



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07166

Date and time of decision: 17 October 2019 15:13:00
J Bishop, 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) is now [age] years old and claims to be a national of Sri Lanka. He identifies as a Hindu Tamil. The applicant travelled by boat from Sri Lanka to Australia and arrived [in] October 2012.
2. On 16 March 2017 the applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). On 9 September 2019 the delegate of the Minister for Immigration (the delegate) refused the applicant's visa. The delegate did not accept the applicant was personally of interest to the Sri Lankan authorities or that the Sri Lankan authorities had visited his family in Sri Lanka after his departure. The delegate determined the applicant did not have a profile of interest and did not face a real chance of serious harm or a real risk of significant harm now or in the foreseeable future in Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
4. Section 473DB of the Act provides that, subject to Part 7AA, the IAA must review decisions by considering the review material without accepting or requesting new information and without interviewing the applicant. Section 473DC provides that the IAA may obtain new information – defined to mean information that was not before the delegate when the decision was made and I consider may be relevant – but it does not have a duty to get, request or accept any new information, whether the IAA is requested to do so by an applicant, or in any other circumstances. If I get or accept new information, I must not, pursuant to s.473DD of the Act, consider that new information unless I am satisfied that there are exceptional circumstances to justify its consideration. In relation to new information given to the IAA by the applicant I must also be satisfied that it:
 - was not, and could not have been provided before the delegate's decision was made; or
 - is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
5. On 1 October 2019 the IAA received a letter from the applicant. The letter reiterated evidence that was before the delegate and I have had regard to it.
6. The applicant's letter also raised the new claim that there will be elections in Sri Lanka soon and it is rumoured former Defence Minister Rajapakse will "come to power". If Rajapakse comes to power it will be a "big problem" for the applicant and Rajapakse will try to kill those suspected of having any Liberation Tigers of Tamil Eelam (LTTE) activity. The applicant's new claims about Rajapaksa coming to power and representing a big problem for him are speculative and lacking in detail. He does not explain why or how Rajapaksa would be a big problem for him or why he believes Rajapaksa would kill people suspected of LTTE involvement. He does not explain where or when he obtained this information. Having regard to all the circumstances, I am not satisfied there are exceptional circumstances that justify considering these new claims and I have not had regard to them.

Applicant's claims for protection

7. The applicant claims to fears harm in Sri Lanka because of his:
 - race/ethnicity – Tamil
 - imputed Political Opinion –imputed connections to the LTTE links
 - status as a failed asylum seeker
 - illegally departure

Factual findings

8. The applicant provided a copy of his birth certificate and its translation, a copy of his translated marriage certificate, a copy of his national identification card and its translation and a copy of the bio-page of his passport issued [in] 2010. Based on the evidence before me, I accept the applicant is a national of Sri Lanka who identifies as a Hindu Tamil. I find the applicant's receiving country is Sri Lanka.
9. The applicant indicated that he speaks only Tamil and I accept that claim. He has not claimed, and there is no evidence before me to indicate, that he fears any harm in Sri Lanka because he is monolingual.
10. I accept if the applicant is not granted a protection visa he would return to Sri Lanka as a failed asylum seeker.
11. I accept the applicant left Sri Lanka illegally by boat.
12. The applicant's evidence is that he and his family have no involvement or connection to the LTTE and I accept that claim.

The landmine explosion

13. During the applicant's arrival interview he said he was taken for one day and assaulted after a minor explosion close to his house. He was interrogated. The applicant's written statement states that his village is called [Name]and about 100 families live there. The village was under the control of the Sri Lankan army (SLA) during the war. In January 2009 there was a landmine attack about 100 metres from the applicant's house and some soldiers died. The Criminal Investigation Department (CID) came to the applicant's house, took him to the CID office at the SLA camp, interrogated him and beat him severely because he was suspected of being responsible for the attack. He was eventually released. During the SHEV interview the applicant stated that the landmine went off on a main road and his house is on the main road. He was working a small parcel of land and his parents were home. Four or five other people who were in the area when the landmine went off were also arrested. His mother told the applicant after he was released that the CID told her he was being arrested on suspicion and enquiries and would be released. The applicant said he was tortured and asked who was responsible. He was accused of knowing who had planted the landmine because it happened so close to his house. He told the CID that he had nothing to do with the incident. His mother came to the front gate of the SLA camp in the morning and stood there crying until the evening when he was released. I accept in January 2009 the applicant, and four or five other people who were in the vicinity, were taken to the CID office at the SLA camp after an explosion occurred close to his home. I

accept the applicant was questioned and beaten while he was detained. I accept the applicant was released the same day he was detained.

14. The applicant said during his arrival interview that there was a SLA camp about 100 metres from his home and the CID worked there. The CID officials would come every two or three days at his place of employment, ask them to come with them, take photographs of them (as discussed in more detail below) and harass them. The applicant's written statement states that after the landmine exploded the CID started harassing him more frequently. In March 2009 the CID came to his work place and told him to report to the CID office. When he went to the CID office he was accused of being involved in the bombing, being in the LTTE and beaten. During the SHEV interview the applicant repeated this claim. He said he was at work and was asked to come for enquiries. He told them he was working and the CID told him to come in the evening. When he attended he was shown a number of photographs of people with their names written underneath. He was asked if he knew anyone but he didn't. He said the enquiry took 30 minutes to one hour and he would have to wait the rest of the time. Sometimes he would be there for three hours. When he was released he was told not to go anywhere, that he could be called at any time and that he should come when he was wanted for questioning. He said this happened about 20 times. The applicant claims the last time he attended the CID office was in March 2012. He was asked about his connection to the landmine, if the LTTE were still operating, if the LTTE were planning any activities and if he had any connections to the LTTE. The delegate asked the applicant if this was happening to other people and he responded it should have been but he didn't know.
15. I accept that, after the landmine exploded, the applicant – along with other people who were in the area at the time – were asked to attend the CID office and answer questions on a number of occasions for a period of time. I accept the applicant could have been beaten during some or all of these enquiries. However, the civil war ended in May 2009 and, in March 2012, the landmine explosion had happened more than three years ago. I find it implausible and do not accept the CID would continue to ask the applicant the same questions about an event over a period of three years on more than 20 occasions. The most recent DFAT report¹ states that towards the end of the conflict the Sri Lankan security forces questioned and monitored civilians for possible LTTE activity. I accept the applicant, like other young Tamil men living in the area, could have been subjected to routine questioning from the CID towards the end of the conflict and/or for a period of time after the conflict ended. However, I do not accept that in 2012 the applicant was being questioned by the CID because the CID had a particular adverse interest in him as an individual.

Hut incident

16. During the SHEV interview the applicant said about one month after the landmine explosion (February 2009) he was sleeping in one of the huts on his family's rice field to make sure the pigs didn't come and destroy their crop. Three people came into his hut and spoke to him in Sinhalese asking for food. The applicant ran to another hut where other people were sleeping and stayed there for the night. He didn't know if the three people were LTTE or the SLA. The next day he went to the CID office and told them what had happened. The CID believed it was the LTTE and told the applicant that if anything happened in the area they would come and kill him. I accept three men could have come into the applicant's hut asking for food. However, if the applicant did report the incident to the CID, and the CID believed the three men were LTTE, it is counterintuitive that the CID would then target the applicant who had alerted them to the LTTE's potential presence in the area. In addition, the applicant didn't mention the incident or

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

the CID threatening to kill him in his arrival interview or in his SHEV application. I do not accept the applicant was threatened by the CID as claimed.

CID taking his photograph in 2010

17. The applicant's written evidence is that in 2010 the CID came to his house and took his photograph and then went to his workplace twice and took his photograph. During the SHEV interview the delegate asked the applicant why the CID would need to take a photograph of him and he responded that the CID can monitor him in the local area but if he leaves that area he can still be harassed at the airport or other different places if they have a photograph. The delegate asked the applicant why the CID took another photograph of him when he was at work and he responded different CID people took that photograph about one or two months after the first photograph. It is not apparent to me why the CID would need to take another photograph of the applicant simply because the CID officers were different. Likewise, it is not apparent to me why the CID would go to the applicant's home and workplace to take a photograph of him when, on his own evidence, he was reporting to their office on numerous occasions.
18. The applicant was issued with a Sri Lankan passport [in] 2010 that included a digital photograph of him and all his personal details. During the SHEV interview he said he applied for the passport because of all the problems he was having with the CID. He said he got the passport from the Post Office after filling out a form. The DFAT report² indicates the CID is one of the agencies involved in processing returnees to Sri Lanka and has access to numerous databases. If the CID wanted a photograph of the applicant to distribute to other places then, if the applicant had his passport at that time, it is likely the CID could have accessed the digital photograph of him. If the applicant didn't have his passport at the time, and if the applicant truly believed his photograph was being taken by the CID so it could be sent to various places to enable the CID to identify and harass him outside his home area, I find it astounding that he would make an application for a passport enabling the Sri Lankan authorities to upload and have access to a digital photograph of him.
19. The applicant's evidence about the CID coming to his home and workplace to take photographs is unconvincing and implausible. I do not accept the claim.

Events six months prior to the applicant leaving Sri Lanka

20. The applicant claims the CID started to monitor and follow him. Six months before he left Sri Lanka he moved to a nearby village to try and hide from the CID. He was working [for a] company and lived in [company accommodation] where the CID could not enter and he was safe. However he could not live in the [accommodation] forever and he was not certain how long his employment would last. If he lost his job he would be forced to return to his village and the CID would find him. He was afraid he would be arrested, beaten and perhaps killed. He decided to leave Sri Lanka in September 2012. During the SHEV interview the applicant said he worked as [an Occupation] in a [Location]. In that area the SLA or 'anyone' were not allowed to go there. When the delegate asked the applicant why, he responded that the SLA or CID had to make sure he was actually there but normally they couldn't. It was company policies and rules. The applicant didn't mention having to go into hiding during his arrival interview and he listed his home village as his address until he left Sri Lanka during his arrival interview and in his SHEV application. During his arrival interview he indicated he was a self-employed farmer and drove a [vehicle] on a farm for six months. I find it implausible that the CID, a part of the Sri Lankan

² DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

police force,³ would be unable to enter the [Location] because of company policies and rules and I do not accept that claim. I accept the applicant drove a [vehicle] for six months while he was in Sri Lanka but I do not accept he was in hiding during that time because the CID started to monitor and follow him. I am of the view the applicant fabricated the claim to strengthen his claims for protection.

CID visits since he left Sri Lanka

21. After the applicant came to Australia he states the CID visited his house about three times. The first time his wife wasn't home and was at her [sibling]'s house. The CID then went to his wife's [sibling]'s home and took copies of the applicant's national identification card. The CID questioned his wife about why the applicant left without informing the authorities. The second and third times the CID went to the applicant's mother's house and asked her why the applicant had left without informing the authorities. The applicant's wife told him that she and his mother told the CID he was in Australia. The last time this happened was in 2013.
22. During the applicant's SHEV interview he said the CID visited his parents twice and his wife twice at their houses. The delegate put to the applicant that his written statement said his wife wasn't home for the second visit. The applicant responded that his wife was at her [sibling]'s home and the people in the shop opposite their home told the CID where his wife was. The CID came back to his wife's home in the evening and asked her if the applicant was still overseas. The delegate put to the applicant that in his statement he said the CID went to his wife's [sibling]'s house. The applicant responded that he has a lot of things going on and his mind was not clear. He said the shop people told the CID that his wife was at her [sibling]'s home and provided them with her [sibling]'s name. The CID has everyone's details and would know his wife's [sibling]'s address from [her/his] name.
23. The applicant has given different evidence about where the CID visited his wife during their second visit and I do not accept his explanation for those differences. In the beginning of the SHEV interview the delegate asked the applicant if he had any physical or mental health issues that may affect him during the interview and he responded that he didn't. There is no evidence before me to indicate otherwise. The applicant first said during the SHEV interview that the CID came to visit his wife at her home but found out she was at her [sibling] and returned later in the evening to question her. When the delegate put to him that his oral evidence was different to his written evidence he changed it. He said the CID went to his wife's [sibling]'s house. In addition, it is not clear to me why the applicant's wife would be carrying his national identification card when she visited her [sibling] or how the CID knew she had his national identification card with her for them to take copies. During the SHEV interview the applicant said the CID took his national identification card but provided no details about when, where or how. The applicant has given different and unconvincing evidence about the CID coming to his wife's home.
24. The delegate asked the applicant why the CID have stopped coming and he responded that he thinks they confirmed he was in Australia. They took his details and found out he wasn't in Sri Lanka and stopped coming. The applicant said the CID have confirmed he was not in Sri Lanka and then said he didn't know if the CID had confirmed that but he just thought they had confirmed that because they stopped coming. When the delegate put to the applicant that the CID would have no way of knowing he was not in Sri Lanka he responded that his family told them he was in Australia and at that time there were a lot of boats leaving. The applicant's

³ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

evidence about why the CID stopped visiting his parents and wife was contradictory and confusing.

25. The delegate asked the applicant what the CID asked his parents about and he responded the same things that they asked his wife. They asked where the applicant was and why he didn't tell the CID he was leaving. During the SHEV interview the applicant said the CID asked his parents for a photograph and his mother gave them one. The applicant didn't mention his parents giving the CID a photograph of him in his written evidence. As discussed above, the applicant was issued with a Sri Lankan passport [in] 2010 that included a digital photograph of him and all his personal details. The country information indicates that it is likely the CID would have access to that digital photograph. I find the claim of the CID asking the applicant's parents for a photograph to be implausible and I do not accept it.
26. Overall, I am not satisfied the CID have ever come to the applicant's parents or wife's houses looking for or asking about the applicant.

White van abductions

27. The applicant submitted that there were lots of incidents and he was scared. At night the white vans would come and people, who were being harassed like the applicant, were abducted and kidnapped. He said there were two people in the same situation as he was who were kidnapped and are still missing. He never slept in his house because of the kidnaps even after he was married. He would sleep somewhere else and his wife and child would sleep at his parents' house or sometimes at her [sibling]'s home about 1.5 kilometres away.
28. On the applicant's own evidence he was going to the CID office on a regular basis and sleeping on his family's land in a hut at night to protect the family's crops. If the applicant was of adverse interest to the Sri Lankan authorities and/or unknown persons there was ample opportunities for him to be arrested and detained and/or abducted in a white van. I do not accept the applicant was too scared to sleep in his own home because he feared being abducted in a white van.

Tamil National Alliance

29. The applicant provided the Department a copy of an undated letter from Mr [A] (Member of Parliament). The letter stated the applicant and his family are known to him and are "severe supporters of the Tamil National Alliance." It states the applicant built a home for him, his wife and their child to live in that is about 100 metres from a SLA camp. It states that unknown people in civilian clothing came to his house and threaten him. To escape the harassment the applicant lived with his parents for a small period but the harassment continued. The harassing people warned the applicant not to tell anyone about their visits. Due to these activities the applicant's mental "agony" went to the extreme and to escape their harassment he deserted his wife and child.
30. The applicant has never claimed to be a supporter of the Tamil National Alliance or claimed unknown people came to his home in civilian clothing and threatened him. During the SHEV interview the applicant claimed that he feared harm mainly from the CID. DFAT assesses that document fraud is prevalent in Sri Lanka and attempts to use fraudulent documents are common⁴. Given the overall poor quality of the original document, the lack of features that would make the document difficult to reproduce and the content of the document being

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

inconsistent with the applicant's claims for protection, I place no weight on the document or its contents.

31. The applicant claimed to have sent letters from his village head and "my bishop" disclosing the problems he faced. The applicant identifies as a Hindu and I do not understand why he would have a bishop. The delegate located the document from the Member of Parliament (as discussed above) but indicated in her decision that she was unable to locate the other two letters. The applicant has not provided those letters to the IAA despite having ample time to do so. I am not satisfied the applicant provided letters from his village head and bishop disclosing the problems he faced.

Refugee assessment

32. 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

33. 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.
34. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues⁵. Likewise, the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE in Sri Lanka⁶. However, the Sri Lankan authorities are aware that Sri Lankan Tamils went overseas as economic migrants and that 'everyone' in the northern/eastern provinces had some level of involvement with the LTTE during the war. A person's past history is only relevant to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.⁷ The Sri Lankan government has encouraged all Sri

⁵ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁶ Ibid

⁷ Country Policy and Information Note Sri Lanka: Tamil separatism, UK Home Office, 15 June 2017, OGG67028826

Lankans living overseas to return or invest in the Sri Lankan economy.⁸ DFAT assesses that the Sri Lankan authorities may monitor Tamils returning to Sri Lanka depending upon their risk profile.

I accepted the applicant is a Hindu Tamil from the Northern Province of Sri Lanka and that area had been under the control of the SLA during the civil war. I accepted the applicant and his family had no connection or involvement with the LTTE. I accepted that, after the landmine exploded, the applicant – along with other people who were in the area at the time – were asked to attend the CID office and answer questions on a number of occasions for a period of time. I accepted the applicant could have been beaten during some or all of these enquiries. I accepted the applicant, like other young Tamil men living in the area, could have been subjected to routine questioning from the CID towards the end of the conflict and/or for a period of time after the conflict ended. I did not accept that in 2012 the applicant was being questioned by the CID because the CID had a particular adverse interest in him as an individual. I did not accept the applicant had ever been in hiding from the CID, that the CID had taken photographs of the applicant or that the CID had ever visited his parents and/or wife after he left Sri Lanka. I am of the view that the applicant is of no adverse interest to any Sri Lankan authorities – including the CID - when he left Sri Lanka. Based on all the country information and my factual findings relating to the applicant specifically as outlined above, I am not satisfied there is a real chance the applicant will suffer any harm from the CID and/or any other Sri Lankan authorities upon his return to Sri Lanka.

35. DFAT reports⁹ that there were systematic abductions using white vans often leading to enforced disappearances during the civil war and in the post-civil war period. Victims would be abducted in unmarked vehicles by unknown persons and mostly never seen again. In 2016 and 2017 DFAT assessed that the small number of reported abductions involving white vans referred to incidents where the Sri Lankan police did not follow protocol during arrests. DFAT understands that disappearances are no longer common. I find the chance of the applicant being abducted by a white van is remote.
36. The applicant submitted that he will be imputed with LTTE connections because he left Sri Lanka and has been living in Australia. He will be assumed to be guilty. I have no country information before me to indicate that merely spending time abroad is viewed adversely by the Sri Lankan authorities. The applicant has not claimed and there is no evidence before me to indicate that the applicant has been involved in any activities that would be considered or perceived to be anti the Sri Lankan government. I do not accept the applicant will be viewed with suspicion for spending a significant period of time abroad in Australia. I do not accept the applicant faces a real chance of any harm on this basis.
37. The 2018 DFAT report states Sri Lankan returnees, including those from Australia are questioned at the airport upon their return. I accept that by the manner of the applicant's return the Sri Lankan authorities may know or infer that he has lived in, amongst other places, Australia and that he has made claims for protection in Australia.
38. The DFAT report states about returnees that:

Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department and, at times, the Terrorism Investigation Department, process returnees, including those on charter flights from Australia. These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding

⁸ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁹ Ibid

criminal matters. Australian officials based in Colombo may meet charter flights carrying voluntary and involuntary returnees. IOM¹⁰ meets assisted voluntary returns after immigration clearance at the airport. Processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths, and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed.

For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal 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 hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.¹¹

39. I accept the applicant will, upon his return, undergo a standard procedure of this kind and will not be allowed to exit the airport until all returnees in his group are processed. Based on my earlier findings and the information in the 2018 DFAT report, I find that the applicant, as a returnee with his profile, will not be mistreated during this standard process. I find the applicant being subject to a standard procedure does not involve systematic and discriminatory conduct and does not amount to persecution within the meaning of s.5J(4) of the Act. Indeed, I find that the applicant will not face a real chance of any harm during this standard procedure.

40. There has been a decrease in systematic surveillance of returnees but:

DFAT is aware of anecdotal evidence of regular visits and phone calls by the Criminal Investigation Department to failed asylum seekers in the north as recently as 2017. A UNHCR survey in 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. Refugees and failed asylum seekers reported social stigma from their communities upon return; in some communities, people resent the financial support provided to refugee returnees.

41. The continued surveillance of returnees contributes to a sense of mistrust of returnees within their communities. I accept the applicant is likely to be subjected to a period of surveillance by the Sri Lankan authorities and social stigma from the community upon his return to Sri Lanka. However, I do not accept that any surveillance and/or social stigma the applicant – who continues to have strong familial ties in Sri Lanka - may face upon his return to Sri Lanka amounts to serious harm.

42. I accepted the applicant left Sri Lanka illegally by a boat.

43. The applicant has not claimed and there is no evidence before me to indicate, that he was involved in people smuggling. Information in the most recent DFAT report¹² states that after processing at the airport, persons who departed illegally are charged under the Sri Lanka's Immigrants and Emigrants Act (I&E Act), fingerprinted, photographed and questioned about their activities abroad. The person is then transported to the closest Magistrate's Court at the first available opportunity once investigations are completed, at which point responsibility shifts to court or prison services.¹³ Should a magistrate not be available (for example because it is a weekend) a charged returnee may be detained for up to two days in an airport holding cell. When brought before a court, a returnee who pleads guilty will attract a fine and then the

¹⁰ International organisation for migration

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

¹² Ibid

¹³ Ibid

person is free to go. While penalties can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees (SLR), DFAT advises that no returnee who was merely a passenger on a people smuggling venture has ever been given a custodial sentence for departing Sri Lanka illegally. Fines are imposed on returnees to deter people from departing illegally in the future and are generally between LKR 3000 (about \$A25) for a first offence to LKR 200,000 (about \$A1,670). These fines can be paid by instalment. As the applicant was not involved in organising or facilitating people smuggling I find that there is no real chance he will be given a custodial sentence.

44. Based on DFAT's advice I find that if the applicant pleaded not guilty, he would either be immediately granted bail on personal surety, or wait to be collected by a family member if required to have a family member act as guarantor. DFAT advises that most passengers of people smuggling ventures spend many years on bail and that most are free to go after paying a fine. However, bail conditions are discretionary and can involve monthly reporting to police. DFAT states that although the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over a protracted length of time can be high.¹⁴
45. The applicant indicated in his SHEV application that he has been working full time since February 2016 and, during his SHEV interview, he confirmed he is still working. The most recent DFAT report indicates fines for first offences start at \$A25. The applicant did not provide any evidence that he would be unable to meet the fines or costs associated with the processes of his illegal departure. Based on all the evidence before me, I am not satisfied the applicant would be unable to pay a fine if he returned to Sri Lanka. Likewise, the applicant did not claim and there is no evidence before me to suggest that his relatives living in Sri Lanka would be unable or unwilling to act as a guarantor if one was required. Indeed, his evidence was that he had no problem with his immediate family.
46. On the basis of the material before me, including DFAT's advice, I accept that on return the applicant may be detained in a police holding cell at the airport for a short period during investigation and while waiting to be taken before a court and fined. However, I am not satisfied, given my findings of fact as outlined in detail about and the applicant's overall profile, that the imposition of any fine, surety or guarantee and/or the possibility of being detained for a short period of time would constitute serious harm in this case.
47. Furthermore, I find that the treatment the applicant may face under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans.¹⁵ The evidence before me does not suggest that the I&E Act is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be pursuant to a non-discriminatory law of general application. As such, it does not involve discriminatory conduct and does not amount to persecution within the meaning of s.5J(4) of the Act.
48. Considering all of the applicant's claims, I am not satisfied being subject to monitoring and/or surveillance by the Sri Lankan authorities, being subject to social stigma from his community, being detained for a short period of time at the airport and/or the imposition of a fine, surety or guarantee would constitute serious harm.

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

¹⁵ Immigration and Refugee Board of Canada, 10 November 2017, OG020B81694

Refugee: conclusion

49. 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

50. 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

51. 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.

52. The applicant has been working in Australia and there is no medical or other corroborating evidence before me to indicate he would be unable to work upon his return to Sri Lanka. I accepted the applicant will be subjected to a series of administrative processes (as outlined above) and could be subject to the procedures and penalties as a returnee who departed Sri Lanka illegally. I accepted the applicant, as a returning failed asylum seeker, is likely to be subjected to a period of surveillance by the Sri Lankan authorities and social stigma from the community. I have found the applicant is not a person of any interest to the Sri Lankan authorities and, upon his return, I do not accept being subjected to a series of administrative processes, procedures and penalties and/or a period of surveillance or social stigma from the community would singularly or cumulatively, amount to significant harm within the meaning of s.5(1) and s.36(2A) of the Act.

53. I have found the applicant does not face a real chance of any harm for his other claimed reasons if he returned to Sri Lanka. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear".¹⁶ I also find the applicant does not face a real risk of any harm for those reasons.

54. I am not satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka (the receiving country), there is a real risk that he will suffer significant harm now or in the foreseeable future.

¹⁶ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.