



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08869

Date and time of decision: 2 March 2021 09:24:00
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 from Batticaloa in the Eastern Province, Sri Lanka. On 11 May 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 2 February 2021. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

Information before the IAA

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

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil born in Batticaloa, Sri Lanka.
 - During the civil war his home was between areas controlled by the government and the Liberation Tigers of Tamil Eelam (LTTE).
 - His father farmed land in the LTTE controlled area and was forced to pay taxes to the LTTE.
 - The LTTE recruited young Tamils in his area. His family received a letter from the LTTE requesting recruits, but his family did not send anyone.
 - The applicant worked as [an Occupation] for [an Employer] from 2006 to 2010. He has provided a reference from his employer in support of this claim.
 - Because of this work the applicant was regularly away from home and he believes that this, and that many young men in the area supported the LTTE, contributed to creating an impression he was assisting the LTTE.
 - [In] October 2007 he was asked to attend the offices of the Tamil Makkal Viduthalai Pulikal (TMVP). He was asked questions about his activities and was accused of providing information to the LTTE and assisting them to set up land mines. The TMVP officer threatened to shoot him but told him if he left the country he would not lose his life. He was released later that night.
 - Around one month later the applicant learned that the TMVP officer who interviewed and threatened him had been killed and as a result the applicant stayed in Sri Lanka.
 - In 2010 the applicant was visited at home by six Criminal Investigation Department (CID) officers and taken to their camp. He was beaten, accused of assisting the LTTE and told if he stayed in Sri Lanka he would be harmed. He was later released.

- In March 2013 the applicant received a threatening telephone call telling him to leave the country.
- [In] April 2013 12 men abducted him from his home and he was taken to a CID camp where he was beaten and accused of aiding the LTTE. His abductors demanded a ransom from his mother for his release but the applicant was able to escape from his abductors and the camp.
- The applicant made his way to the home of a friend and in April 2013 left Sri Lanka by boat and came to Australia.
- After he left Sri Lanka the CID have made visits and telephone calls to enquire about him.
- Tamils continue to be harassed and targeted in Sri Lanka and they cannot obtain protection from the authorities. Tamil memorials for war victims have been destroyed.
- The applicant fears that should he return to Sri Lanka he would be harmed as a Tamil and as a Tamil from an LTTE area and that because of this and because of his work for the [employer] he will be imputed with a profile of an LTTE supporter.
- He fears harm from the authorities and the TMVP. Members of the TMVP have joined the police and other Sri Lankan security authorities. He fears harm from former TMVP leaders who are back in power and have joined with the Sri Lankan government. He was suspected of being an informant to the LTTE and he is on a list.
- The applicant is worried about what may happen to him should he return to Sri Lanka. He described at the protection visa interview that for the previous week he had experienced mental depression and had been unable to sleep or attend work.

Factual findings

6. The applicant has consistently claimed to be a Tamil from the [City] area in the Eastern Province of Sri Lanka and has provided identity documents in support of his claimed identity. I accept the applicant's identity and nationality as stated and that Sri Lanka is the receiving country for the purpose of this review.
7. The LTTE had a significant presence in the Eastern Province during the civil war and I accept as plausible that the applicant's area was between LTTE and government controlled areas. It is plausible his father farmed land in an LTTE controlled area and as such was required to pay taxes to the organisation. I accept this claim. However, I note there is no indication his father came to any harm or came to the interest of the authorities for doing so.
8. I accept that the LTTE recruited young Tamils in his area and that many young Tamils in his town supported the LTTE.
9. The applicant has provided a work reference in support of his claim he worked for [an Employer] from 2006 to 2010 and I accept this claim. I also accept that this work required him to be away from his home. However, as discussed further below, I am not satisfied that this contributed to an impression he was helping the LTTE.
10. I accept that during the civil war and in the subsequent period of recrimination against the LTTE the authorities, and paramilitary groups working with them, remained suspicious of Tamils and Tamils were subject to ongoing security checks and questioning as to their activities. In this context it is plausible that the applicant came to the attention of the authorities and the TMVP,

but I have concerns as the level of attention and interest to which the applicant claimed he was subjected.

11. It is the applicant's claim that he was interviewed by a TMVP officer in 2007. There is no indication he came to attention prior to this time, despite being a young Tamil male in a location with proximity to the LTTE where many young Tamils supported the LTTE, and despite his father farming land in an LTTE area and paying taxes to the LTTE.
12. His claim is that in this encounter he was accused of passing information to the LTTE and assisting them to set up landmines. In part the applicant believes this interest in 2007 may have been related to his work for the [employer] and frequent absence from his home.
13. The work reference advises that the applicant began to work for the [employer] in April 2006 and I am surprised that he worked in this role and was frequently absent from his home for 18 months before coming to the attention of the TMVP in October 2007. If he was suspected of passing information and the very significant accusation of helping set up land mines, I consider the TMVP or other authorities would have acted earlier to question him.
14. Other aspects of the applicant's account add to my concerns that his account is genuine. His claim is that his life was threatened by the TMVP and he was told to leave the country yet there is no indication he discussed these threats with his direct employer or the [employer] administrators or sought any assistance from them to take any protective measures to ensure his safety.
15. I am also not satisfied that someone who was suspected of passing information to the LTTE and of helping them set up land mines would have been released into the community as described. The applicant's account is that his life was threatened if he did not leave the country, yet he remained in Sri Lanka for the following month until the TMVP officer was killed without any further action against him by that officer or others from the TMVP.
16. The applicant described the TMVP officer as a person who had killed before, who had shot and killed Tamil boys and who was well-known for killing people. In the context of this description I find it difficult to accept the TMVP officer merely let the applicant go after questioning him and threatening him and told him to leave the country. If the TMVP had wanted to remove the applicant because of suspected LTTE support, including setting land mines, it seems implausible to me that they would have simply told him to leave the country rather than kill him, noting the applicant claimed this TMVP officer had killed Tamils in the past.
17. I do not consider it is plausible that, if he was suspected as claimed, there was no ongoing interest in him from the TMVP in the ensuing years he remained in Sri Lanka including the more than two years he remained working for the [employer]. Although the particular officer who interviewed him may have been killed, if he was suspected as he claimed I consider that others in the TMVP would have been aware of the applicant and the suspected profile and that he would have been of ongoing interest and subject to further questioning as he continued the same activities that he claimed initially brought him to attention; being working for the [employer] and being frequently absent from home.
18. I am willing to accept that as a Tamil living in the Batticaloa area the applicant had an encounter with the TMVP and was questioned about his activities. I accept that he may have found this to be a frightening experience. But I do not accept that after this questioning he was of ongoing interest to the TMVP, or others, or that his life was threatened if he did not leave Sri Lanka. If he was of any ongoing interest I find he would have been detained under the emergency

powers in place at the time that allowed the authorities to detain persons for extended periods for questioning on mere suspicion. That he was released to live in the community and was able to continue to work indicates he was not viewed as a security concern.

19. The next encounter the applicant claimed to have had was with the CID in 2010. He claimed he was of significant enough interest for six CID officers to come to his home and take him to their camp for questioning. He claimed he was accused of helping the LTTE and was beaten by ten different people. This indicates a significant level of concern, particularly noting the number of officers he claimed the CID had engaged to take him from his home, but again his account is he was released without charge. His claim is that after his mother engaged the assistance of a Tamil CID officer she was acquainted with to speak on the applicant's behalf the other CID officers advised the applicant should leave the country. But the applicant remained living and working in Sri Lanka without any indication of any further interest from the CID or others until the claimed 2013 incidents.
20. I consider it important to note the claimed incident occurred in 2010, after the end of the civil war and at the time the government forces claimed to have destroyed the last vestiges of the LTTE, and the applicant claimed he was accused at that time of "still helping the LTTE". I find it difficult to accept that the authorities would release a Tamil into the community in 2010 after simply questioning them if they suspected that person of aiding the LTTE at the time. At this time many thousands of Tamils who had LTTE links were detained in rehabilitation or prosecuted for security offences. Yet the applicant claimed he was released to live openly in the community after being questioned and beaten. If he was of concern to the extent he claimed I do not accept he would have been released without any further follow up questioning, or detention, or monitoring of his activities and I do not accept that the assistance of a Tamil CID officer who had some acquaintance with his mother would have overcome any security concerns of the CID.
21. In addition to these concerns I am concerned that his account of the 2010 incident as given at the protection visa interview differed to a significant degree from his statement of claims account. When asked at the protection visa interview about the variation in his accounts the applicant explained he could not remember the details and because he has had nightmares he does not want to remember the details. I accept that recounting traumatic events can be difficult for protection visa applicants and I accept that due to the passage of time an applicant may have difficulty recalling past events and that there may be some variation in details of events across different accounts. In his statement of claims the applicant provided a detailed account of the 2010 incident which included details as to the number of CID officers who came to his home to take him to the camp, that he was visiting home between work shifts, that he was beaten by ten officers, locked up all night, beaten in the night and then released the next day. I note the caveat that the statement of claims is only a summary of his claims for protection and not an exhaustive statement, but even taking that into account and the applicant's expressed concern at remembering such events I am surprised that the statement of claims account does not include information given at the protection visa interview which was that a bribe was paid to secure his release and that he was held for a number of days.
22. At the protection visa interview the applicant initially stated he was held for five days at the CID camp. When the delegate pointed out the discrepancy as to the length of detention the applicant then stated he was staying (at the camp) two days, but also that he could not remember because he was locked in a dark room. I have difficulty accepting the applicant did not mention this longer period of detention in his statement of claims but specifically described being released the "following morning". Similarly I have difficulty accepting he did mention the

bribe in his statement of claims, particularly considering he mentioned the matter of a bribe regarding the later 2013 incident in that statement.

23. These variations in themselves may not in themselves cast sufficient doubt on the applicant's claims such as to bring the veracity of his claims into question. But considered with my other concerns as to the implausibility of someone who was of such interest due to suspected LTTE support after the LTTE had been routed in the civil war that the CID sent six officers to arrest him, but then released him to continue to reside and work in the community the applicant has failed to satisfy he was of interest as he claimed. The claimed CID suspicions of his activities are significant and I do not accept someone of such a concern would have been released with no indication of any further monitoring or requirement to report, either the following day or some days later, even with the assistance of a Tamil CID officer acquainted with his mother or the payment of a bribe. I do not accept the claim that the applicant was taken from his home in 2010 by the CID and taken for questioning and was beaten. I do not accept he was of interest to the CID or other authorities in 2010 or suspected of being linked to or supporting the LTTE.
24. It is not apparent why the applicant became of the later claimed interest which resulted in the claimed threatening telephone call in March and the claimed abduction in April 2013. In the statement of claims he indicated the threatening telephone call was from a person asking why he was still living in the area and had not left. I have difficulty accepting that there was no apparent interest in the applicant from 2010 until 2013 and that for those two to three years he was able to live and work openly in the community if the authorities were concerned about him and his presence in the area. From the information given in his protection visa application he was living in the family home and had been working for the same [company] since April 2010, becoming a [job task] for the company. Yet from his account he did not come to the attention of the authorities until 2013 when he claimed the CID sent 12 officers to take him forcibly from his home at night. I find it difficult to accept the hiatus of more than two years of no interest from the authorities was followed by the claimed level of interest for seemingly the same suspected activities of assisting the LTTE.
25. I also find the applicant's account of his escape from this claimed detention in a CID camp to be far-fetched. His claim is that he was beaten in the van on the way to the camp by "all the men in the van ... using their fists and feet". After speaking to his mother to arrange a bribe for his release he stated he was beaten for a further hour by three officers to the point where he felt "close to losing consciousness". Yet under the ruse of needing to use the toilet he was able to "push" a CID officer, escape over the camp wall and run into the jungle, eventually finding a road sign that showed him where he was and from there he made his way to the home of a friend 15 kilometres away.
26. I note the information before the delegate as to white van abductions and her finding, largely on this basis, that she was "prepared to accept the applicant's claim that he was abducted, detained and beaten by the CID twice on suspicion of being involved in the LTTE". But unlike the delegate I do not accept this claim. While I accept such abductions occurred, I find the applicant's account of his claimed experience to be implausible and I do not accept it is genuine.
27. I do not accept the claim that the applicant received a threatening telephone call or was taken by the CID in 2013 and was beaten or that a bribe was paid for his release. I do not accept he was of interest to the CID or other authorities in 2013 or suspected of being linked to or supporting the LTTE. It follows that I do not accept the CID made enquiries about the applicant after he left Sri Lanka.

28. I accept the applicant's claim that due to concern as to what may happen to him should he return to Sri Lanka that leading up to the protection visa interview he experienced mental depression and had been unable to sleep or attend work. No medical reports have been provided by the applicant indicating any clinical or mental health condition, nor is there any indication he has been receiving any ongoing treatment or counselling for any such conditions.
29. I accept the applicant departed Sri Lanka illegally in 2013.

Refugee assessment

30. 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

31. 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.
32. I have accepted that the applicant is a Tamil from the east in Sri Lanka and that he lived in proximity to LTTE controlled territory and that his father farmed land in LTTE controlled territory and paid taxes to the LTTE. I have also accepted the applicant had an encounter with the paramilitary TMVP in 2007 and that he worked for the [Employer]. However I have not accepted the applicant was of adverse interest to the authorities, paramilitary groups or others when he departed Sri Lanka in 2013, nor do I accept he would be now or in the reasonably foreseeable future should he return.
33. I accept that during the civil war and in the oppressive security environment in place in the aftermath of the civil war Tamils were subject to harassment and I accept he may fear ongoing harm should he return to Sri Lanka but there has been a significant change in the security situation since the applicant left Sri Lanka in 2013.
34. I am not satisfied that the country information before me and discussed further below supports a finding that Tamils, young Tamil males, and those from or near the LTTE controlled areas in

the east or returning asylum seekers are of ongoing adverse interest to the Sri Lankan authorities. Nor does the country information indicate any ongoing interest in Tamils whose links include farming land in LTTE controlled territory or paying taxes to the LTTE.

35. The UK Home Office has commented on the profile of Tamils or returning asylum seekers who are of interest to the authorities and the Home Office's May 2020 report on Tamil separatism noted 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. The indications are that being of Tamil ethnicity in itself would not warrant international protection, nor would being from or near an LTTE controlled area. Those of concern are past members of the LTTE or those with a connection to the LTTE who are active in post-conflict Tamil separatism. Specifically the UK Home Office report identified the profile of LTTE supporter of interest to the authorities and indicates that this is "individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka".¹
36. At the protection visa interview the applicant expressed his concern at reports of ongoing mistreatment of Tamils in Sri Lanka and that the country is run by the Sinhalese and Tamils have no place in the country. I accept that reports of detention and disappearance of Tamils may be concerning for the applicant. The International Truth and Justice Project documented 76 cases of torture and sexual violence from 2015 to 2017 and reports from Associated Press and Freedom From Torture noting cases of torture in that same period. But the indications are that the Sri Lankan government has moved away from the systematic program which operated after the civil war of identification and detention and rehabilitation of LTTE members and the Department of Foreign Affairs and Trade (DFAT) assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer state-sponsored.² Furthermore in regard to the International Truth & Justice Project the UK Home Office commented that a representative from the northern province community was not aware of any such incidents and had not received information on this from contacts in the north and east. In regard to similar reporting by a UK non-government organisation the Human Rights Commission advised they had not seen any evidence of the torture reported and no such cases had been brought to their attention in Sri Lanka.³
37. In its fact finding mission to Sri Lanka conducted in September and October 2019 the UK Home Office spoke with a range of agencies and informed sources about conditions and the security situation in Sri Lanka, particularly for Tamils, including UNHCR, the International Organization for Migration, the Human Rights Commission of Sri Lanka and journalists, human right activists and non-government organisations, in addition to official Sri Lankan sources. I also take into account that the UK Home Office report includes information from Tamil politicians, including from the Tamil National Alliance. In regard to the treatment of Tamils the report comments that "most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil"; one of the sources cited is the Tamil National Alliance. The report noted that since the end of the civil war the focus of the Sri Lankan government has changed and most sources noted that Tamils are not specifically targeted and do not suffer persecution just

¹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

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

³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

for being Tamil but that “certain Tamils may be subject to closer scrutiny” indicating that these would be political activists and journalists.⁴

38. The applicant has expressed concern as to the election of the Gotabaya Rajapaksa government and the return of past TMVP leaders to power in Sri Lanka and their close relationship to the current government. President Gotabaya Rajapaksa was sworn in as the new president following the November 2019 elections and his Sri Lanka Podujana Peramuna (SLPP) had a sweeping win in the 2020 parliamentary elections.⁵ I note the concerns in various commentary about the return to power of the Rajapaksas particularly in the context of the mistreatment of Tamils under the repressive Mahinda Rajapaksa government and I accept that the applicant may be concerned about the return of the repressive policies of the past. Mahinda Rajapaksa was elected in 2005 and together with his brother, Gotabaya, in the role of Defence Secretary in his government affected the military defeat of the LTTE to end the protracted civil war. It was in this environment that the excesses of human rights abuse were committed and continued to be committed in the aftermath of the war in attempts to quash any resurgence of the LTTE.⁶
39. I accept that Tamils in general may be concerned as to the presence in the new government of Rajapaksa supporters who have been implicated in war crimes and human rights abuses and I note the Sunday Observer speculated in 2019 that former TMVP leaders Vinayagamoorthy Muralitharan (Colonel Karuna) and Sivanesakumar Chandrakanthan (Pillaiyan) may seek to make a comeback to politics.⁷ I note the commentary expressing concern as to the implications of the Rajapaksa led government on progress with human rights and the treatment of minority groups, including Tamils, and the family's attempts to strengthen its grip on power and progress with constitutional amendments and the applicant expressed his concern at the destruction of Tamil war memorials in Sri Lanka.⁸
40. However the election of the coalition Sirisena government in 2015 saw a significant shift in respect for human rights for Tamils and the change of government in 2015 provided Sri Lanka the opportunity to break from the repressive policies of the past and the cloud of suspicion of Tamils imbued by the long running civil war. I note the concern about the incoming Rajapaksa government and their supporters in the light of the past, but Gotabaya and Mahinda Rajapaksa and their supporters are returning to government in a very different environment from that in place between 2005 and 2015.
41. There is no information before me to indicate that President Rajapaksa or his political supporters intend to introduce repressive policies that would impinge on the Tamil population in general or Tamils with a profile similar to that of the applicant, or that such has been the result since the SLPP's success at the February 2018 local elections and ongoing political influence in the ensuing three years.
42. The applicant expressed concern as to the movement of TMVP members into the police, military and other security forces and the return of past TMVP leaders to influential positions. The indications are the TMVP remain involved in politics and media articles report tension,

⁴ UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928

⁵ Aljazeera, “Sri Lankan parliamentary elections: Five key takeaways”, 7 August 2020, 20200810133022

⁶ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; Aljazeera, “Sri Lankan parliamentary elections: Five key takeaways”, 7 August 2020, 20200810133022

⁷ Sunday Observer, “Is Karuna making a comeback?”, 22 September 2019, 20190926124155

⁸ Aljazeera, “Sri Lankan parliamentary elections: Five key takeaways”, 7 August 2020, 20200810133022; UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928

spilling into violent attacks, between the TMVP and political rivals.⁹ While the applicant may be concerned by such reports I have not accepted the applicant was of interest to the TMVP when he left Sri Lanka and I do not accept he would be now. I note the concerns as to the continuing use of torture in Sri Lanka and other abuse of detainees however I am not satisfied that the applicant has a profile of concern to the authorities or would be imputed as such and I am not satisfied that there is a real chance he would be tortured or experience other harm.

43. At the protection visa interview the applicant referred to his mental depression leading up to the interview, but as already noted there is no clinical information before me indicating he has any ongoing conditions requiring treatment or counselling. The applicant claimed not to have attended work in the week leading up to the interview because of his concerns and depression but there no indication of ongoing inability to work or earn a living and I am not satisfied would face any harm on this basis.
44. The applicant departed Sri Lanka illegally in 2013 and, while he has not made express claims to fear harm on this basis, as a result of his illegal departure he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return.
45. 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. 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.¹⁰
46. 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.¹¹
47. 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

⁹ Tamil Guardian, "Police deployed and two hospitalised as TMVP overruns budget in Batticaloa", 13 December 2020, 20210128102837; Tamil Guardian, "Former TNPf candidate seriously injured by paramilitary sword attack", 11 August 2020, 20210128103818; Tamil Guardian, "Candidates on the verge of withdrawing due to ferocious threats – TNPf", 30 July 2020, 20210128104147

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

¹¹ *ibid*

conditions are imposed on persons who departed illegally on a discretionary basis and may include reporting to police at the returnee's expense.¹²

48. 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.¹³
49. 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 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.
50. 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.
51. 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 on any of the bases claimed, considered individually or cumulatively.

Refugee: conclusion

52. 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

53. 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

54. 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

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

¹³ *ibid*

- 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.

55. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are in turn defined in s.5(1) of the Act.

56. 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.¹⁴ I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm.

57. 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,¹⁵ 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

58. 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.

¹⁴ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

¹⁵ *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.