision. These sources detail several specific incidents in which the Sri Lankan authorities have threatened and raped Tamil women, and also the current situation for Tamils in post-civil war Sri Lanka more generally.
8. The IAA submission does not explain, and it is not otherwise apparent, why these sources could not have been provided before the delegate's decision; nor does it explain how, as general country information, they constitute personal information in the relevant sense, and I am not satisfied they do. Overall, I am not satisfied exceptional circumstances exist to justify consideration of the new country information or that the matters in s.473DD(b) are met.

Applicants' claims for protection

9. The applicant's claims can be summarised as follows:
 - In [year] the applicant was born in [City 1], Northern Province. Six months earlier her father, uncles and other family members were killed during conflict between the SLA and the LTTE.
 - The applicant's parents were both LTTE members. Following the death of the applicant's father, her mother, who was pregnant with the applicant, left the LTTE. The LTTE expected her to return to the organisation, and when she did not they harassed her.
 - The SLA and the Karuna Group paramilitary seriously mistreated the applicant's mother on account of her and her husband's LTTE links. The applicant's mother still experiences health problems as a result of the mistreatment.
 - In 2005 or 2006 the applicant's mother travelled to [Country 1] to get away from the SLA and Karuna Group. The applicant remained in Sri Lanka and lived for some time in [accommodation] and also with her grandmother and aunt in [City 1].
 - The applicant witnessed a lot of violence during the Sri Lankan civil war. In approximately 2007 SLA soldiers assaulted and raped her, and raped and killed one of her friends. The applicant continues to experience psychological trauma and headaches as a result.
 - In 2010 the applicant and her grandmother travelled to [Country 1] legally by plane. The applicant registered with the United Nations High Commissioner for Refugees [(UNHCR)].
 - In 2011 the applicant married her now ex-husband in [Country 1].

- The applicant's mother was followed by a Sri Lankan man in [Country 1] who accused the applicant's father of being with the LTTE and threatened to kill her and the applicant.
- In 2012 a man questioned the applicant's ex-husband about the applicant's mother and knocked the applicant over. The applicant and her ex-husband relocated to a different part of [Country 1].
- When the applicants were out in public an unknown man identified her as her mother's daughter and threatened her.
- In August 2013 the applicant, her ex-husband and the infant applicant son arrived in Australia.
- In 2015 the applicant and her ex-husband separated after he subjected her to domestic violence.
- In 2017 the applicant married her current husband, a Sri Lankan national, who has been recognised as a refugee in Australia.
- The applicant fears the Sri Lankan authorities, and associated paramilitaries, will detain, interrogate, torture, rape or kill her because she is a young Tamil woman from the north, who would be vulnerable without a male guardian or other family to protect her and the applicant son; she and her family have LTTE links; she has spent a significant period of time outside of Sri Lanka and has sought asylum in [Country 1] and Australia; her husband has been found to be a refugee in Australia and is of interest to the Sri Lankan authorities.
- The applicant also fears mistreatment from her in-laws and discrimination from Sri Lankan society due to her status as a divorcee.
- Her health issues also puts her at increased risk of harm should she return to Sri Lanka.
- The applicant son has not raised any protection claims of his own.

Refugee assessment

10. 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

11. 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.
12. The applicants have been consistent in stating their identities since their arrival in Australia. In support, the applicant has provided her original Sri Lankan birth certificate, with an English translation and a copy of her Sri Lankan passport. The applicant son has also provided his original [Country 1] birth certificate, which lists the applicant as his mother. On the basis of the information before me I am satisfied the identities of the applicants are as claimed and that Sri Lanka is the receiving country for the purposes of this assessment.
 13. For the reasons set out below, I accept in 2007 the applicant was raped by SLA soldiers and that she witnessed other acts of violence in Sri Lanka. I also accept the applicant was the victim of domestic violence perpetrated by her ex-husband after their arrival in Australia and that for these reasons, she has psychological vulnerabilities. I have also had regard to a report from the applicant's counsellor at [an organisation], dated 17 February 2019. The report states that the applicant has attended approximately 40 sessions since January 2016, where she presented with symptoms consistent with Post Traumatic Stress Disorder (PTSD). During the course of the SHEV interview the applicant was at times emotional and I have had regard to these matters in the following assessment. Nonetheless, I found the evidence the applicant gave at her SHEV interview regarding the Sri Lankan authorities' claimed interest in her and her family, to be far-fetched and lacking credibility.
 14. The applicant was born in [City 1], Northern Province, which although primarily under the control of the Sri Lankan military authorities, was an LTTE active area during the civil war (1983-2009). Historically many Tamils, particularly in the north and east of Sri Lanka, reported being monitored, harassed, arrested and detained by security forces under the former Rajapaksa government.¹
 15. Country information before the delegate indicates that during the civil war the LTTE maintained control over significant portions of the Northern Province, and that the majority of Tamil civilians in these areas had some degree of contact with the LTTE in their daily lives. This included undergoing self-defence and combat training with the LTTE, or providing the organisation with material support.
 16. The post SHEV interview submission describes the applicant's mother as a "well known member" of the LTTE's intelligence wing, and her father as an LTTE cadre. Although the applicant did not reveal her mother's LTTE membership until the end of her SHEV interview, and her father's LTTE membership was first mentioned in the post SHEV interview submission, I accept the reasons given in that submission for the late disclosure, and have not drawn an adverse inference. However, applicant has not elaborated further regarding her parents' specific roles or ranks within the LTTE organisation and, apart from asserting her mother was well known, she has not provided any other evidence to support this or to indicate her parents were prominent in any way. On the evidence I am not satisfied that the applicant's parents were anything other than ordinary LTTE members. While I accept that

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

unspecified members of the applicant's extended family also had unspecified LTTE affiliations, I am not satisfied that these were anything other than low level. It is plausible, and I accept, that the LTTE harassed the applicant's mother for not returning to the organisation after she had given birth to the applicant.

17. The applicant has also claimed that after her mother left the LTTE the Sri Lankan authorities and the Karuna Group targeted her mother because of her and her husband's LTTE involvement and that she spent approximately ten years hiding in various parts of the country. Then in 2005/2006 the SLA and Karuna Group detained the applicant's mother and subjected her to serious physical mistreatment. Following this the applicant's mother applied for a passport and departed Sri Lanka for [Country 1], where she remains.
18. The applicant's evidence at SHEV interview regarding these events was vague and confused and I have significant concerns with these claims. The applicant's former representative has argued that she cannot be expected to be familiar with the details of her parents' LTTE involvement, and her mother's life in hiding prior to her departure for [Country 1], because of her extended period of separation from her mother as a child, and her mother's desire to protect her. I do not accept this explanation. While her knowledge as a child may have been limited, the applicant is currently in regular contact with her mother, and these matters form the basis of her claim for protection. I do not accept that she would have sought such information.
19. The applicant has claimed her mother paid bribes to agents in order to depart Sri Lanka in 2005/2006, although she has not claimed that her mother departed under a different identity or used a fraudulent travel document. I accept that some LTTE affiliates would have been able to successfully depart the country during the civil war through the payment of bribes. However, the applicant has claimed that the authorities and the Karuna Group had been consistently targeting her mother for the ten years prior to her departure, and that she was in hiding from them. In these circumstances I do not consider it credible that her mother could have applied for a passport and departed Sri Lanka without incident simply through the unspecified payment of bribes.
20. I accept that as a child the applicant [attended a school] in [City 1], and after her mother's departure for [Country 1], at the homes of her grandmother and aunt. I accept that in approximately 2007 SLA soldiers raped and assaulted the applicant and raped and killed one of her friends in front of her. I accept the applicant's evidence that she witnessed a lot of violence during the final years of the civil war and that she and her grandmother were often afraid to leave their home because of the presence of the SLA soldiers nearby, who regularly entered their house for security checks and harassed the applicant.
21. Country information before the delegate indicates that the Sri Lankan authorities closely monitored the northern Tamil population through the mandatory registration of each Tamil household and its inhabitants, restriction of the free movement of Tamils between villages and districts, and a nightly curfew.² They also regularly interrogated Tamil civilians regarding matters such as their family composition and any LTTE involvement. Female Tamil civilians without male protection were particularly vulnerable to sexual violence perpetrated by the authorities in the north and east. The applicant has not directly claimed that the SLA raped her because of her parents' LTTE involvement and on the evidence I am satisfied it was an opportunistic attack because of the applicant's profile at that time as a Tamil girl without male protection.

² Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

22. I also accept that shortly after the SLA raped the applicant, the LTTE forced her to undergo one month of training. The applicant explained to the delegate that she was one of many Tamil teenagers recruited at this time and that after one month her mother was able to pay money to have her released. The applicant has not claimed that the LTTE approached her again in the three years before she departed for [Country 1]. The applicant's evidence in this regard is consistent with the country information before the delegate regarding the LTTE's policy of forcibly recruiting Tamil children as required. I am satisfied that the applicant had a very short period of low level involvement with the LTTE.
23. The applicant claimed that in 2009 she and her grandmother travelled to [a city], and then to [Colombo], so that they could apply for passports. Country information before the delegate indicates that security arrangements on exit points out of the northern districts remained tight during the final years of the civil war, with checkpoints also set up around the capital, Colombo.³ The applicant claimed that in order to evade the authorities her mother paid an agent to obtain a permit for the applicant to travel from [City 1] to Colombo, and also that the applicant cut her hair short in order to change her appearance; however, she also advised the delegate that she provided her birth certificate and a letter from her village headman attesting to her identity, and personally signed the passport application form. The applicant then returned to [City 1] where she resided for a further [number] months until 2010 when she and her grandmother again travelled to Colombo from where they departed legally for [Country 1]. I do not accept the applicant used an agent or cut her hair for the reasons claimed and I am satisfied that the applicant did not pay a bribe to evade detection, but rather used an agent to facilitate administrative processing. I am not satisfied that she could have passed through various checkpoints, obtained a passport and departed Sri Lanka without incident if she was a person of interest to the authorities.
24. I accept that while the applicant was in [Country 1] she attended an interview with the UNHCR and was given an identity card, which was later confiscated by the [relevant] authorities on her way to Australia. In her SHEV application the applicant stated both that the UNHCR found her to be a refugee, and also that the outcome of that process was still pending. Her evidence at SHEV interview regarding this matter was also unclear. The applicant has claimed that her mother continues to reside in [Country 1] as a UNHCR registered person, however there is no other evidence before me that the applicant or her mother have been found to be owed protection through the UNHCR process and I do not accept that to be the case.
25. The applicant has also claimed that the SLA, LTTE and Karuna Group have a presence in [Country 1]. After the applicant's arrival there her mother was followed by a man who accused the applicant's father of being with the LTTE, and threatened to kill the applicant, her mother and the rest of the family. On another occasion, a man approached the applicant and her ex-husband, and after ascertaining the name of the applicant's mother, pushed the applicant over. Several months later a man again approached the applicant and the newborn applicant son, and after ascertaining the name of the applicant's mother, threatened to kill the applicant. The applicant has claimed that as a result of these incidents her mother made arrangements for the applicant, the applicant's ex-husband and the applicant son to leave [Country 1] for Australia.
26. I have significant concerns with the veracity of these claims. I consider it farfetched that the applicant's mother, who arrived in [Country 1] three years before the applicant, was not threatened until the applicant joined her. There is also no evidence before me that the

³ Ibid.

applicant's mother has been approached again since the last claimed incident in 2012 and I note she continues to live and work in [Country 1]. I do not consider it credible that if Sri Lankan government, aligned paramilitaries, or LTTE operatives in [Country 1] had an adverse interest in the applicant's mother then their threats would end with the applicant's departure from [Country 1]. Furthermore I have found the LTTE involvement of the applicant and her family was low level and I am not satisfied that the applicant or her mother were of interest to the Sri Lankan authorities, or any affiliated paramilitary group, or the LTTE at the time of their respective departures from Sri Lanka. Overall I do not accept that the applicant or her mother were ever threatened or assaulted by unknown persons while she was living in [Country 1].

27. The post SHEV interview submission, prepared by the applicant's former representative, also asserts that the individuals who targeted her in the past may try and harm her again to deter her from reporting their actions. The applicant has not otherwise claimed that she intends report any person or group and on the evidence I am not satisfied she would do so.
28. The post SHEV interview written submission also states that the applicant's health places her at an increased risk of harm should she return to Sri Lanka, but does not provide further detail. I accept that the applicant's claim she experiences headaches as a result of the head injuries she sustained when the SLA raped and assaulted her in 2007, but there is no evidence before me that she has sought medical treatment, or would face harm in Sri Lanka, on account of this.
29. In relation to the applicant's mental health the [report] notes although she has reported difficulties with her memory and concentration, and has some symptoms of depression, she has not expressed any current suicidal ideation, has good insight into her current challenges, and engages well with the process of counselling. The report also notes that the applicant's "help seeking behaviour" would significantly reduce if she were returned to Sri Lanka, where those with mental illness can face stigmatisation. The applicant has attended numerous sessions with a counsellor but has not been referred to a psychiatrist, or other medical professional, and is not on medication.
30. The Department of Foreign Affairs and Trade (DFAT) also indicates that mental health services in Sri Lanka are scarce and that societal reluctance to discuss mental health issues can act as a barrier against people seeking proper treatment.⁴ While I accept the applicant may not seek out mental health assistance to the same degree as she has in Australia, there is no evidence before me that this would lead to serious harm, or that it would involve systematic or discriminatory conduct. On the evidence I am satisfied the applicant does not face a real chance of persecution on account of her mental health condition.
31. The 2012 UNHCR Guidelines, issued two years after the applicant's departure from Sri Lanka, identified persons with certain links to the LTTE, and their family members, as potentially in need of protection at that time although it did not specify individuals of Tamil race as requiring protection, for that reason alone. Furthermore, in the UNHCR's opinion, individuals originating from an area where the LTTE had been active, such as the applicant, did not require protection solely on that basis unless there were additional, relevant factors which may have given rise to a profile of risk.⁵

⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

⁵ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

32. For the reasons discussed above, I consider the applicant's parents were ordinary LTTE members, that her own LTTE involvement was low level and that neither her own connections nor that of her family members raised any interest of the Sri Lankan authorities at the time of her departure from Sri Lanka. The more recent country information also indicates that there have been significant improvements in the security situation in Sri Lanka, particularly in relation to the Tamil population. DFAT currently assesses that high-profile individuals with links to the LTTE would continue to be of interest to the Sri Lankan authorities (the vast majority having already come to the attention of the authorities).⁶ Aside from the LTTE leadership, former members who had committed terrorist or serious criminal acts during the conflict, or who provided weapons or explosives to the LTTE, may be considered high-profile.⁷ DFAT also assesses that former low-profile LTTE members (such as combatants and persons employed in administrative roles) who have since come to the attention of the Sri Lankan authorities would still be detained and may be sent to the remaining rehabilitation centre.⁸ The applicant was never an LTTE member and spent only one month in their custody as a child. I do not consider that she would be regarded as a 'low level' member of the LTTE. I am not satisfied that the applicant holds such a profile or would be imputed with such a profile or political opinion, even when considered against her parent's links to the LTTE.
33. The post SHEV interview submission states that the applicant's husband has been found to be a refugee in Australia and is a person of adverse interest to the Sri Lankan authorities, who have accused him of LTTE links and continue to harass his family to obtain information on his whereabouts. The submission claims that as a result the Sri Lankan authorities would target the applicant, because of her husband's profile, if she were to return. The applicant did not speak of her fears in this regard during her SHEV interview, nor has she provided any further information to support her claim. While I am prepared to accept that the applicant's husband has been granted a protection visa in Australia, on the evidence before me I am not satisfied that the Sri Lankan authorities are currently targeting his family, or would target the applicant for this reason, if she were to return.
34. Seven years have now passed since the publication of the UNHCR Guidelines and the country information before me indicates the situation for Tamils in Sri Lanka has continued to improve markedly. The monitoring and harassment of Tamils in the north and east of the country, while still occurring, has reduced significantly and some members of the Tamil community reported they felt more empowered to question monitoring activities.⁹ There are no restrictions on freedom of movement throughout the entire country, and significant military checkpoints in the north have been dismantled, with troops now largely confined to barracks, reducing their impact on civilian life.¹⁰ The country information before the delegate does not indicate that former pro-government paramilitaries, such as the Karuna Group, are still operational. Given my findings about the profile of the applicant and her family, and having regard to the country information before me, I conclude that she is not a person who faces a real chance of harm by virtue of any actual or imputed LTTE connections.
35. Furthermore, in 2017 the UK Home Office noted that being of Tamil ethnicity does not in itself warrant international protection.¹¹ I have also considered recent country information from DFAT and the United States Department of State which indicates that Tamils are not

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ UK Home Office, "Sri Lanka: Tamil separatism Version 5.0", June 2017, OG6E7028826

being systematically targeted and subjected to serious harm because of their race, or based on their prior place of residence.¹² Overall, the country information before me does not support that being a Tamil from the north of Sri Lanka in itself gives rise to a real chance of harm.

36. The applicant has also claimed that as a young Tamil woman without a male guardian she will face serious harm in Sri Lanka. Information before the delegate indicates that there are large numbers of female-headed households in the north and the east that are headed by women who were widowed during the conflict. DFAT reports that women in these situations face many challenges, including lack of physical security for their family, and a lack of permanent housing and economic opportunities. DFAT assesses that women throughout all of Sri Lanka face a moderate risk of societal discrimination, including violence, and there are a few support mechanisms available to women in these circumstances.¹³
37. At the outset of the SHEV interview the applicant stated her husband's parents are happy about their marriage and accept she has a son from her previous marriage. While the applicant has not met her husband's parents in person she told the delegate she speaks to them on the phone once in a while, as recently as the month before the SHEV interview, and that her husband speaks to them daily. However, when the delegate questioned the applicant about her familial support in Sri Lanka, in the context of her possible return there, she appeared to change her evidence and said if she had to live with her in-laws they may mistreat her because she had already been married and had a child before she married their son.
38. The post-SHEV interview written submission claims that after the SHEV interview the applicant checked with her husband whether his family would accept her should she return to Sri Lanka, and he told her that while he has instructed them they must be polite to her, they would not allow her and the applicant son to live with them as it would result in them being harassed and ridiculed by the wider Tamil community, due to her previous marriage. While the [report] also notes the applicant fears her in-laws would not support her if she returned to Sri Lanka, I note that the report was written after the applicant's SHEV interview, during which the issue of the applicant's potential return to Sri Lanka was raised. I do not consider it credible that the applicant would have been unaware of her in-laws' position prior to the SHEV interview and I consider her evidence in this regard is undermined by her previous response to the contrary.
39. The delegate concluded that the applicant would have the support of her husband and his parents should she return to Sri Lanka, and I note that the applicant has not disputed this in her submission to the IAA. On the evidence, I am satisfied that should the applicants return to Sri Lanka they could live with her husband's parents. Furthermore the applicant's grandmother continues to reside in her own home in [City 1] and a close friend, with whom the applicant has regular contact, also resides there. Despite her written claim to the contrary, the applicant's evidence at SHEV interview clearly indicated that there are other members of her extended family living in Sri Lanka and I am satisfied the applicants would not be alone, or unable to subsist, should they return.
40. Given the country information, I consider it plausible that the applicant may face some societal discrimination, such as harassment, upon return to Sri Lanka as a young Tamil

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; US Department of State, "Country Reports on Human Rights Practices for 2017 – Sri Lanka", 20 April 2018, OGD95BE927333

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

woman who has been divorced once before. Given the applicant was raped and assaulted by the Sri Lankan authorities as a child, I also appreciate she is genuinely concerned that this will occur again if she returns. However the applicant's rape took place more than ten years ago, during the height of the civil conflict, and she resided in Sri Lanka for a further three years after this without incident. Despite the challenges faced by Sri Lankan women generally, and despite the sexual assault the applicant experienced at the hands of the SLA, I consider her personal circumstances mitigate against the risk that she would experience a real chance of serious harm as a young Tamil woman from the north, who has been divorced once before, upon return to Sri Lanka.

41. For reasons already stated, I am not satisfied that the applicant faces a real chance of harm because of her Tamil race alone, her family's previous LTTE links or her husband's status in Australia. For the same reasons, I am also not satisfied the applicant son, through his relationship with the applicant, would face a real chance of harm in connection with these matters.

Returning Asylum Seekers

42. I accept that, on their return to Sri Lanka, the applicants may be considered by the authorities to be returning asylum seekers. The applicant departed Sri Lanka legally, using a genuine passport issued in her own name, and the applicant son was born in [Country 1]; however I accept they may be returned involuntarily to Sri Lanka.
43. As the delegate noted, upon arrival in Sri Lanka, involuntary returnees, including those on charter flights from Australia, are processed by different agencies that check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are also processed en masse, and individuals cannot exit the airport until all returnees have been processed, which may take several hours due to administrative processes and staffing constraints at the airport.¹⁴
44. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person's identity, to address 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, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records. The applicant has not claimed to have ever been charged with an offence in Sri Lanka and I am not satisfied she would face a real chance of harm during this process.
45. There is no credible evidence before me that the applicants are of interest to the Sri Lankan authorities. The routine processing the applicant underwent at the airport in Colombo before departing for [Country 1] in 2010, indicates she was not a person of interest to the Sri Lankan authorities at that time. There is no credible evidence before me to suggest she would now be imputed with LTTE involvement, or with an anti-Sri Lankan government political opinion, including because she departed Sri Lanka prior to the end of the civil war and has spent a significant period of time outside the country seeking asylum in [Country 1] and Australia, as she has claimed. Returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and I am not satisfied that the applicant would face greater

¹⁴ Ibid.

questioning than other returnees.¹⁵ I am not satisfied that returning Tamil asylum seekers such as the applicants, face a real chance of serious harm.

Refugee: conclusion

46. The applicants meet do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

47. Under s.36(2)(aa) of the Act, 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

48. 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.
49. I accept that the SLA raped and assaulted the applicant when she was a child and that her husband has been recognised as a refugee in Australia. I accept that the applicant's parents were ordinary LTTE members and that some members of her extended family had LTTE affiliations. I also accept that the applicant was forced to undergo one month of training with the LTTE as a child. However I have not accepted that the applicant would face a real chance of harm in relation to these reasons upon return. For the same reasons I also find there is not a real risk she will suffer significant harm.
50. I am satisfied the applicant departed Sri Lanka legally and the applicant son was born overseas. Nonetheless I accept they may be identified as returning asylum seekers and be subject to processing at the airport on return. DFAT has reported that returnees are not subject to mistreatment during such processing and I am not satisfied this processing would amount to significant harm as defined.¹⁶ I am not satisfied they face a real risk of significant harm as returning asylum seekers.
51. I accept that as a young Tamil woman from the north, who has been divorced once before, the applicant may face some societal discrimination in Sri Lanka. However, I am not satisfied the applicant will be arbitrarily deprived of her life, have the death penalty carried out on her, or be subjected to torture on this basis. I am also not satisfied that any harassment would

¹⁵ Ibid.

¹⁶ Ibid.

amount to torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, as defined in as defined in s.36(2A) and s.5(1) of the Act, because it would not, through any act or omission, intentionally inflict severe pain or sufferings, pain or suffering that could that could reasonably be regarded as considered cruel or inhuman in nature, or cause extreme humiliation as to be regarded as cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant is at real risk of significant harm on this basis.

52. I accept the applicant has mental health issues arising from her previous experiences in Sri Lanka, including her rape and assault at the hands of the Sri Lanka authorities, and that there are limited specialist mental health facilities in Sri Lanka. However, I am not satisfied the applicant will be arbitrarily deprived of her life, have the death penalty carried out on her, or be subjected to torture on this basis. I am also not satisfied she would be precluded from accessing similar services to those she has utilised in Australia, such that it would amount to torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, as defined in as defined in s.36(2A) and s.5(1) of the Act, because it would not, through any act or omission, intentionally inflict severe pain or sufferings, pain or suffering that could that could reasonably be regarded as considered cruel or inhuman in nature, or cause extreme humiliation as to be regarded as cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant is at real risk of significant harm on this basis.

Complementary protection: conclusion

53. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

Member of same family unit

54. Under s.36(2)(b)(i) or s.36(2)(c)(i) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person mentioned in s.36(2)(a) or (aa) who holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a spouse of the family head or a dependent child of the family head.
55. As noted above, the applicant has claimed her husband has been granted an unspecified class of protection visa in Australia. Section 91WB of the Act prohibits the grant of a protection visa to a family member of a protection visa holder holding the same class of visa which has been applied for, unless the application was made prior to the grant of that protection visa. There is no suggestion that the applicant lodged her SHEV application before her husband was granted his protection visa.
56. As neither of the applicants meet the definition of refugee or the complementary protection criterion, it follows that the other applicants do not meet the family unit criteria in either s.36(2)(b)(i) or s.36(2)(c)(i).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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.