



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08918

Date and time of decision: 7 April 2021 12:27:00
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 Jaffna District, Northern Province, Sri Lanka. On 10 June 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790.¹ As a Tamil he claims to fear harm from the authorities in Sri Lanka.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 13 December 2016. 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.
3. On 17 August 2017 the IAA affirmed the decision not to grant the applicant a protection visa. On 25 February 2021 the Federal Circuit Court of Australia, by consent, quashed the decision of the IAA and directed the IAA to determine the matter according to law.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The IAA received a statement from the applicant dated 27 January 2017. In this statement the applicant stated why he disagreed with the delegate's decision.
6. In this statement the applicant also advanced a claim that he helped the Liberation Tigers of Tamil Eelam (LTTE) to organise Heroes' Day events from 2002 to 2004. This claim is new information. There is no apparent explanation before me as to why this information was not and could not have been given to the Minister. The applicant was put on notice by the delegate of the limitations of providing further material after a decision had been made. I am not satisfied that this information meets the provisions of s.473DD(b)(i). However this information is credible personal information in that it is capable of being believed and although I have some concerns as to the late advance of this claim it does not run counter to his other claims and is consistent with claims made in his 2013 statement that "under the LTTE they were made to celebrate Martyrs' Day". I accept that this is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. On the same basis I am further satisfied that there are exceptional circumstances to justify the IAA considering the new information.
7. Included with the 2017 statement are two photographs of the applicant's fingers. The applicant advised his hands were damaged in a work injury in 2002 and that in the past the authorities have asked him about the damage when questioning him and accused him of being involved with the LTTE. At the protection visa interview the delegate asked the applicant about his fingers and I am satisfied the damage to the applicant's hand was apparent to the delegate. As such these photographs are not new information.
8. The statement footnotes and cites a media article reporting the Sri Lankan Northern Provincial Council Chief Minister C.V. Wigneswaran cautioned in October 2016 that it was still not safe for those seeking asylum abroad to return or be returned to Sri Lanka. This is new information.

¹ In his decision the delegate recorded the visa application date as 8 October 2015. However the application was lodged by email on 10 June 2016, as noted in the visa application acknowledgement letter.

The Chief Minister's statement and media report pre-date the delegate's decision. I am not satisfied that this is credible personal information, nor am I satisfied it could not have been provided before the delegate's decision was made. Furthermore I note the passage of time since this statement was made in October 2016 and that, as discussed below, I have obtained new information as to the current situation in Sri Lanka and the applicant has also submitted recent country information. I am not satisfied that any exceptional circumstances exist that justify the IAA considering the new information.

9. More than four years have passed since the delegate's decision and I have obtained new information on the current situation in Sri Lanka for Tamils. This information updates the information before the delegate and I consider that there are exceptional circumstances to justify considering this new information.
10. On 22 March 2021 the following reports were provided to the applicant for consideration and comment highlighting potentially adverse information which may form part of my decision:
 - Office of the United Nations High Commissioner for Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020
 - UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020
 - UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020
 - INFORM Human Rights Documentation Centre, "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", 29 June 2020
 - Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 4 November 2019
 - Report of the Office of the High Commissioner for Human Rights, "Promotion reconciliation, accountability and human rights in Sri Lanka", 27 January 2021
11. On 3 and 5 April 2021 the applicant's representative responded with submissions including a statement from the applicant addressing the above information and several country information reports. The information in the reports is general country information and not personal information. The new information provided was in response to a request for comment by the IAA. I am satisfied the information was not and could not have been provided to the delegate before the decision was made. Given the passage of time since the delegate's decision and that the new information addresses the situation in Sri Lanka for Tamils, particularly following the change of government, I am satisfied that there are exceptional circumstances to justify considering the new information in these country reports.
12. The applicant's statement also included new information advising that his parents died in 2019 and 2020 and that he is currently unemployed. I am satisfied this information was not and could not have been provided to the delegate before the decision was made. This is credible personal information and as this in part relates to the applicant's concerns as to his ability to subsist in Sri Lanka I am satisfied that had it been known it may have affected the consideration of the applicant's claims. I am further satisfied that there are exceptional circumstances to justify the IAA considering the new information.
13. In his statement the applicant requested the IAA invite him for an interview to discuss his protection claims. The IAA is a limited form of review. It does not generally conduct interviews

and can only consider new information in exceptional circumstances. I note the applicant opened his statement to the IAA by very specifically stating that he has no new protection claims and there is no explanation before me to explain why an interview was requested, or to specify what further information the applicant wished to provide at an interview that could not be provided in writing. I do not consider the circumstances warrant getting new information by way of an interview.

Applicant's claims for protection

14. The applicant's claims can be summarised as follows:

- The applicant is a Tamil from Jaffna District, Northern Province, Sri Lanka.
- When he was born the area was government controlled, later came under LTTE control and returned to government control in 1995.
- When the area was under LTTE control his family gave money to the LTTE to avoid having a family member recruited by the LTTE. He helped the LTTE organise Heroes' Day events from 2002 to 2004.
- There was a strong military presence in the area during the civil war and he lived near an army base and he was subject to security checks. Tamils in the area were subject to ongoing harassment and abuse and the applicant decided to leave Sri Lanka for his safety.
- The applicant travelled to [Country 1] for work in January 2006 where he remained until September 2009. The applicant left [Country 1] after overstaying his visa. While in [Country 1] he had some problems with the [Country 1] authorities and he sought assistance from the Sri Lankan Embassy in [Country 1].
- During his time in [Country 1] he was involved in Tamil martyr commemorative events and he thinks people gave information to the authorities about his involvement.
- In 2012 the applicant was stopped at a checkpoint and taken to a house where he was threatened by army soldiers and accused of having LTTE links. His mother went to the army camp and intervened and he was released.
- He was detained again by the army about six weeks before he left Sri Lanka. Due to a work injury the applicant has damage to the fingers on his [hand] and he was questioned about this and accused of being involved with the LTTE because of this injury.
- People came to his family home twice in the two weeks before he left Sri Lanka and made enquiries about him; he believes they were from the Criminal Investigation Department (CID) or paramilitaries.
- The applicant departed Sri Lanka in August 2012 by boat and came to Australia.
- The applicant fears he would be harmed should he return to Sri Lanka because he is a young Tamil male from a former LTTE fort area who has been accused of being involved with the LTTE and who had a direct close relationship with the LTTE. He fears the damage to his fingers will cause suspicion that he was injured in an LTTE related bomb blast.
- The applicant also fears harm for reason of his illegal departure in 2012 and that he or his family will not be able to meet any bail payment for his release.
- The applicant cannot obtain the protection of the authorities and his fear extends to all of Sri Lanka. He is concerned at the return of the Rajapaksa family to power in Sri Lanka.

- The applicant's parents died in 2019 and 2020 and he has lost his last support system in Sri Lanka. He is also currently unemployed and will suffer significant economic hardship in Sri Lanka which will threaten his ability to subsist.

Factual findings

15. The applicant has consistently claimed to be a Tamil from the Jaffna District, Sri Lanka. The applicant has provided documents in support of his claimed identity and residence in Jaffna District. I accept the applicant's identity and nationality as stated and that Sri Lanka is the receiving country for the purpose of this review.
16. I accept that at times the area was under LTTE control and that his family gave money to the LTTE to avoid having a family member recruited by the LTTE. I accept that the applicant helped the LTTE organise Heroes' Day events from 2002 to 2004. However I note that at the time he did not come to adverse attention as a result of this matters, despite his area being under government control from 1995.
17. I accept the applicant has visible damage to the fingers on his [hand].
18. I accept the applicant was concerned for his safety during the civil war and travelled to [Country 1] for work in 2006, remaining there until 2009.
19. I accept that while in [Country 1] he was involved in Tamil martyr commemorative events.
20. The applicant claimed that he thinks people gave information to the authorities about his involvement. However, I note he returned to Sri Lanka from [Country 1] in 2009 and did not experience any problems with the Sri Lankan authorities at that time, which indicates that even if the authorities were aware of his activities in [Country 1] he was not considered to be a security concern as a result of these. Nor it is apparent that he experienced any difficulties when he had some contact with the Sri Lankan Embassy in [Country 1] to receive assistance with some issues he had with his status in [Country 1].
21. At the end of the civil war thousands of LTTE members and supporters were detained in rehabilitation camps or prosecuted for security offences. Although the LTTE had been routed at the end of the civil war the government at the time, led by President Mahinda Rajapaksa, was concerned about a resurgence of the LTTE and took a ruthless approach to suppression of any LTTE activities and identifying LTTE supporters.² In the context of the strict security measures in place in 2009 and the reports of stringent monitoring of the Tamil population and questioning of Tamils about any links to the LTTE I consider it implausible that he would not have come to attention if he was of concern, for either his activities in [Country 1] or his LTTE connections in the past. That the applicant did not come to adverse attention and was not questioned at the time of his return in 2009 or when he returned to live in Jaffna District with his family indicates he was not of interest to the authorities.
22. The applicant claimed in 2012 to have been stopped at a checkpoint and taken to a house where he was threatened by army soldiers and accused of having LTTE links and speculated this may have been because people had informed the authorities about his activities in [Country 1]. I find it difficult to accept he would have come to attention for this reason some

² UN High Commissioner for Refugees, (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

three years after his return from [Country 1]. I accept as plausible that he was stopped at a checkpoint in 2012; the north remained highly militarised at this time.³ I also accept as plausible that he was taken to a house where he was asked about any connection to the LTTE and that he was threatened by the soldiers. Such mistreatment of the general Tamil civilian population was part of the general monitoring and security checking of Tamils in place at the time. But that the applicant was released soon after being detained and after his mother visited the army camp indicates that even if the authorities were aware of his activities in [Country 1] or his past activities he was not of an ongoing concern after initial checks were conducted.

23. In the same context it is plausible that the applicant was again questioned by the army about six weeks before he left Sri Lanka and it is also plausible he was asked about the damages to his hand. But as in the earlier incident he was released without charge and allowed to continue living in the community, indicating he was not of a security or other concern. At this time the authorities had emergency powers available to them to detain people for extended periods for questioning on mere suspicion.⁴ That the applicant was not so detained indicates he was not of ongoing concern.
24. I take into account that the applicant was not targeted in these incidents, rather they occurred as a result of him travelling via security checkpoints. Such checking and questioning of Tamils was common at the time and was part of the repressive security environment in place. The indications are that Tamils identified as having LTTE connections or concerns, or identified as being involved in activities of concern, were not released as the applicant was released, but were detained often for extended periods using the emergency powers, or otherwise.
25. Noting my findings above that the applicant was not of an ongoing security concern I am not satisfied that his claim people he believes they were from the CID or paramilitary groups came to the family home twice in the weeks before he left Sri Lanka and made enquiries about him is genuine. I am not satisfied that he had a profile that would have been of interest to the CID or paramilitary groups. Furthermore if he was of interest to the CID or paramilitaries I find it difficult to accept he was able to evade them until he left Sri Lanka by sometimes being at the home of his wife or his mother as he explained at the protection visa interview. Noting that his wife's residential address is in the same village as his mother I find it difficult to accept the CID/paramilitaries did not locate him there if the claim they were looking for him is genuine. I also take into account that in August 2012, when he claims he was of such significant interest the CID/paramilitaries made two visits to the family home, he was able to travel by bus to Colombo passing the security checkpoints in place between the north and Colombo.⁵
26. Overall I accept that as a Tamil the applicant was subject to security checks and was detained on two occasions for several hours as part of these measures. I accept that he was asked about any LTTE connections and his injuries at these times. But I do not accept he was of adverse

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report: Sri Lanka", 16 February 2015, CISEC96CF1164

⁴ US Department of State, "Sri Lanka - Country Reports on Human Rights Practices 2013", 27 February 2014, OG1F18C90164; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁵ International Crisis Group, "Sri Lanka: Tamil politics and the quest for a political solution", 1 November 2012, CIS24515; News of the Transtamils, "Symptoms of returning to war in Sri Lanka as forces set up check points in north", 1 January 2013, CIS25672; US Department of State, "Sri Lanka - Country Reports on Human Rights Practices 2013", 27 February 2014, OG1F18C90164; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

interest to the authorities or paramilitaries, beyond being a Tamil in the north, at the time he left Sri Lanka.

27. I accept the applicant departed Sri Lanka illegally in August 2012.
28. I accept the applicant's parents have died and that he is currently unemployed.

Refugee assessment

29. 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

30. 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.
31. I have not accepted the applicant was of interest to the authorities or paramilitaries in Sri Lanka when he departed in 2012 nor do I accept he would be should he return now, or in the reasonably foreseeable future.
32. I accept that from his past experience living in the highly militarised north he may have a subject fear of experiencing harm but the security situation has improved in Sri Lanka since the applicant's departure, although the military continues to maintain a significant presence in the north. I accept that during the civil war and in the oppressive security environment in place in the aftermath of the civil war under the Mahinda Rajapaksa regime Tamils were subject to harassment and I accept that there is some concern in the general Tamil community at the return to power of past President Mahinda Rajapaksa and the election of his brother as President.⁶ However the improvement in the security situation has resulted in a decrease in

⁶ Internal Displacement Monitoring Centre, "SRI LANKA: Civilians displaced by conflict facing severe humanitarian crisis: A profile of the internal displacement situation", 1 May 2009, CIS17345; US Department of State, "Sri Lanka - Country Reports on Human Rights Practices 2013", 27 February 2014, OG1F18C90164; International Crisis Group, "Sri Lanka: Tamil

Tamils held in detention and the number of incidents of extrajudicial killings and disappearances has significantly decreased since the end of the war. The government has effective control across all of Sri Lanka and armed militia groups are no longer prevalent. Tamils face a low risk of mistreatment on a day-to-day basis and a low risk of torture overall.⁷

33. The Sri Lankan government remains concerned as to the rise of Tamil separatism but the indications are being of Tamil ethnicity in itself would not warrant international protection and that generally a person would not be regarded as a concern unless they have or are perceived to have had a significant role in the LTTE or to have been active in post-conflict Tamil separatism. Since the civil war ended the Sri Lankan government's focus has changed and the government's ongoing objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. 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".⁸ I am not satisfied the country information before me supports the applicant's concerns of an extensive network of Tamil informers watching for people returning home or that the applicant would be detained under the Prevention of Terrorism Act (PTA), or other detention powers.
34. I accept there is credible reporting of the brutality of the government of past President Mahinda Rajapaksa in which human rights abuses were committed both during the civil war and in the immediate aftermath and that many agencies and the general Tamil community have expressed concern as to the return of the Rajapaksas to power. The applicant referred to the current President as an "unforgiving, ruthless man" and in his April 2021 statement the applicant cited incidents of concern under the previous Rajapaksa government. However, the election of the coalition Sirisena government in 2015 saw a significant shift in respect for human rights for Tamils and the general population in Sri Lanka. Although there has been ongoing criticism of the slow pace of reform the change of government in 2015 provided Sri Lanka a chance to break from the repressive policies of the past which largely targeted the Tamil population. I note the concern about the incoming Rajapaksa government in the light of the past but Gotabaya and Mahinda Rajapaksa are returning to government in a very different environment from that in place when they were implicated in human rights violations.⁹ It is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the 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.¹⁰
35. I accept there is concern and disappointment from the Tamil community at return of the Rajapaksas to power and I note Human Rights Watch (HRW) expressed concern at the lack of any prosecutions or progress regarding human rights abuses committed during the civil war.¹¹

politics and the quest for a political solution", 1 November 2012, CIS24515; April 2021 IAA submission: BBC News, "Mahinda Rajapaksa: Sri Lanka's long-time leader back in the seat of power", 21 November 2019

⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

¹⁰ *ibid*

¹¹ April 2021 IAA submission: Human Rights Watch (HRW), "Sri Lanka Seeks Diversion, Not Justice, Over Wartime Abuses", 22 January 2021

Other reports express concern at constitutional amendments which HRW contend will undermine judicial independence and weaken the oversight of human rights institutions.¹²

36. I have noted reports of incidents since the election of the Rajapaksa government. The Office of the United Nations High Commissioner for Human Rights reports monitoring of Tamils following the election of President Gotabaya Rajapaksa but that those of interest are Tamils with certain profiles such as political activists and journalists, particularly those critical of alleged war crimes. Similarly the Human Rights Documentation Centre noted reports of harm to Tamil civilians in May 2020 the victims of which were largely journalists, activists and those involved in politics.¹³ In its recent report “A Return to Threats, Fears”, HRW commented the human rights situation has “seriously deteriorated under the administration of President Gotabaya Rajapaksa”. However the report itself cites intimidation and surveillance of human rights activists, lawyers, journalists and victims of past abuse who have engaged with the Human Rights Council, rather than the Tamil population in general.¹⁴ Similarly HRW recently reported the current government “aggressively attacking efforts to hold officials to account for past grave abuses”.¹⁵ Noting the circumstances and profiles of those who have come to attention in these reports I am not satisfied that they give rise to a real chance the applicant would be harmed should he return to Sri Lanka. The indications from various international agencies are that the Sri Lankan government has moved away from the systematic program which operated after the civil war of targeting of Tamils and identification and detention and rehabilitation of LTTE members.¹⁶
37. The recent report of the Office of the High Commissioner for Human Rights highlights concerns relating to the militarisation of civilian government functions, reversal of constitution safeguards and threats to reconciliation and accountability, and the report particularly noted the appointment to senior posts of former military personnel accused of war crimes. But despite these concerns, and the applicant’s concerns as to the continued use of the PTA, the human rights concerns highlighted in this report relate largely to the Muslim population following the 2019 Easter bombings, journalists and human rights activists.¹⁷
38. I am not satisfied that the information before me indicates that President Rajapaksa or his political supporters or his Sri Lanka Podujana Peramuna party (SLPP), 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 and subsequent success in the 2020 parliamentary elections. I have had regard to the HRW World Reports submitted but I am not satisfied these reports indicate widespread or systemic human rights abuse of Tamils as a result of the incoming government. The report for the year 2020 under the subheading ‘Treatment of Minorities’ focusses on the Muslim population and the only reference to Tamils is in the context of Archaeological Heritage Management which may disadvantage Tamil communities in the east of the country.¹⁸

¹² April 2021 IAA submission: HRW, “Sri Lanka, A Return to Threats, Fears”, 13 January 2021

¹³ Office of the United Nations High Commissioner for Human Rights, “Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka”, 18 February 2020, 20200221140652; INFORM Human Rights Documentation Centre, “Repression of Dissent in Sri Lanka: 1st - 31st May 2020”, 29 June 2020

¹⁴ April 2021 IAA submission: HRW, “Sri Lanka, A Return to Threats, Fears”, 13 January 2021

¹⁵ April 2021 IAA submission: HRW, “Sri Lanka, Justice Under Attack”, 1 February 2021

¹⁶ UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020, 20200527172009

¹⁷ Report of the Office of the High Commissioner for Human Rights, “Promotion reconciliation, accountability and human rights in Sri Lanka”, 27 January 2021, 20210203162131

¹⁸ April 2021 IAA submission: HRW, “World Report, Events of 2018”, HRW, “World Report, Events of 2020”

39. Considered overall I am not satisfied that there is a real chance the applicant would experience harm on the basis of his Tamil ethnicity, being a young Tamil male from the LTTE fort area, for his LTTE association, and actual or imputed political opinion, now or in the reasonably foreseeable future in Sri Lanka.
40. I accept that the applicant departed from Sri Lanka illegally as a passenger on a boat and I accept 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.
41. 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.¹⁹
42. 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.²⁰
43. 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. I note the applicant's concerns as to the ability to meet bail payments but, noting his illegal departure, it is not apparent he would plead not guilty and thereby incur such expense. Furthermore, I note bail requirements are applied on a discretionary basis.²¹
44. 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

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²⁰ *ibid*

²¹ *ibid*

progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.²²

45. 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.
46. 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.
47. The applicant has stated that he has no formal qualifications, is currently unemployed and because of his profile he will be harassed by the authorities and not able to work in Sri Lanka. But I am not satisfied he has a profile that will be of interest to the authorities or that he would be harassed by them and I do not accept he would not be able to work. I accept losing his parents may result in loss of familial support for him but I am not satisfied he will be denied access to services or the ability to subsist. The applicant similarly had no formal qualifications when he returned from [Country 1] in 2009 but this does not appear to have been an impediment to him working in Sri Lanka at that time. I accept that the military operates a number of commercial businesses in the north, and while this may attract criticism from the Tamil community there is no indication that Tamils are denied employment as a result. I do not accept there is a real chance the applicant would experience economic hardship, be denied services, or the capacity to earn a livelihood threatening his capacity to subsist.
48. 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

49. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

50. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

²² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

Real risk of significant harm

51. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
52. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
53. 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.²³ 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.
54. 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,²⁴ 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

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

Decision

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

²³ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²⁴ *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.