



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06794

Date and time of decision: 24 July 2019 09:57:00
J Jennings, 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 referred applicant (the applicant) claims to be a Tamil and Hindu from the Eastern Province, Sri Lanka. The applicant left Sri Lanka in October 2012 and travelled by boat to Australia.
2. The applicant was invited to apply for a protection visa, initially on 10 December 2015. In a letter addressed to the applicant from the department dated 16 February 2017 it was noted he had contacted the department and indicated he was experiencing delays in applying and he was given a further 30 days to lodge an application.
3. On 13 March 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790.¹ He claims he has been imputed with a Liberation Tigers of Tamil Eelam (LTTE) profile and fears he will be harmed as a result and that he has been outcast by his family and community because of his relationship with a Christian girl.
4. On 30 May 2019 the applicant was invited to attend an interview, scheduled for 25 June 2019, to discuss his visa application and claims. This letter was sent by post to the address given by the applicant in the Form 929, Change of Details, dated 5 July 2017 which the applicant had previously sent to the department. The interview invitation letter was returned to the department. The interview invitation letter was then sent to the applicant by email on 12 June 2019 to the email address he provided in the Form 929. The information before me also advises that the department attempted to telephone the applicant on two occasions prior to the interview and left voicemail messages. The applicant did not attend the scheduled interview and did not make any contact with the department about the interview.
5. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 27 June 2019. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka. Notification of the department's decision was sent to the applicant by post on 27 June 2019 to his residential address.
6. On 2 July 2019 the IAA sent an acknowledgement of referral letter to the applicant by post to his residential address; this letter has since been returned to the IAA unclaimed. A copy of this letter was also sent to the applicant by email on 17 July 2019. This letter advised the applicant the IAA would proceed to make a decision on his case on the basis of the referred materials and advised the applicant of the circumstances in which he could provide new information or make a submission to the IAA.

Information before the IAA

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

¹ Further undated Form 790 with accompanying documents was received by the department on 19 April 2017 – some details such as employment history not completed in the earlier forms were completed in this second, unsigned version

9. I note the applicant did not attend the protection visa interview scheduled in June 2019. The posted invitation letter was returned to the department indicating he did not receive this but I am satisfied that the applicant was on notice as to his responsibility to inform the department of any change to his contact details. The department sent the applicant a letter dated 21 March 2017 acknowledging receipt of his application and advising him of his responsibility to tell the department of any change in his circumstances, including his contact details. Furthermore I note the department made alternative contact with the applicant to notify him of the interview using his email address and also attempted to contact him by telephone but that the applicant did not respond to the email or telephone messages.
10. The cover letter dated 3 July 2017 received with the SHEV application advised that the applicant had tried to access legal assistance to complete his application but that he could not afford to pay for legal assistance and that he lodged the application without such assistance as he had been informed he may lose his SRSS payments if he delayed further. He stated he had been assisted by RACS but that due to their limited resources this assistance was minimal. He stated that he may not be able to provide further information if requested to do so in writing but that he may be able to provide answers to any questions orally through an interpreter at interview. The applicant's statement of claims cautions that it is not an exhaustive statement but that he "will provide further information in relation to [his] claims during any interview".
11. I accept that the applicant obtained only limited assistance when completing his SHEV application. Although it is stated his statement of claims is only a summary of his claims for protection I note it covers in some detail his experiences in Sri Lanka and includes information about extended family members and friends in addition to describing the circumstances of his employer's arrest and how this relates to his protection claims and the circumstances surrounding his Christian girlfriend and also goes on to discuss the policies of the Sirisena government in Sri Lanka and his fears should he return to Sri Lanka as a failed asylum seeker.
12. The applicant's statements in the cover letter dated 3 July 2017 and the preface to his statement of claims indicate that he was aware that he would be given an opportunity to attend an interview to discuss his claims. I am satisfied the applicant was given the opportunity to put forward his protection claims and that he was invited to discuss these further at interview. I will proceed to assess his protection claims on the information before me.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil from the Batticaloa District, Eastern Province, Sri Lanka.
 - The applicant's parents and some of his siblings were killed in the tsunami in 2004 and after this he lived with his aunt. The applicant has [surviving] [siblings] living in Sri Lanka.
 - The applicant is a Hindu. The applicant met and fell in love with a Christian girl around 2005 and they continue to be in a long distance relationship. He advised his family of the relationship in 2016. His aunt does not approve of this relationship and has not kept in contact with him. If he returns to Sri Lanka he will be outcast by his community and will have little support.

- One of the applicant's uncles was a member of the LTTE for 11 years and he died in 2009.
- The applicant was working as a [occupation] in a [workplace] in 2009 when his employer was kidnapped [in] July 2009 by an armed group. The applicant believes his employer had assisted the LTTE by providing services through his [workplace]. The applicant's employer was taken to Colombo and detained for approximately one and a half years, he was charged with the offence being in possession of an illegal gun and for being involved with the LTTE. He was later transferred to Batticaloa gaol and was still in detention there at the time the applicant left Sri Lanka in 2012.
- In 2010 men came to the applicant's home and asked about him, he thinks these men were connected with his employer's kidnapping and he remained in hiding from them while his aunt told them he wasn't home and she didn't know where he was. He is aware that the family of another boy who had been working at the same [workplace] paid an amount of money to some men who had been asking about their son.
- After being threatened by the men the applicant decided to move to another area with his cousin; the area he moved to in [Town] was a Sinhalese dominated area and he thought there was less chance of him being harmed in this area.
- He later heard that a friend and a cousin had been killed in two separate incidents; he believes his cousin was killed by the Karuna group because he had been an LTTE sympathiser however he is not aware who killed his friend.
- His aunt advised him that the men had continued to come to the house to ask about him and threaten harm to him; they also asked the neighbours if the applicant had been seen. This occurred in 2011 and 2012.
- The applicant left Sri Lanka illegally in 2012.
- The applicant does not know who killed his friend and cousin or who kidnapped his employer, or who threatened him, it could have been Sri Lankan army, Criminal Investigation Department (CID), or the Karuna group. The applicant fears he would face the same harm should he return to Sri Lanka and that Tamils are perceived as being linked to the LTTE. He fears the security situation has not changed since he has been in Australia and that he cannot obtain the protection of the authorities. He could not remain living in a Sinhalese area as before as he could easily be identified and reported as suspicious to the authorities. He fears that as a returning failed asylum seeker he would be harmed and when he was questioned the authorities would come to know about his past problems and links to the LTTE.
- The applicant's parents are deceased and he is estranged from his aunt. He would have very little support if forced to return to Sri Lanka.

Refugee assessment

14. 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

15. 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.
16. The applicant has consistently claimed to be Tamil from Batticaloa, Eastern Province, Sri Lanka and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
17. I accept that the applicant's parents and some siblings died in the 2004 tsunami and that after a period living in a tsunami relief camp he lived with his aunt.
18. I accept the applicant's claim to be in a long-distance relationship with a Christian girl and it is plausible that his aunt does not accept this relationship and has discontinued contact with him as a result. The applicant's parents are deceased and since their death he lived with his aunt and, apart from the time he lived with his cousin in [Town], this was his family home. From the account given by the applicant at the arrival entry interview on 18 January 2013 it was his uncle who made the arrangements for the applicant to leave Sri Lanka and at that time the applicant indicated he was still in contact with his family in Sri Lanka and the indications are that this was a close familial relationship. The applicant has [siblings] remaining in Sri Lanka and in the unsigned second version of the Form 790 received 19 April 2017 he stated he was in regular contact with them by phone every three weeks.
19. I accept that it may be distressing for the applicant to be estranged from his aunt and I accept that his [siblings] may not be in a position to, or willing to, assist him on his return to Sri Lanka, but I am not satisfied that this would result in serious harm. The applicant was able to live independently from his family, albeit with a cousin, for the period in 2010 to 2012 when residing in [Town]. I also note he was employed at this time. There is no indication that he would not be able to live or work independently again should he return to Sri Lanka.
20. There is no indication that beyond her disapproval and estrangement from the applicant his aunt or others have threatened any harm to the applicant because of this relationship. Nor does the country information before me indicate that those in mixed religious relationships attract any adverse attention or official or systemic discrimination in Sri Lanka.² The civil law

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333; Amnesty International, "Amnesty International Annual Report 2017-18"; NGED867A612; Human Rights Watch, "Human

in Sri Lanka provides for mixed marriages.³ While DFAT noted anecdotal information suggesting mixed relationships/marriages are rare the indication are that problems arising from mixed relationships/marriages are largely due to concerns over marriages of Buddhist women to Muslim men and the social stigmas within the Muslim community to those who marry outside the faith.⁴ The country information does not indicate that couples in mixed relationships or marriages are outcast or otherwise unable to live openly and participate in the community. While he may experience some disapproval from his family and the general community there is no threat to the applicant's life or liberty, or physical harassment or ill treatment, or significant economic hardship, denial of access to basic services to capacity to earn a livelihood that threatens the applicant's capacity to subsist, or other form of harm that may be considered serious harm. I am not satisfied that there is a real chance of serious harm to the applicant on this basis of his relationship with a Christian.

21. I accept that the applicant had an uncle in the LTTE who died in 2009; country information informs of the death of thousands of Tamils, both LTTE members and civilians at the end of the civil war in 2009.⁵ However his uncle was killed in 2009 during the civil war and noting that the civil war ended in May/June 2009 I consider that if the authorities had any interest in the applicant because of his links to the uncle they had ample opportunity from mid-2009 to locate him and act on any concerns while he was living in the family home. It is also plausible that his cousin was killed around 2010 by the Karuna group for being an LTTE sympathiser; country information supports that in the immediate aftermath of the war the authorities used paramilitaries to identify LTTE sympathisers and members and there are credible reports of arbitrary deaths of Tamils suspected of LTTE links at the hands of paramilitaries at this time.⁶ From the applicant's account there is no indication he came to adverse attention because of these links and I consider it significant that despite these familial links to the LTTE there is no indication that the authorities took any steps to question or detain other family members with similar links to these people. From the applicant's account his [siblings] were in Sri Lanka at this time and although they shared the same familial relationship to the uncle and the cousin there is no indication that they came to attention of the authorities or paramilitaries because of their relationship to relatives who were LTTE members. Nor is there any indication that the applicant's aunt, uncle or the cousin he lived with in [Town] came to any attention, although the familial link between the LTTE members and the aunt, uncle and cousin may have been more distant than in the case of the applicant and his [siblings].
22. From the applicant's account the interest in him from the men who visited his home did not commence until the arrest of his employer. He explained that after speaking with his employer's wife he decided it was the same people. From the applicant's account his employer was initially kidnapped by unknown people and was later charged and imprisoned; this account is consistent with country information that reported the irregular detention by non-state actors of suspects who then later came into the official custody of the Sri Lankan authorities.⁷ I accept that this experience would have been concerning to the applicant and that when the same, or similar people, made enquiries about him he was fearful for his

Rights Watch World Report 2018", NGED867A63; United Kingdom: Foreign and Commonwealth Office (FCO) "Human Rights & Democracy: The 2017 Foreign & Commonwealth Office Report", 16 July 2018, CIS7B839411734

³ US Department of State, "International Religious Freedom Report for 2017 – Sri Lanka", 29 May 2018, OGD95BE927541

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

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

⁶ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka COI Compilation", December 2016, CIS38A80123251

⁷ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345; Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka COI Compilation", December 2016, CIS38A80123251

safety. It is plausible that people linked to the kidnap of his employer may have sought to speak to the applicant at this time; as already noted country information advises that the paramilitary groups acted with the authorities to detect people suspected of LTTE links or otherwise of concern and noting that the applicant worked in a [workplace] where his boss was suspected of supporting the LTTE it is plausible that they had an interest in questioning the applicant. But there is no indication that they questioned, or sought to question other employees from the [workplace]. The applicant refers to “other boys” working at the [workplace], indicating multiple employees, but he does not indicate the other employees were threatened or of interest to the authorities or paramilitaries. Nor is there any indication that his employer’s wife or his employer’s other family members came to any harm or were threatened; I consider it significant that the applicant stated in his statement of claims that his employer’s family told him to be careful because of his connection to the [workplace], but despite reporting this interaction with his employer’s family he did not indicate any harm to them. The only indication given by the applicant of any interest in others as the result of his employer’s arrest was the boy whose family paid money to the people so that they would stop asking about their son.

23. While the arrest of the employer is plausible it is difficult to reconcile the subsequent claimed events described by the applicant; the family of one employee was extorted for money, whereas the applicant was threatened and there is no indication any extortion demands were made. It is also difficult to reconcile that if the people looking for the applicant suspected him of LTTE links because of his involvement with the [workplace] and wanted to harm him or detain him as a result of this association they did not do the same with the other employee whose family they extorted for money instead, or indeed with members of the employer’s family or other employees. Although he claims they “threatened” him I note there is no indication that they sought to extort the applicant or his family, or demanded any money as was the case with one of the other boys he worked with at the shop.
24. Despite some concerns as to the plausibility of any interest in the applicant or imputed LTTE profile because of his association with the [workplace], country information does confirm that at this time the authorities or paramilitary groups acted with impunity in pursuing Tamils because of real or imputed LTTE connections and the applicant’s account that unknown men looked for him and threatened him is credible in the context of the country information about conditions, particularly in the Eastern Province, at the time. It is also credible in the context of reports of extortion gangs and criminal abductions and ransom demands prevalent at the time,⁸ although the applicant does not claim to have been so extorted.
25. However I consider it significant that the applicant was able to avoid any interaction with these people by simply hiding when they came and by his aunt telling them he was not at home. Although the applicant moved to another area of Sri Lanka in 2010 to avoid interaction with these people the stringent security situation in place at the time required Tamils to register their residence and report to the authorities when moving to a new area.⁹ As such, if the applicant was of interest due to any security concerns or LTTE connections, I am satisfied he could have been identified and located by the authorities in the two years after the arrest of his employer until he left Sri Lanka. That he was not so identified by the authorities, and that he was able to obtain a National Identity Card in January 2012 indicates that he was not of adverse concern or considered a security concern by the authorities, or of interest to

⁸ US Department of State, “Sri Lanka 2015 Crime and Safety Report”, 4 May 2015, CISEC96CF12840; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064

⁹ Danish Immigration Service “Human Rights and Security Issues concerning Tamils in Sri Lanka”, 1 October 2010, CIS19345; Landinfo, “Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province”, 1 December 2012, CIS25286

paramilitary groups working with the authorities. I have already noted there is no indication that he or his family received any extortion demands.

26. Moreover, it is important to note that the security situation has improved significantly since this time when the applicant was concerned about the people asking after him and his cousin and friend were killed. While the applicant expressed concern in his statement of claims about the security situation in Sri Lanka and stated he does not believe the current Sirisena government is peaceful, the country information before me indicates that the Sri Lankan government has moved away from the systematic program which operated after the civil war of identification and detention and of those suspect of having LTTE links and that the role and power of the paramilitary groups has diminished. Colonel Karuna who headed the Karuna group, to which the applicant referred as being present in the Eastern Province, has moved into mainstream politics. In the 2016 ACCORD report a senior analyst from the International Crisis Group stated “there are no longer any active paramilitaries in Sri Lanka” although he did refer to ex-LTTE and ex-Tamil militants reportedly working with the Sri Lanka military as informants and/or intelligence operative, some of who are may be involved in criminal activities”. Other commentary cited by ACCORD from various sources is that paramilitaries have been less active since the war and a former military intelligence officer of the Indian army commented that since “the exit of Mahinda Rajapaksa from power, paramilitary wings have lost much of their influence and relevance to pressurize people”. The US Country Report for 2014 is cited by ACCORD and that agency noted “[t]here were persistent reports of close ties between pro-government paramilitary groups such as the [EPDP] and government security forces. Whereas during the war these groups served more of a military function, often working in coordination with security forces, in the post war environment they increasingly took on the characteristics of criminal gangs as they sought to solidify their territory and revenue sources”. However the more recent US Department of State report published in 2018 and commenting on the 2017 year, does not make reference to the EPDP or paramilitary groups and it does not indicate that paramilitary groups are working with the current government. The country information before me does not support a finding that there is real chance the applicant would experience harm in Sri Lanka from paramilitary groups.¹⁰
27. Nor am I satisfied that there is a real chance the applicant would be harmed by the authorities. DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer state-sponsored.¹¹ Monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. While the military maintains a strong presence in the east of the country the armed forces personnel are generally restricted to their barracks. The Sri Lankan police are now responsible for civil affairs across Sri Lanka and military governors in the Northern and Eastern Provinces have been replaced with civilians. Some of the land held by the military since the war has been returned to its former owners, although some areas remain unsafe to return to or remain unavailable.¹² Overall the Sirisena government, elected in 2015, has taken steps to curb the excesses of military power exercised under the Rajapaksa government. The improvement in the security situation has

¹⁰ US Department of State, “Country Reports on Human Rights Practices for 2017 - Sri Lanka”, 20 April 2018, OGD95BE927333; Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), “Sri Lanka COI Compilation”, December 2016, CIS38A80123251; 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 DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064

resulted in a decrease in Tamils held in detention and the election of the Sirisena government has led to greater political cooperation.

28. Reporting in June 2017 the UK Home Office commented that being of Tamil ethnicity in itself would not warrant international protection and that generally a person who evidences past membership or connection to the LTTE would not be regarded as a concern unless they have or are perceived to have had a significant role in the LTTE or to have been active in post-conflict Tamil separatism.¹³ I note reports from agencies that report ongoing harassment and mistreatment of Tamils, particularly those involved with the LTTE, and I note the US Department of State continued to report human rights abuses and that they noted LTTE sympathisers amongst those mistreated.¹⁴ However, the Emergency Powers used to detain people arbitrarily have been allowed to lapse and application of the PTA has been suspended and the number of people detained under the PTA has reduced significantly.¹⁵ The government has closed most rehabilitation sites and the UNHCR Special Rapporteur reported in July 2016 that the numbers remaining under rehabilitation amounted to only 40.¹⁶ Nor are Tamils subject to the same abuse and mistreatment that was prevalent during the civil war and during the repressive Rajapaksa government in the aftermath of the conflict when the applicant's employer was arrested and his friend and cousin killed.
29. I am not satisfied that the applicant was imputed with an LTTE profile or other profile of concern, or that he would be should he return to Sri Lanka. I do not accept he would be of adverse interest to the authorities or others, even noting the heightened security measures following the April 2019 terrorist attacks.¹⁷ I accept that he would be returning to Sri Lanka as a failed asylum seeker however there is no indication on the evidence before me that the applicant's status as a failed asylum seeker would bring him to adverse attention on return to Sri Lanka. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of concern to the authorities¹⁸, but I have not accepted that the applicant was so imputed or that he would be now or in the foreseeable future as a returning asylum seeker.
30. I have accepted that the applicant exited Sri Lanka illegally and as such he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return. Penalties for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,670). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine.¹⁹

¹³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

¹⁴ Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; Freedom From Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", August 2015, CISEC96CF13070; International Truth & Justice Project, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849 ; US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka", 3 March 2017, OGD95BE926876

¹⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017, CISED50AD3780; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

¹⁶ Office of the United Nations High Commissioner for Human Rights, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

¹⁷ Straits Times, "Sri Lanka on high alert over Ramadan terror threat", 1 May 2019, 20190501134734;

¹⁸ Freedom from Torture, "Sri Lankan Tamils tortured on return from the UK", 13 September 2012, CIS24086

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

31. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival which may take several hours to complete. As involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.²⁰
32. As a returnee, I accept that the applicant may be questioned by police at the airport and charged under the I&E Act. As part of this process, most returnees will be fingerprinted and photographed, then transported to the nearest Magistrates Court at the first available opportunity. However, returnees may be required to remain in police custody at the CID Airport Office for up to 24 hours if a Magistrate is not available before this time, such as a weekend or public holiday, and may be held in an airport holding cell.²¹ The applicant may be detained in crowded and unsanitary conditions while detained.
33. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis and payable by instalment if the returnee faces difficulty with payment. DFAT advises that the Sri Lankan Attorney-General's Department has directed that all passengers of people smuggling ventures be charged under the I&E Act and appear in court. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, although DFAT understands that conditions are rarely applied, and a person will only need to return to court when the case against them is being heard. Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The applicant was only a passenger on the boat. The Sri Lankan authorities claim no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally.²²
34. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. Even having regard to general detention conditions, I do not consider that a brief period in detention would constitute such a level of threat to his liberty as to amount to serious harm, or significant physical harassment or ill treatment or otherwise amount to serious harm for the applicant for the purposes of s.5J of the Act. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm.
35. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act and possible detention on return. That law is not discriminatory on its terms, and the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the I&E Act would be the result of the non-discriminatory

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

²¹ *ibid*

application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

36. Considering the totality of the material before me, I am not satisfied that the applicant would experience persecution on return to Sri Lanka for reason of his ethnicity or real or imputed political opinion or that he would be imputed with an LTTE profile, even considering him being a Tamil from the former LTTE controlled east and his familial and employment connections to the LTTE or for reason of his relationship with a Christian, his illegal departure and being a failed asylum seeker.

Refugee: conclusion

37. 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

38. 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

39. 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.
40. I accept that the applicant will be identified on return as a person who departed illegally and that he will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I accept that the applicant may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources. I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm.

41. Nor am I satisfied that any harm he may experience as a result of being estranged from his aunt or other family members or any disapproval from family or the general community because of his relationship with a Christian would amount to significant harm.
42. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the “real risk” test for complementary protection is the same standard as the “real chance” test,²³ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

43. 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.

²³ *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.