



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07328

Date and time of decision: 14 November 2019 09:51:00
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 born in the Northern Province, Sri Lanka. In 1990 the applicant travelled to India with his family where he lived as a refugee. He came to Australia from India in 2012.
2. On 3 April 2017 he lodged an application for a protection visa. He claims to fear harm should he return to Sri Lanka. A delegate of the Minister for Immigration refused to grant the visa on 9 October 2019.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA received correspondence from the applicant on 5 November 2019 including a Change of contact details form,¹ and copies of the Notification of refusal of application for Safe Have visa sent to him by the department, his 2017 statement of claims and identity documents previously provided to the department. This is not new information.
5. I have also obtained the Department of Foreign Affairs and Trade (DFAT), Country Report, Sri Lanka, dated 4 November 2019.² This report was published after the delegate's decision and the delegate relied on the then current 23 May 2018 DFAT report for Sri Lanka which the 2019 report has updated. It has been prepared specifically for the purpose of protection status determinations. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil born in Jaffna, Northern Province, Sri Lanka.
 - One of the applicant's older brothers joined the Liberation Tigers of Tamil Eelam (LTTE) in the 1980s. This brother went missing during the civil war and the family assume he was killed in combat.
 - The applicant travelled with his parents and some of his siblings to India in 1990. They left by boat and departed illegally. They initially lived in a refugee camp and later moved to live in the community as refugees. The applicant has provided copies of refugee documentation issued to him by the Indian authorities.
 - The applicant's oldest brother stayed in Sri Lanka until around 1993 when he went to [Country]. This brother [did a work task] for the LTTE while living in Sri Lanka.
 - Around 1999 the applicant's mother returned to live in Sri Lanka to support his sister who was still living in Sri Lanka.

¹ Although at Question 1 the applicant has indicated a change of contact details the details provided are the same as those held by the department

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

- The applicant's youngest brother returned to Sri Lanka in the 2004 peacetime period. The applicant believes he was working for the LTTE and that he was arrested by the army in Vavuniya. He was held in prison for seven years and released around 2017.
- The applicant married another Sri Lankan refugee in India. His wife and children remained in India when the applicant travelled to Australia, but around 2017 they travelled to Sri Lanka where they now live with his wife's family.
- The applicant fears that if he returns to Sri Lanka he would, like his younger brother, come to the attention of the authorities who will impute him with an LTTE profile. He will be targeted as a young Tamil man, and because of his older brother's LTTE association. He looks similar to this brother and he may be mistaken for him. He also fears harm from Tamil groups.
- The applicant fears he will experience harm because of his illegal departure from Sri Lanka in 1990 and that he may be detained in prison for a long period and harmed or killed.

Factual findings

7. The applicant has consistently claimed to be Tamil from Jaffna, Northern Province, Sri Lanka, who has resided as a refugee in India since 1990. He has provided identity documents in support of his claimed identity and his residence and status in India. I accept the applicant's identity as stated. I accept that although he has spent a long period residing in India he has no right of residence in that country and that Sri Lanka is the receiving country for the purpose of this review.
8. It is the applicant's claim that three of his brothers had LTTE associations and he further fears should he return to Sri Lanka he may come to harm because of his familial links to the LTTE.
9. The applicant's knowledge of the claimed activities of his brothers and their level of LTTE association is slight, which may in part be the result of the passage of time and that because he has been living in India he has only a limited knowledge of their experiences. However, even accounting for this I am concerned that he was not aware of the activities of the second brother who from his account was an active LTTE member from 1988, or of his youngest brother who he claimed was imprisoned in Sri Lanka for seven years for real or imputed LTTE associations. Although the applicant has been living in India or Australia since 1990 his sister remained in Sri Lanka throughout the period of the claimed events relating to his brothers and his mother returned in 1999 and the indications are that he has remained in contact with them, though he advised he has curbed this contact more recently because of their requests he send them money, yet he has a very limited knowledge of the activities of his brothers.

Oldest brother

10. The applicant claims this brother [did a work task] for the LTTE before leaving Sri Lanka in 1993. The applicant's statement of claims asserts this brother left Sri Lanka "after experiencing problems with the authorities". However, when asked at the protection visa interview to describe these problems he advised he did not have a proper knowledge of his brother's experience and that at this time in Sri Lanka the authorities were active and used to kill LTTE members. The applicant's response in this regard relates general information about the overall situation for Tamils in Sri Lanka at the time but from his actual knowledge there is no indication that this brother experienced any problems. The applicant was [age] years of age and working at the time he departed Sri Lanka and I consider if his older brother was

experiencing difficulties the applicant was of an age and maturity to be aware of these problems, despite this brother being married and living with his in-laws. I am willing to accept this brother [did a job task] for the LTTE before leaving Sri Lanka around 1993, but I do not accept that he experienced any problems as a result of this activity.

Second brother

11. There is some discrepancy in the applicant's account of when the second brother went missing; at his protection interview he stated this occurred at the end of the war in 2009, yet in his written statement of claims he dated this disappearance as being in 1987 or 1988. However it is important to note the statement of claims which refers to the disappearance as occurring in 1986/87 comments that at the time of his disappearance this brother was married with children; yet in 1986/87 this brother would have been only a teenager. I also consider it significant that his essential claim that the second brother went missing in 2009 is consistent with the information he provided at his Arrival Entry interview in February 2013. I consider the date of 1987/87 in the statement of claims to be an error.
12. I note the delegate based adverse findings in part on the applicant's response to questioning at the protection interview when asked if the whole family left for India he referred to two other siblings remaining in Sri Lanka, but did not mention this brother. The delegate did not put her concerns to the applicant for comment or explanation. I consider it significant that the applicant had consistently put forward information that this brother had joined the LTTE and was killed in the war and on that basis he may consider it was implicit in the information he had previously provided that this brother did not travel to India with the family and therefore he did not specifically refer to this brother in response to the delegate's questions.
13. The applicant bases his assumption his second brother was an LTTE member of rank and a group leader on seeing him being picked up at the family home by, or travelling with, a group or escort of other LTTE members, yet he does not know his brother's rank although he could recount his brother's LTTE name (pseudonym). There is no indication that his lack of knowledge was because of any secrecy on the part of his brother, noting the applicant's claim that this brother was willing to reveal his LTTE name to the applicant. At the time the applicant left Sri Lanka in 1990 this brother would have been approximately [age] and, according to the protection interview account, had been an LTTE member for around two years from 1988. I find it difficult to accept that after just two years membership of the LTTE, being of a young age and still living at home that the applicant's second brother was an LTTE member of rank or a group leader as claimed by the applicant. I am willing to accept that this brother had LTTE associations in the 1980s and remained in Sri Lanka when the family went to India. However I am not satisfied that he was more than an ordinary member.
14. I have some concerns regarding the claim the family assume this brother was killed or disappeared in 2009 on the basis that at the end of the war most LTTE fighters who did not escape surrendered and their names were published but that his brother's name was not published. Country information indicates that as late as 2017 the authorities had not released a list of those who surrendered or were detained at the end of the war despite protests by Tamil families demanding such information and President Sirisena indicating the information would be released.³ This independent country information casts some doubt on the applicant's recount of the circumstances for the family believing his brother died or disappeared in the fighting in 2009.

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

15. While I am willing to accept that this second brother had some LTTE association I consider the applicant has exaggerated the extent of this association in an attempt to enhance his protection claims. The conflict in Sri Lanka was characterised by periods of ceasefire and the fighting escalated and subsided throughout the years of the civil war and at times of intensified fighting the LTTE stepped up recruiting combatants from the Tamil community, particularly in the last phase of the war after the end of the ceasefire agreement in 2006. I am willing to accept that the applicant's second brother maintained LTTE associations, or that he re-engaged with the LTTE during the last phase of the war, and became involved with the fighting post the end of the ceasefire in 2006. I am willing to accept that this brother died in the fighting in or around 2009, noting that thousands of Tamils died in the last months of the war and remain unidentified. I do not accept that from 1998 to 2009 he was a member of rank or a group leader of the LTTE.

Youngest brother

16. It is the applicant's claim his youngest brother returned to Sri Lanka in 2004 and at some later stage he was arrested and gaoled for seven years for reason of LTTE links. At the Arrival Entry interview he stated he believed this brother may have had been involved with the LTTE. In his statement of claims he stated variously he believed the authorities suspected his younger brother of being involved with the LTTE or that this brother was targeted because of the activities of the second brother. At the protection interview he stated he had heard his younger brother helped the LTTE after his return and was arrested. He stated he did not know if he had been charged with any offences; he did not like to discuss such matters with his family on the telephone. At the protection interview the applicant stated his brother had been arrested in Vavuniya, imprisoned for seven years and released two years prior to that interview, being 2017. This would indicate he was arrested in or around 2010, some six years after his return in 2004. To the extent that there is some variation in the applicant's account of the circumstances of his youngest brother overall this is slight. However I have concerns regarding the veracity of the claim his imprisonment was for reason of LTTE links or activity as discussed below.
17. I have considered the claim this brother was imprisoned because of his familial LTTE links. The brother returned during a period of peacetime and went to live with his sister. There is no indication that he experienced any trouble on return, indicating that he did not attract any adverse attention because of his association with the second brother at that time. Nor is there any indication that he attracted any adverse attention in the six years up to 2010. The applicant stated that their sister was with the youngest brother in Vavuniya when he was arrested yet she was not arrested and I consider it significant that there is no indication that the authorities had any interest in her, indicating that a familial link to an LTTE member (second brother) was not the reason for the arrest of the youngest brother. Nor is there any indication that the applicant's sister who remained in Sri Lanka, or his mother who returned in 1999, have come to attention for reason of the activities of the second brother or the oldest brother. I am not satisfied that the youngest brother was arrested and detained because of any familial LTTE association.
18. I have considered if the youngest brother may have been arrested and detained for reason of working with or assisting the LTTE, however in the light of the independent country information about the situation for detained LTTE members or those with LTTE links I am not satisfied that the claimed detention for seven years is plausible.
19. The civil war ended in 2009 and at that time the authorities undertook a concerted campaign to identify and detain LTTE fighters, members and supporters of concern. I have had regard

to DFAT reporting about the numbers of persons still detained in 2017 for reason of LTTE links or activity; this reporting indicated the number to be low having decreased significantly in the ensuing years since the end of the conflict, in November 2015, it was reported that 204 suspected LTTE cadres (including around 50 in rehabilitation centres) remained in government custody, 56 had been convicted, and trials were in process for 124. In 2015 hunger strikes by Tamil detainees imprisoned for LTTE links, some of whom had been held under the Prevention of Terrorism Act (PTA) since the 1990s, resulted in a Sri Lankan court decision to grant many of these detainees bail. By December 2017 only one rehabilitation centre with eight inmates remained open in Vavuniya. Yet the applicant claimed his brother was not released until 2017.

20. Members and fighters were generally detained in rehabilitation camps. Detention for rehabilitation was generally for one year, although this could be extended to two years for some rehabilitees who were considered highly radicalised.⁴ Taking into account the claim that the applicant's youngest brother was imprisoned for seven years, and that rehabilitation was generally one year which could be extended to two years, I discount rehabilitation for LTTE links/activity as a reason for the claimed imprisonment.
21. In addition to the rehabilitation provisions for LTTE members the authorities prosecuted some high profile LTTE members for security offences. Persons suspected of having committed security offences were generally transferred to prison and charged under the Emergency Powers in place. The PTA and the Emergency Powers provided the authorities wide ranging powers to detain suspects for extended periods and I have considered if this may account for the claimed seven imprisonment of the youngest brother.
22. Even taking into account the sometimes slow and protracted legal process in Sri Lanka and delays in court hearings imprisonment for seven years indicates the detainee would be of significant interest or high profile. I accept that the applicant may be reluctant to discuss such matters over the telephone, but even accounting for his concerns it is difficult to accept that he has almost no knowledge of this brother's claimed LTTE links. This brother lived with their sister on his return to Sri Lanka and she was present when he was arrested indicating they maintained a relationship and that she would have some awareness of his activities and it is difficult to accept that he imprisoned was for reason of LTTE activity the applicant has no knowledge of the nature of the activity, particularly noting the severity of the punishment which points to a significant role with the LTTE.
23. I am also concerned by his description of the whereabouts of his youngest brother in his statement of claims. This statement is dated 28 March 2017 and in regard to his youngest brother stated "we fear that he has not been released and continues to be detained". This statement indicates that the family were not aware if, and where, the youngest brother was detained at this time. This is difficult to accept; the country information advises that at this time the International Committee of the Red Cross and the Human Rights Commission of Sri Lanka had access to prisoners, including those held under the PTA. Families had access to prisoners, although they could not meet unaccompanied with those held under the PTA. There is no indication that a family would not be aware of the circumstances of a convicted prisoner or one held under the PTA at the time the applicant made this statement.
24. I also consider it significant that there is no indication the youngest brother has been subject to any surveillance or monitoring following his release as the US Department of State noted

⁴ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGG6E7028826, Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

in its 2016 report “intensive surveillance by the military” of those ex-LTTE members released.⁵

25. I take into account that the applicant has consistently claimed his youngest brother was imprisoned; at the Arrival Entry interview, in his statement of claims and at his protection interview. Beyond claiming his brother was imprisoned for reason of LTTE links the applicant has stated he does not know the details of his brother’s offences or any charges made against him. In the light of the country information indicating most LTTE members or supporters detained were subject to rehabilitation detention for one or two and that the numbers of those remaining detained in either rehabilitation or imprisoned in 2017 was very low I am not satisfied that the applicant’s claim his brother was imprisoned for seven years until 2017 for reason of LTTE links or activity is plausible. I accept his brother was imprisoned for seven years but I am not satisfied it was for reason of LTTE links, either familial or imputed or real. I am not satisfied that the country information supports the applicant’s claim his brother was imprisoned for seven years for LTTE links or activity. I accept that the brother was arrested in Vavuniya in 2010 and imprisoned until 2017 for reasons other than LTTE links and I find that the applicant has attributed this to LTTE links in an attempt to enhance his protection claims.
26. However, even if I am wrong, I consider it significant that there is no indication that either the applicant’s sister or mother, who have similar familial links to this brother and additionally resided with this brother at least for some period from 2004, have experienced any harm or come to the adverse attention of the authorities. I also note from the applicant’s account his sister was present with their brother when he was arrested but the applicant has not indicated that the authorities have any concerns about her.

Refugee assessment

27. 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

28. 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

⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

- 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.
29. I have accepted that the applicant is a Sri Lankan citizen and a Tamil and that he departed Sri Lanka for India in 1990. I have accepted that he has familial links to the LTTE.
30. I note the applicant's concern that he may experience harm in Sri Lanka from the authorities or Tamil groups as a young Tamil man and because of his familial links to the LTTE, or be mistaken for his brother, however I am not satisfied that his fear is well-founded. Despite their similar familial links there is no indication that the applicant's sister or mother have come to harm or are of interest to the authorities or that they are of interest to Tamil groups. I accept that the applicant may resemble his brother, but noting the passage of time since the disappearance of his brother I do not accept there is a real chance he would be mistakenly identified as his brother, or that he would be harmed if he was. There is no indication the authorities or others have an ongoing interest in the second brother or others because of his activities; the applicant has not claimed that his second brother's wife or children have come to attention and I have already noted there is no indication of any interest in his mother or sister and I do not accept that the activities of this brother, or the applicant's other brothers, would cause him to be imputed with a profile of concern.
31. Should he return to Sri Lanka it would be as a failed asylum seeker. While there are reports of Tamils returning to Sri Lanka coming to attention of the authorities⁶ the indications are that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. While agencies dispute the extent which progress has occurred in human rights in Sri Lanka the country information before me support that there is a real chance Tamils or young Tamil men coming to harm on that basis. The UK Home Office reported the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism, journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a "stop" list of those against whom there is an extant court order or arrest warrant⁷. I am not satisfied that the applicant would be of concern or imputed with a profile that would attract adverse attention from the authorities or Tamil groups.
32. There is no indication that his mother or sister has experienced harm because of their LTTE familial links. Noting this and the country information before me I do not accept that there is a real chance the applicant would be harmed by the authorities or Tamil groups because of his familial links, or for being a young Tamil man, considered individually or together.

⁶ Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065; Immigration and Refugee Board of Canada 'LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)', 10 November 2017, OG020B81694,

⁷ Immigration and Refugee Board of Canada 'LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)', 10 November 2017, OG020B81694; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

33. I accept that the applicant departed Sri Lanka illegally in 1990 and that because of his illegal departure he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return.
34. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. I note the applicant has not been issued with a Sri Lankan National Identity Card but he has access to his Sri Lankan birth certificate and Indian identity documents to help establish his identity. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT advises that at the earliest possibility after investigations are complete police transport persons charged under the I&E Act to the closest Magistrate's court. Persons can remain in police custody at the Criminal Investigation Department office at the airport for up to 24 hours after arrival and in cases where a magistrate is not available, such as a weekend or public holiday, may be detained at an airport holding cell for two days. 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.⁸
35. The penalties under the I&E Act 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 1,633). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine and the Sri Lankan Attorney-General's Department advises no fare-paying passenger on a people smuggling venture has been given a custodial sentence. 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.⁹
36. DFAT advises that the Attorney-General's Department has directed that 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, and may include reporting to police at the returnee's expense.¹⁰
37. 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 frequency of court appearance depends on the Magistrate and DFAT understands that most persons charged under the I&E Act appear in court every three to six months. Cases are only progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.¹¹
38. 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 amount to

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁹ *ibid*

¹⁰ *ibid*

¹¹ *ibid*

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.

39. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. 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, punishment or detention of the applicant under the I&E Act would be the result of the non-discriminatory 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.
40. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka.

Refugee: conclusion

41. 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

42. 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

43. 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.
44. 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.¹² 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 in 1990. But this questioning, charges and fine or briefly being detained does not amount to the death

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

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.

45. 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,¹³ 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

46. 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.

¹³ *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.