



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09374

SRI LANKA
IAA reference: IAA21/09378

SRI LANKA
IAA reference: IAA21/09377

SRI LANKA
IAA reference: IAA21/09375

SRI LANKA
IAA reference: IAA21/09376

Date and time of decision: 29 July 2021 10:28:00
J Bishop, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

Background to the review

Visa application

1. The referred first applicant (the first applicant) claims to be national of Sri Lanka and identifies as a Hindu Tamil. He is now [Age] years old and arrived in Australia [in] May 2013 with his wife, the second referred applicant (the second applicant), and their son, the third referred applicant (the third applicant). On [Date 1] the first and second applicants had another child, the fourth referred applicant (the fourth applicant).
2. On 7 September 2017 the applicants lodged a combined application for Safe Haven Enterprise Visas (SHEVs). Only the first applicant raised claims for protection.
3. On [Date 2] the first and second applicants had another child, the fifth referred applicant (the fifth applicant), and a “change of circumstances form” was lodged at the Department to include the fifth applicant in the combined SHEV application. On 1 November 2018, the Department notified the first applicant that the fifth applicant had been included in the SHEV application. Based on the information before me, I am satisfied all the applicants are fast track applicants.
4. On 15 June 2021 the delegate refused the applicants’ visas. The delegate determined the first and second applicants did not have profiles of adverse interest and did not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Sri Lanka. The delegate found the other applicants did not meet the family unit criterion.

Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
6. Section 473DB of the Act provides that, subject to Part 7AA, the IAA must review decisions by considering the review material without accepting or requesting new information and without interviewing the applicant. New information is defined in s 473DC to mean information that was not before the delegate when the decision was made and the IAA considers may be relevant. Section 473DC also provides that the IAA does not have a duty to get, request or accept any new information, whether the IAA is requested to do so by an applicant, or in any other circumstances. However, I do have a discretion to get (either at interview or in writing) or accept new information. If I accept new information, I must not, pursuant to s.473DD of the Act, consider that new information unless I am satisfied there are exceptional circumstances to justify its consideration. In relation to new information given to the IAA by the applicant I must also be satisfied that it:
 - was not, and could not have been provided before the delegate’s decision was made; or
 - is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant’s claims.
7. On the 14 July 2021 the applicants provided written submissions and new country information to the IAA. The submissions were based on information before the delegate and I have had regard to them.

8. The applicants provided four articles that were published after the delegate made his decision. The article could not have been provided sooner and discuss current events and conditions in Sri Lanka. I am satisfied there are exceptional circumstances to justify their consideration and have had regard to them.
9. The first applicant requested that he and his wife be interviewed by the IAA with their support person [Mr A] ([Leader from Church]). The first applicant submitted the delegate had agreed to allow [Mr A] to attend their SHEV interviews but when they turned up, [Mr A] was not allowed to accompany them into the interview room. The first applicant submitted that he and the second applicant were nervous during the SHEV interview and were not represented by a lawyer. The first applicant submitted he and the second applicant would like to present their case “fairly in the presence of our support person”.
10. On 12 April 2021 there were a series of emails between [Mr A] and the Department about him attending the first and second applicant’s SHEV interviews as a support person. [Mr A] emailed the Department asking if he could attend the applicants’ SHEV interviews and the Department responded that given COVID19 and interview logistics, it was not possible to grant the request. [Mr A] responded to the Department’s email and argued that the first and second applicant’s have a right to have a lawyer, migration agent or support person. He submitted that the first and second applicants do not have a lawyer or migration agent because of their financial situation and, as he has worked with them, he believed it would be detrimental to their case if they did not have the support of a person that was familiar to them and whom they trusted. [Mr A] stated he was aware of the Department’s policy regarding interviews but argued that the applicants having “experienced extensive trauma in the past could affect the quality of the presentation of their case and cause more trauma”. The Department responded that their officers were trained in conducting assessments with people who had suffered trauma and gave [Mr A] options of cafés where he could meet with the applicants near where the interviews were to take place. The Department responded that it would not be appropriate for the Department to discuss the applicants case other than to the applicants or their nominated registered migration agent or lawyer.
11. I do not accept the submission that [Mr A] was told he could attend the SHEV interviews but then had that approval withdrawn on the day. [Mr A] was informed the day before the scheduled SHEV interviews that his request to attend had been denied and I find it implausible that the first and second applicants did not know that. I do not accept the first and second applicants believed [Mr A] had been given approval to attend their SHEV interviews. I find that the first and second applicants knew [Mr A] could not act as their support person before they attended their SHEV interviews.
12. I have listened to the first and second applicants’ SHEV interviews. The first and second applicants were together at the beginning of the SHEV interview and the delegate explained it was their responsibility to raise all their claims and that they may not have another chance to provide further information to support their claims or raise new claims. The delegate discussed with the first and second applicants that [Mr A] had requested to attend the SHEV interviews but that request had been denied. The delegate discussed with the applicants that the request was made in the context of them suffering previous trauma. The delegate explained to the applicants that if at any time during the interviews either of them were having difficulties to let the delegate know and both applicants agreed that they would. Over a period of about 3 and a half hours the applicants were given ample opportunities to put all their claims for protection to the delegate. And, although the applicants did not alert the delegate to experiencing difficulties, the delegate was sensitive to the first applicant at times when he appeared distressed and encouraged him to take sips of water or to take a break. I am not satisfied that

the first and second applicants did not have a fair hearing. The applicants have taken the opportunity to provide written submissions and new country information to the IAA which I have considered in full. Taking into consideration all the information before me, I have decided not to exercise my discretion to invite the first and second applicants to provide further information whether at an interview or otherwise.

Applicants' claims for protection

13. The first applicant claims to fear harm in Sri Lanka because:

- He is a Tamil from the northern province
- His uncle's had LTTE connections
- He left Sri Lanka and would be returning as a failed asylum seeker

Factual findings

14. The first and second applicants provided their Sri Lankan drivers licences and copies of their national identification cards and Sri Lankan birth certificates. I accept the first applicant was born in the northern province of Sri Lanka and the second applicant was born in the eastern province of Sri Lanka. I accept the first and second applicants are who they claim to be and are Sri Lankan citizens.

15. The third applicant's birth certificate indicates he was born in Colombo to the first and second applicants. I accept the third applicant is who he claims to be and was born in Sri Lanka. I accept the third applicant is a Sri Lankan citizen.

16. I find the receiving country for the first, second and third applicants is Sri Lanka.

17. The fourth and fifth applicants were born in Australia. The combined SHEV application indicated that the fourth applicant was stateless. People who are born outside Sri Lanka to at least one Sri Lankan parent, can obtain Sri Lankan citizenship by registering the birth in the prescribed manner with the Sri Lankan authorities. In 2019, the cost of registering a birth through a Sri Lankan diplomatic mission was \$145. If a child is registered after the age of one, a fine is imposed of \$12 each year beyond the first year¹. There is no evidence before me to indicate the fourth and fifth applicants' births have been registered and the SHEV application indicates the fourth applicant is stateless. Based on the evidence before me, I find that the fourth and fifth applicants are stateless.

18. The fourth and fifth applicants do not have a 'former' country of habitual residence and it would be absurd to assess them against Australia as the receiving country. On either of those approaches the fourth and fifth applicants' application for protection could not succeed. The fourth and fifth applicants have not raised claims of their own and the most appropriate, sensible, practical and fair approach² would be to assess their claims against their parents receiving country. I find the receiving country for the fourth and fifth applicants is Sri Lanka.

19. The applicants claim to be Hindu Tamils and I accept those claims.

¹ DFAT Country Information Report Sri Lanka, Department of Foreign Affairs and Trade, 03 November 2019

² SZEAM v MIMIA [2005] FMCA 1367

20. The first applicant's evidence was that he was born and lived in the northern province of Sri Lanka until [Year 1] when he moved to Colombo. He has a sister who continues to live in Sri Lanka but he does not have contact with her. I accept those claims.
21. The second applicant told the delegate she lived in government-controlled areas of the eastern province before moving to Colombo in [Year 2]. Her mother and [sisters] continue to live in Sri Lanka and she remains in contact with them over the telephone. I accept those claims.
22. The evidence before me indicates, and I so find, the third applicant was born and lived in Colombo before leaving Sri Lanka.
23. The first, second and third applicants claim to have left Sri Lanka legally via the airport using genuine passports. I accept that claim.

The applicant being detained in [Year 1]

24. The applicant claims in [Year 1] he was studying for his [High school level] and, on his way home, he was rounded up by the Sri Lankan army (the SLA) and taken to a camp with the applicant's friend. At the camp the applicant and his friend were blindfolded and taken to another camp where they were tortured and beaten. The SLA accused the applicant and his friend of being involved in a bomb blast at the SLA camp one month before. The applicant's friend could not bear the pain of the beatings so he informed the Sri Lankan authorities that the applicant was involved in the bomb blast. The applicant's friend was released and the applicant was taken to a third camp where another bomb blast suspect was being held. That suspect identified the applicant as being a member of the Liberation Tigers of Tamil Eelam (the LTTE). The suspect apologised to the applicant for what he told the SLA but said he needed to blame someone else so he could be released. The applicant told the SLA what the suspect had told him. "As a result" his parents were allowed to visit the camp and speak to the applicant. His parents went to the Gramaa Sevak and arranged a meeting with the Brigadier of the camp. The applicant was released a week later. He had been detained for 45 days. He had been severely beaten, required an immediate operation after his release and has scars on his [body part]. After his operation - about a week after he was released from the camp - he moved to Colombo and lived with his paternal uncle. He started working with his uncle at his [shop].
25. The LTTE lost Jaffna to the Sri Lankan government in 1995 but continued to have a "guerrilla"³ presence after that date. In [Year 1] the Sri Lankan authorities arrested and conducted rounds ups of Tamils under the *Prevention of Terrorism Act 1979* (the PTA) and there were reports of mistreatment in custody. I accept as plausible that a bomb could have exploded in [Year 1] in the Jaffna area.⁴ I accept as plausible that the applicant, as a young Tamil male, could have been rounded up for investigation and that he was mistreated during his detention. However, if the applicant was separately identified as being involved in a bomb blast and a member of the LTTE, I do not accept his parents would have been able to facilitate his release as claimed. I am not satisfied the applicant was ever identified as being involved in a bomb blast and/or as a member of the LTTE. I find that the first applicant was released because he was of no adverse interest to the Sri Lankan authorities.

Uncle's death in [Year 2]

³ 'Sri Lanka's two-decade civil war', Reuters, 25 March 2007

⁴ Source Doc: Return to Jaffna: CIS Info Request LKA 4066. Cable CL 595 of 09/05/97

26. In [Year 2] the first applicant's uncle was shot and killed. The Sri Lankan government's newspaper reported that the LTTE had killed him but "we know"⁵ it was the Sri Lankan authorities. His uncle was a 'very big' businessman and 'very involved' with the LTTE. He had supported the LTTE by providing transport and financial assistance. His uncle had a number of shops and the applicant was working in one of them. However, during the first applicant's enhanced screening interview conducted on 11 May 2013, he said his uncle was forced to help the LTTE and leased [vehicles] to them. And, during the first applicant's SHEV interview, he said he was cautioned not to leave Sri Lanka after his uncle was killed.
27. I accept the first applicant's uncle was killed in [Year 2] and that he had some involvement with the LTTE. However, based on the evidence before me, I am not satisfied the first applicant's uncle was very involved with the LTTE or that he was killed by the Sri Lankan authorities as claimed. Nor am I satisfied the first applicant was cautioned not to leave Sri Lanka after his uncle's death.

First applicant being harassed after his uncle's death

28. After the first applicant's uncle was killed the first applicant bought one of his uncle's shops and began running it as his own business. The Sri Lankan police (SLP) asked the first applicant to come into the station for questioning and he attended at least three or four times over a period of three months. He was asked about his uncle's death, whether he knew who had killed his uncle, whether he knew anything and whether he was involved with the LTTE. The SLP continually came to the first applicant's shop asking for money and asking for services without paying for them. The first applicant claimed he was having problems with the SLA because he was from another area of Sri Lanka, because he was Tamil and because of his uncle's death. He was asked if he was a member or supporter of the LTTE. He was accused of helping the LTTE because the first applicant worked for his uncle.
29. During the first applicant's SHEV interview, he said the Criminal Investigation Department (the CID) harassed him after his uncle died. The CID would call him for questioning and come to his shop asking for money. When the delegate asked when the last time he had contact with the CID before he was kidnapped, he responded in 2011 when he was taken for questioning.
30. In 2003 it was reported that Tamils fleeing persecution found a safe haven in Sri Lankan government-controlled areas and there were large numbers of Tamils in Colombo. To prevent the infiltration of the LTTE into Colombo, the Sri Lankan authorities would arrest thousands of Tamils and have numerous checkpoints. However, in December 2001 those checkpoints had been removed and in 2002 there were no reports of arbitrary or large-scale arrests or detention of Tamils.⁶ However, Tamils who criticised the Sri Lankan government were subjected to surveillance by the CID in Colombo.⁷
31. It is plausible that the Sri Lankan authorities would go to the first applicant's shop and expect free goods, services and/or money. And, I am prepared to accept the first applicant was questioned from time to time as a Tamil from the northern province living in a Sinhalese area. However, I am not satisfied the first applicant was ever taken in for questioning or was of adverse interest to the Sri Lankan authorities because of his uncle and/or for any other reason. Nor am I satisfied that the second applicant would be of any adverse interest to the Sri Lankan authorities because she is Tamil who is married to the first applicant.

⁵ First applicant's written statement

⁶ Sri Lanka - Country Reports on Human Rights Practices 2003', US Department of State, 25 February 2004

⁷ Swiss Refugee Council, Sri Lanka: Current Situation Update, 15 November 2012

The first applicant's abduction

32. On [Date 1] March 2013 the first applicant closed his shop about 10pm. When he stepped onto the footpath someone put a gun into his back and asked him to get into a car. The first applicant "knows"⁸ it was the CID. There were three or four people in the car. The first applicant was blindfolded and had his hands tied behind his back. The car drove for about 20 minutes before the first applicant got out and was seated in a chair. He didn't know if he was outside or inside. He was slapped around the face and told to pay 10,000,000 rupees (around \$100,000 AUS). The first applicant said he didn't have that much money and they said he did as he was giving money to the LTTE and he should give the money to them. They called the first applicant's wife (the second applicant) and put the telephone to the first applicant's ear. The first applicant was forced to sit on the chair blindfolded with his hands tied behind his back until the following night. When they received the money the first applicant was driven home and his hands untied. He remained blindfolded and was pushed out of the car. He removed his blindfold and walked home.
33. The first applicant said he immediately made arrangements to leave Sri Lanka and left on [Date 2] March 2013. The first applicant, his wife (the second applicant) and child (the third applicant) left Sri Lanka and flew to [Country]. They left legally through the airport on their own passports. They had obtained their passports using a one-day service.
34. The first applicant repeated his claim of being kidnapped, his wife paying a ransom and them leaving Sri Lanka soon after during his SHEV interview. The delegate asked the first applicant who kidnaped him and he responded people involved with the Sri Lankan government because only those people carry weapons with them. The delegate put to the first applicant that criminals also carry weapons and he responded that he had been persecuted by the CID before. In submissions to the IAA, the first applicant said wealthy Tamil couldn't be abducted in Colombo without the involvement of the Sri Lankan government.
35. The second applicant repeated the claim that her husband was kidnapped [Date 1] March 2013 and she paid 50 Lakhs for his release during here SHEV interview. She and the first applicant decided it was not safe to live in Sir Lanka because the CID had guns. The delegate put to the second applicant that criminals have guns and asked what it was about the abductors that indicated they weren't criminals. The second applicant responded the CID targets Tamil businessman.
36. Sri Lankan security forces and/or paramilitary groups were reported to undertake 'many' kidnappings in the northern province and in Colombo in 2012/2013. Kidnapping victims included political opponents, active members of the civil society, human rights activists, LTTE sympathisers or ex-LTTE members. Victims were also kidnapped for ransom and rich shop owners were frequent targets.⁹
37. I was not satisfied the first applicant was ever of adverse interest to the Sri Lankan authorities - over and above being a Tamil male from the northern province during and soon after the war - because of his uncle and/or for any other reason. And, I have doubts that the applicants would have been able to leave Sri Lanka as claimed within four days of the first applicant's release. However, even if I accept the first applicant was abducted and the second applicant had to pay a ransom for his release, I am not satisfied the first applicant was abducted because he was of adverse interest to the Sri Lankan authorities. I accept that if the first applicant was abducted

⁸ First applicant's written statement

⁹ 'Sri Lanka: Current situation update', Swiss Refugee Council, Adrian Schuster, 01 November 2012; 'Sri Lanka - Country Reports on Human Rights Practices 2013', US Department of State, 27 February 2014

the Sri Lankan authorities and/or armed Tamil groups aligned with the Sri Lankan government could have been involved. The second applicant told the delegate that they were wealthy in Sri Lanka and, based on all the information before me, I find this was the most likely reason for his abduction. DFAT reports that extortion and kidnapping still occur in Sri Lanka but have reduced significantly. And, where extortion and kidnapping does occur the motive is usually business-related. DFAT assesses that wealthy Sri Lankans - including wealthy Sinhalese - face a low risk of extortion or kidnapping for ransom.¹⁰ I accept that if the applicants returned to Sri Lanka, and the first applicant returned to his profession of being a successful businessman, he would face a low risk of extortion and kidnapping.

What would happen if the applicants returned to Sri Lanka

38. During the SHEV interview the delegate asked the first applicant why he couldn't return to Sri Lanka and he responded that he had been tortured in [Year 1] and he will be killed. Even if he was dead he would not return to Sri Lanka. The delegate put to the applicant that the Sri Lankan government issued him with a genuine passport in 2013 and allowed him to depart Sri Lanka legally via the airport. The delegate put to the first applicant that indicated the Sri Lankan government didn't have an adverse interest in him. The first applicant said that if he had stayed in Sri Lanka he would have had problems. The delegate put to the applicant that he was trying to understand why the Sri Lankan government wouldn't have a problem with him officially but would target him unofficially. The first applicant responded that if his uncle had left Sri Lanka before he was shot and killed he would still be alive. This happened to his uncle and this would happen to him. The delegate put to the first applicant that his uncle was shot during the war and the war ended 12 years ago and the first applicant responded that last Friday a Mayor was arrested on suspicion under the PTA. The first applicant said that if 'it' can happen to a lawyer Mayor imagine what could happen to an ordinary citizen. In support of this claim, the applicants provided a newspaper article dated 16 April 2021 and its translation. The article stated the organisation "Freedom Hunters for Tamils" protested in front of the Sri Lankan embassy in Britain condemning the arrest of the Mayor of Jaffna and the arrests and violations of human rights against the Tamil people by the Sri Lankan government. The executive president of the organisation said the Rajapaksa regime had initiated atrocities and violence against the Tamils as it did in the period before 2009. The applicants provided another article that stated the Mayor was arrested to increase the government's votes in the upcoming election. That article stated the Sri Lankan government is repressing Tamils and using the PTA.
39. Unlike the first applicant, the Mayor of Jaffna is in a political position in the northern province of Sri Lanka. DFAT reports that Tamils continue to be monitored in the north and east of Sri Lanka particularly those associated with politically-sensitive issues.¹¹ And, when someone is arrested under the PTA the Sri Lankan authorities must now inform the Human Rights Commission and the person is detain in normal prisons.¹² I accept the Mayor of Jaffna was arrested in April 2021 under the PTA. But I do not accept that the Mayor's arrest supports the first applicant's claim that he will be killed if he returned to Sri Lanka. I am not satisfied the first applicant will be killed if he returned to Sri Lanka.
40. The delegate put to the first applicant that he was trying to understand why a Tamil businessman who had lived most of his life in Sri Lankan government-controlled areas and left Sri Lanka legally would have any problems if he returned to Sri Lanka. The first applicant said

¹⁰ DFAT Country Information Report Sri Lanka, Department of Foreign Affairs and Trade, 03 November 2019

¹¹ Ibid

¹² Report of a Home Office fact-finding mission to Sri Lanka, UK Home Office, 20 January 2020

people who have returned to Sri Lanka from Germany are still in detention. He said this will happen to him. He said the current Sri Lankan government will create problems for Tamils and people are still disappearing but those events are not published. In support of the first applicant's claims, the applicants provided a newspaper article that stated 24 Tamils deported from Germany and Switzerland had been handed over to the SLA at the airport. The article stated that as soon as their isolation process was complete the Tamils would be handed over to the CID and the national investigation division. As outlined in detail below, when a person returns to Sri Lanka after being deported (most likely on temporary travel documents) a number of Sri Lankan authorities undertake various investigations before that person is allowed to leave the airport. The newspaper article appears to indicate that the people deported back to Sri Lanka were in quarantine and, once quarantine had been completed, they would be handed over for those standard processes to be undertaken. Based on the evidence before me, I am not satisfied the first applicant will be detained if he returned to Sri Lanka. However, I accept the applicants may be required to quarantine and undergo the administrative processes as outlined below.

41. The delegate asked the second applicant what would happen if they returned to Sri Lanka and she responded that they have nowhere to go and Tamils are treated badly. She said the Sri Lankan authorities will find out her husband (the first applicant) has returned and he will be taken and killed. She is 100% sure he will be killed. The delegate put to the second applicant that it sounded like the first applicant was targeted because he was a businessman and asked why the first applicant would be a target now. The second applicant responded that the first applicant had been harassed and the people who abducted him told him that they could prove he was with the LTTE. The delegate put to the second applicant that the Sri Lankan authorities issued them with passports and allowed them to leave Sri Lanka legally. That indicated they were not of any adverse interest to the Sri Lankan authorities at that time. The delegate asked the second applicant why they would be of adverse interest to the Sri Lankan authorities now. The second applicant said getting a passport was not a 'big deal' and you could pay a bribe. She said 'those people' would not know if a person was involved with the LTTE.
42. I find it implausible that if the first applicant was told by his abductors that they could prove he was with the LTTE that he would fail to mention that detail in his written or oral evidence. I do not accept the claim. The first applicant didn't mention paying a bribe to exit Sri Lanka in his written statement or during his SHEV interview and the second applicant didn't explicitly state that they had paid a bribe. However, during interviews with the Department on 25 April 2013 the first applicant claimed that he did pay a bribe to leave Sri Lanka via the airport. If the applicants had to pay a bribe at the airport I find it implausible that the first applicant would fail to mention that detail in his written claims and/or during his SHEV interview. Based on all the evidence before me, I am not satisfied the applicants had to pay a bribe to exit Sri Lanka.
43. The second applicant continues to have her mother and [sisters] living in Sri Lanka whom she remains in contact with. I am not satisfied the applicants would have no where to go if they returned to Sri Lanka. The first applicant has not claimed he cannot work and I am not satisfied the first applicant would be unable to secure work if he returned to Sri Lanka.

Refugee assessment

44. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.] 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

45. 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.

46. The first applicant raised during his SHEV interview that the current Sri Lankan government is the same government that caused all the problems for Tamils. In November 2019 Gotabaya Rajapaksa - who was the defence chief during the civil war - was elected President of Sri Lanka and his brother Mahinda Rajapaksa - who was the former President from 2005 to 2015 - is now the current Prime Minister of Sri Lanka.¹³ Since the November 2019 election, there are reports of increased monitoring, surveillance, intimidation and harassment of Tamils in day-to-day life by security forces in the north and east of Sri Lanka and some reports of assaults and arrests of Tamil civilians.¹⁴

47. In submissions to the IAA, the applicants provided recent articles about the current Sri Lankan government. One article stated that the current President of Sri Lanka joined a list of 37 political leaders who have suppressed press freedom and are considered “Press Freedom Predators.”¹⁵ The article stated that under the Rajapaksa government it was too dangerous to report on sensitive issues such as the plight of Tamils or Muslims. It stated that Rajapaksa acquired the moniker ‘Terminator’ when he served as Defence Minister of Sri Lanka and oversaw the death squad known as the white van commando. The vehicles were used to kidnap and torture journalists. And, much of the Sri Lankan press are now censoring themselves. Another article stated that a mass murderer and drug kingpin KD who had been sentenced to death was released from prison and unconditionally sent home. KD’s comrades have vowed to take revenge. The article outlines that those involved with KD’s conviction and death sentence were at serious risk of harm and questioned whether the Sri Lankan

¹³ United Kingdom: Home Office, Country Policy and Information Note - Sri Lanka: Tamil separatism, May 2020, v 6.0

¹⁴ See for example Report of a Home Office fact-finding mission to Sri Lanka, UK Home Office, 20 January 2020; Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, OHCHR, 18 February 2020; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, United Nations Human Rights Council, 05 May 2020

¹⁵ From Terminator to Predator: Gota Enters Worldwide Ranking of ‘Press Freedom Predators’, Colombo Telegraph, 6 July 2021

government was involved in the threats.¹⁶ The pardoning of KD undermined the rule of law and the Office of the UN High Commission for Human Rights (OHCHR) has condemned KD's pardon. The OHCHR stated that his pardon was another example of arbitrary and selective granting of pardons that weaken the rule of law and undermine accountability. Sri Lanka was said to be on an "alarming path" towards the recurrence of grave human rights violations and continually denied minorities concerns.¹⁷ However, the article also stated Rajapaksa pardoned 16 LTTE suspects. Another article stated there were reports of the CID barging into a civil society activist's house and taking him away. The article questioned whether there will be a return to the white van abductions of the first Rajapaksa era.¹⁸ And, on 25 February 2021 the Sri Lankan government blacklisted seven Tamil organisations operating overseas under the charge of terrorism related activities and funding terrorism.¹⁹ The articles provided by the applicants to the IAA are consistent with information in the DFAT report that Tamils who held leadership positions in Tamil diaspora groups, those who held a high profile role with the LTTE, or were suspected of raising funds for the LTTE or held views perceived as presenting a risk to the unitary Sri Lankan state or the Sri Lankan government would be of adverse interest to the Sri Lankan government.²⁰

48. I accept Tamils throughout Sri Lanka, but in particular young to middled aged Tamil men in the north and east, were frequently harassed by the Sri Lankan security forces and/or paramilitary groups under the previous Rajapaksa regime during and soon after the war.²¹ I accept there are recent reports of Tamils being physically attacked and/or arrested in Sri Lanka. But Tamils are not specifically targeted on the sole basis of their ethnicity.²² I have found the first applicant was a Hindu Tamil from the northern province. However, the first applicant lived in Colombo since [Year 1] and I did not accept he - or his wife - had an adverse profile with the Sri Lankan authorities when he left Sri Lanka. And there is no information before me to indicate that the first or second applicants would have an adverse profile with the Sri Lankan authorities now. I am not satisfied the first or second applicants would face a real chance of serious harm by the Sri Lankan authorities or anyone else in Sri Lanka because of any actual and/or imputed political opinion. Nor am I satisfied the applicants would face a real chance of serious harm by the Sri Lankan authorities or anyone else in Sri Lanka because of the return of the Rajapaksa government.
49. I accept the applicants could face a low risk of official or societal discrimination because they are Tamils.²³ There is no information before me to indicate the fourth and fifth applicants would be denied access to essential services (like education and health) in Sri Lanka because of their stateless status. And, the first and second applicants have access to documentations which would enable them to register their births to become Sri Lankan citizens if they wished to do so.
50. I accept the applicants could be identified by the Sri Lankan authorities as returning asylum seekers on their return to Sri Lanka. Involuntary returnees like the applicants, upon their return to Sri Lanka, are processed by agencies including the Department of Immigration and

¹⁶ Judges, lawyers, detectives, danger...!Danger...!!Danger...!! Death threats following Kudu Duminda's release by his underworld disciples who grew up in freedom, chadrapradeep, 30 June 2021, LankaeNews

¹⁷ Sri Lanka teeters on the brink of anarchy, Asanga Abeyagoonasekera, 30 June 2021, Gulf Today

¹⁸ Go Not Meekly Into the Rajapaksa Night, 27 June 2021, Groundviews

¹⁹ Applicants' post SHEV interview submission

²⁰ DFAT Country Information Report Sri Lanka, Department of Foreign Affairs and Trade, 03 November 2019

²¹ 'Sri Lanka - Country Reports on Human Rights Practices 2013', US Department of State, 27 February 2014

²² See for example: 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', INFORM Human Rights Documentation Centre, 29 June 2020; 'Report of a Home Office fact-finding mission to Sri Lanka', UK Home Office, 20 January 2020

²³ DFAT Country Information Report Sri Lanka, Department of Foreign Affairs and Trade, 03 November 2019; United Kingdom: Home Office, Country Policy and Information Note - Sri Lanka: Tamil separatism, May 2020, v 6.0

Emigration, the State Intelligence Service, the CID and, at times the Terrorism Investigation Department, who will undertake checks of returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Processing can take several hours and returnees are processed as a group. All individuals are required to remain until all returnees are processed.²⁴ For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, determine if a person is trying to conceal their identity due to a criminal or terrorist background or if a person is attempting to avoid court orders or arrest warrants. This will sometimes involve interviewing the returning passenger and contacting his claimed home suburb or town.²⁵ All returnees are subjected to this standard procedure, which does not involve mistreatment, regardless of ethnicity or religion. The evidence before me is the applicants have never been convicted of a crime or been involved with terrorism. I am not satisfied the applicants would be perceived to have been involved in any terrorist, criminal or anti Sri Lankan government activities upon their return to Sri Lanka.²⁶ I am not satisfied the applicants would face any harm from being subjected to this standard procedure.

51. I accept the applicants have not resided in Sri Lanka since 2013 and the fourth and fifth applicants have never lived there. DFAT assesses that refugees and returnees may face re-integration issues in relation to employment and accommodation and states that some refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities, and that continued surveillance of returnees - when it occurs - can contribute to a sense of mistrust.²⁷ The second applicant continues to have relatives living in Sri Lanka who she remains in contact with. I am not satisfied the applicants would be unable to access housing and the first or second applicants would be unable to access employment on their return to Sri Lanka if they wished to do so. And, if the first applicant returned to his previous profession of being a successful and wealthy businessmen, I find the chances of him being kidnapped for ransom remote. I am not satisfied there is a real chance the first applicant would be kidnapped for ransom if he became a successful and wealthy businessman on his return to Sri Lanka.
52. I accept the applicants may face some social/official stigma and/or discrimination on their return as Tamil returnees and failed asylum seekers. However, given the first and second applicants' profiles and findings as outlined in detail above, and the third, fourth and fifth applicants' profiles as Hindu Tamils, I am not satisfied any of the applicants would be subjected to monitoring. Nor am I satisfied that any social/official stigma and/or discrimination amounts to significant ill treatment or any other types of harm that may be regarded as serious harm.
53. Having considered the applicants circumstances and profiles as a whole, in the context of the country conditions in Sri Lanka, I am not satisfied the applicants faces a real chance of persecution now or in the reasonably foreseeable future for any of the claimed reasons. The applicants do not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

54. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

²⁴ DFAT Country Information Report Sri Lanka, Department of Foreign Affairs and Trade, 03 November 2019

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

Complementary protection assessment

55. Under s.36(2)(aa) of the Act, 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

56. 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.

57. 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.

58. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

59. I accepted the applicants would be subjected to the standard procedures as returning failed asylum seekers as outlined above. I accepted the applicants may be subjected to some official/social discrimination and/or stigma. However, I am not satisfied that being subjected to a series of administrative processes and/or social/official and/or discrimination/stigma would amount singularly or cumulatively, to significant harm within the meaning of s.5(1) and s.36(2A) upon their return to Sri Lanka now or in the foreseeable future.

60. As outlined in detail above, I was not satisfied the first applicant faced a real chance of harm for his other claimed reasons now or in the reasonably foreseeable future in Sri Lanka, considering his profile and history, if he is returned to Sri Lanka. As 'real chance' and 'real risk' involve the same standard,²⁸ it follows that I am also not satisfied that the first applicant will face a real risk of significant harm if he is returned to Sri Lanka now or in the foreseeable future for any of those claimed reasons.

²⁸ *MIAC v SZQRB* (2013) 210 FCR 505

61. Having considered the applicants circumstances individually and cumulatively, I am not satisfied that they faces a real risk of significant harm if they returned to Sri Lanka now or in the foreseeable future for any of the claimed reasons.

Complementary protection: conclusion

62. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

Member of same family unit

63. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a spouse and a dependent child of the family head.

64. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that the applicants also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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.