



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09730

SRI LANKA
IAA reference: IAA21/09731

Date and time of decision: 21 October 2021 14:27:00
S MacKenzie, Reviewer

Decision

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

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 applicants (the applicants) are a family unit consisting of father (the applicant; IAA21/09730) and son (child applicant; IAA21/09731). The applicants arrived in Australia [in] October 2012 as unauthorised maritime arrivals and were accompanied by the applicant's daughter [Ms A]. In April 2017, the applicants lodged a valid combined application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visas on 20 August 2021, on the basis that the applicants did not face a real chance of serious harm or a real risk of significant harm in Sri Lanka.
3. The information before me indicates that [Ms A] lodged a separate SHEV application and has subsequently been granted a protection visa.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 14 September 2021, the IAA received an email from a lawyer on the applicants' behalf. Attached to the email is a written submission from the lawyer (IAA submission) and a written statement from the applicant (IAA statement). The applicant states that he also provides the statement on behalf of his son (the child applicant). On 11 October 2021, the IAA contacted the applicants and confirmed that they consented to the IAA submission and IAA statement being provided in support of the review.
6. The IAA submission and/or IAA statement refers to information not before the Minister. Firstly, that [Ms A] has been granted a protection visa in Australia for reason of her sexuality and this will cause problems for the applicants if they return to Sri Lanka. Secondly, the applicants fear harm from a man in Sri Lanka who has connections with the authorities. Thirdly, the applicant is suffering from anxiety and mental stress. It is new information.
7. In respect of the new information about [Ms A], it is not clear whether the grant of the protection visa relates to events that pre-date or post-date the delegate's decision. On the evidence, I am not satisfied the applicants could not have provided this information prior to the delegate's decision of 20 August 2021. [Ms A's] written SHEV application forms part of the review material and having regard to her protection claims I am satisfied the new information about the visa grant is personal information that, on its face, is capable of being believed. I am also satisfied that it is information that was not previously known and, had it been known, may have affected the consideration of the applicants' claims. The applicant's evidence in his protection visa interview on 7 July 2021 (SHEV interview) was that he feared harm in Sri Lanka for reason of his daughter's sexuality and I consider the information that she has been granted protection in Australia on this basis may be relevant to the issues for consideration. I am satisfied that there are exceptional circumstances to justify considering this new information.
8. In the IAA submission, it is submitted that the man who pursued [Ms A] in Sri Lanka and who the applicants fear 'has connections with the authorities'. This differs significantly from the applicant's evidence in his written SHEV application and in the SHEV interview that he didn't know anything about the man, including his name and occupation. While the applicant

speculated throughout the SHEV process that the man (or his family) may have had a connection with a paramilitary group, the police, or another arm of the Sri Lankan authorities, his consistent evidence indicated that he did not know whether he did in fact have such a connection. As noted below, the IAA wrote to the applicant on 11 October 2021 seeking his comments about this apparent discrepancy. However, no response was received. On the evidence, I am not satisfied the applicants could not have provided this information prior to the delegate's decision of 20 August 2021. Nor am I satisfied the information is credible. I consider if the applicant knew the man had a connection with the Sri Lankan authorities that he would have stated as such in his written SHEV application or advised the delegate in the SHEV interview when these matters were being discussed. I note at one point in the SHEV interview the applicant speculated that it may have been the man's family who had a connection to a paramilitary group, admitting "we don't know these things". I am not satisfied that there are exceptional circumstances to justify considering this new information. I have considered the applicant's consistent evidence throughout the SHEV process, and reiterated in his IAA statement, that he suspects the man had a government or paramilitary connection.

9. While the applicant claimed in his SHEV interview that he was suffering from several physical health conditions, he gave no indication in his evidence before the Minister that he was suffering from any psychological conditions. The applicant's reference in his IAA statement to suffering from 'anxiety' and/or 'mental stress' indicates a new health diagnosis not previously revealed. The applicant does not indicate when (or if) he was diagnosed with this condition/s and it appears to differ from his recent evidence that his health conditions were physical in nature. On the evidence, I am not satisfied this information could not have been provided to the Minister before the delegate made his decision. While I accept the applicant may generally be worried about the visa process and the wellbeing of his family, I am not satisfied the information that indicates he is suffering from a diagnosed psychological condition is credible. I am not satisfied exceptional circumstances exist to justify considering this new information.

10. I have obtained the following information not before the Minister (new information):

- a. Country information primarily about the treatment of Sri Lankans of Tamil ethnicity and citizens who have sought asylum abroad¹
- b. Country information about healthcare in Sri Lanka²
- c. Telephone number search from Sri Lankan online telephone directory SLT Rainbow Pages³
- d. News report from The Daily FT⁴

11. The new country information (**a – b**) is from credible and authoritative sources relevant to the issues for determination. The applicant has given some indication that he fears harm in Sri Lanka on account of his Tamil ethnicity and status as a failed asylum seeker, and I note the applicant suffers from a number of health conditions. I am satisfied that there are exceptional circumstances to justify considering this new country information.

¹ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

² UK Home Office, "Country Policy and Information Note Sri Lanka: Medical treatment and healthcare", July 2020, 20200806140038

³ [Details deleted.]

⁴ [Details deleted.]

12. In the SHEV interview, the applicant advised the delegate that his wife in Sri Lanka lodged a complaint or statement with the “Human Rights Commission” in Sri Lanka. The information was provided to corroborate a claim that his family had faced harassment in Sri Lanka. He also advised that the Human Rights Commission had sent him a letter in relation to that complaint/statement but that he had since authorised the letter to be destroyed on the advice of a lawyer in Australia. The applicant indicated to the delegate that if he could now provide the letter he would, but that he was unable to since it had been destroyed. The review material indicates that the delegate had before him a letter from The Human Rights Organization of Sri Lanka which was provided in support of [Ms A’s] SHEV application, which I infer to be the same letter that the applicant referred to in his SHEV interview. The new information (c – d) indicates that the telephone number printed on the letterhead does not belong to The Human Rights Organization of Sri Lanka. The new information also indicates that the contact person recorded on the letterhead was involved in visa fraud and subject to a disciplinary inquiry by [Department 1]. This information indicates that the letter may not be genuine or reliable evidence of the applicant’s claim that his wife contacted such a human rights organisation. I am satisfied that there are exceptional circumstances to justify considering this new information.
13. On 11 October 2021, I provided the applicant a copy of the new information (a - d) and invited his response (invitation to comment). I outlined my concerns in respect of the letter from The Human Rights Organization of Sri Lanka and concerns about his evidence in respect of the identity of the man who he claimed pursued him in Sri Lanka. I also raised a concern about information before me that indicated his family members were intending to travel abroad prior to the events that he said motivated him and two of his children to leave Sri Lanka. Further, I invited the applicant to provide to the IAA a copy of a police report relating to a complaint that he said his family had lodged in Sri Lanka. Also on 11 October 2021, I provided the child applicant a copy of new information (a) and invited his response (invitation to comment).
14. As outlined in the invitations to comment sent on 11 October 2021, the applicants were advised that if the IAA did not receive a response by 18 October 2021 it may make a decision on the review without taking any further action to get the information. Three days have now passed since the deadline to respond and there has been no response or contact by either of the applicants to indicate that a response will be provided in the foreseeable future. In all the circumstances, I consider it is reasonable to proceed to make a decision without waiting further time for the applicants to respond.
15. I note the applicant’s request in his IAA statement that he wishes to ‘explain’ the statement in person to the reviewer prior to a decision being made. The applicant has not explained why he needs to appear in person to explain his written statement or why appearing in person is the preferable manner in which he can provide the information he wants to provide. I am mindful that the IAA does not hold ‘hearings’ and that Part 7AA of the Act provides for a limited form of review on the papers. In all the circumstances, I am satisfied the applicant has had ample opportunity to present his case and I have decided not to invite him to appear before the IAA to explain his statement.

Applicants’ claims for protection

16. The applicant has his own protection claims, while the child applicant claims protection as a member of the family unit.
17. The applicant’s claims can be summarised as follows:

- He is a Tamil from the Northern Province;
- In October 2012, he confronted a young man who was harassing his daughter ([Ms A]);
- That evening, an armed group came to his home and harassed his family;
- The applicant heard there was a boat going to Australia and he took that opportunity to flee Sri Lanka;
- Accompanied by [Ms A] and the child applicant, he departed Sri Lanka within about 48 hours of the confrontation with the young man;
- In around September 2013, an armed group came to his house in Sri Lanka looking for him and [Ms A];
- In September 2016, a man went to his house in Sri Lanka asking for information about his family;
- If returned to Sri Lanka, the applicant primarily fears harm in connection with past events in Sri Lanka. In particular, from the young man who he suspects may have a connection with a paramilitary group, the police, or another arm of the Sri Lankan authorities;
- He also fears harm on account of his daughter's sexuality, particularly now she has been granted protection in Australia;
- He fears harm in Sri Lanka on account of his Tamil ethnicity and status as a failed asylum seeker.

Refugee assessment

18. 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

19. 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.

Identity

20. Since their arrival in Australia, the applicants have consistently claimed to be Tamils from the Northern Province of Sri Lanka. They have provided some evidence of their identity including copies of their birth certificates.
21. Accompanying his SHEV application, the applicant provided a written statement dated 28 March 2017 (SHEV statement). In his SHEV statement, he explained that he grew up in [Village 1] and then [Village 2]. He referred to his 'boat interview' (which I infer to be the Irregular Maritime Arrival Entry Interview conducted on 16 January 2013, or entry interview) and said it was incorrectly recorded that he lived in '[Village 2] [Village 1]', which are two different places. I accept this explanation and clarification.
22. On all the evidence, I accept the applicants' identities are as claimed, that they are nationals of Sri Lanka, and that Sri Lanka is their receiving country.

Events in Sri Lanka

23. The applicant's written claims and evidence about events in Sri Lanka was initially set out in his SHEV statement. He claimed that his daughter ([Ms A]) was being harassed on the way to school by a young man who wished to marry her. One day, the applicant decided to confront the young man and an argument ensued. The applicant hit the young man. In response, the young man threatened to kill the applicant and [Ms A]. That evening, an armed group went to the applicant's home when neither he nor his daughter were there. The group threatened and harassed his wife and family. The applicant believes one of the men that came to his home was the young man he had hit earlier that day. They told the applicant's wife they would kill her husband or [Ms A]. Following this, the armed group hid outside the house waiting for the applicant to return. His wife contacted him to warn it was not safe to return home. Due to fear, neither the applicant nor his daughter returned home that night and stayed with a friend. The applicant heard from friends there was a boat going to Australia so he used that opportunity to flee Sri Lanka. The following day, he entered his home via the back fence and collected his son (the child applicant). His son was very adamant he should come to Australia, and the applicant knew he wouldn't want to remain in Sri Lanka without him because they have a close relationship. The applicant and his two children left the country by (illegal) boat. His wife and other children decided to remain in Sri Lanka.
24. The applicant also stated in his SHEV statement that although he didn't know who they were affiliated with, he suspected the armed group had a connection with the police or Sri Lankan authorities and it was for this reason he was too scared to tell the police about the incident. He stated that because the group had guns it indicated they had some connection with the authorities. The applicant also stated that after he left Sri Lanka his family relocated and later faced harassment. He said that his family went to stay in [a named town] for about two to three months before returning home. His wife has told him that in about September 2013 an armed group came in a white van to his home, searched the home, and asked about his and his daughter's whereabouts. One of the men indicated he was the one who had been previously hit by the applicant. His wife also told him that his [other child] started being stopped by men asking about the applicant's whereabouts. It last happened in 2014. He also claimed that in September 2016 a man, claiming to be a relative, went to his home asking for information about his family. His wife called him while the man was in the house and he eventually left. The applicant suspects the man may be connected to the armed group.

25. The applicant also mentioned in his SHEV statement that he has twice sought to return to Sri Lanka. He said in around November 2012 he signed up for voluntary removal. He said that he did not explain to officials at that time he was worried that his wife and children were being threatened by the armed group and he wanted to protect them. He was urged by his family to remain in Australia. The applicant stated that he again sought to return to Sri Lanka in September 2013 after his wife was harassed. However, he was again convinced by his family to remain in Australia.
26. The applicant gave oral evidence to the delegate about events in Sri Lanka in the SHEV interview (by videoconference). I have listened to the audio recording of that interview.
27. Since his arrival in Australia, the applicant has consistently claimed that he and his family came to the adverse attention of armed persons following the harassment of his daughter and the altercation with the young man. However, I found aspects of his evidence about events in Sri Lanka unconvincing.
28. In the SHEV interview, the applicant said that the incident involving the young man, who he believed was Tamil, and the armed group coming to his house, happened on [a specified date in] October 2012. He feared that the man was associated with one of the paramilitary groups operating in Sri Lanka at the time. The applicant said that he returned to his house on [the following day] and departed Sri Lanka with his two children on [the day after that].
29. The applicant advised the delegate that the day following the incident ([date specified]) his wife went to the police station about one to one and a half kilometres from their home. She reported that the young man had come to their house with threats and had damaged their property. She also reported that she did not know where her husband and daughter were. However, I have difficulty reconciling this aspect of his evidence with his earlier evidence in his SHEV statement that he was too scared to tell the police about the incident because he suspected the armed group had a connection to the police (or other Sri Lankan authorities). I consider if his wife did genuinely file a report with the police the day following the incident and prior to the applicant's departure from Sri Lanka that he would not have indicated in his written claims that this was not the case. I also note he indicated in his entry interview that he did not involve the police for fear the group may have been involved with the government. Towards the end of the SHEV interview, the applicant stated that in 2012 people generally avoided going to the police because they were harassing people, taking them on suspicion, and torturing them. This is also difficult to reconcile with his claim that his wife filed a report at a local police station. I also found the applicant's evidence in the SHEV interview that he was unable to obtain a copy of the police report filed on [the following day] because complaints are seldom written down by the police and therefore there would be no record of it, unconvincing.
30. Although not mentioned in his SHEV statement, the applicant also claimed in the SHEV interview that due to further incidents of harassment they faced after he left Sri Lanka his family made a further report to the police, and to the Human Rights Commission of Sri Lanka (HRCSL). I also found aspects of this evidence unpersuasive and difficult to reconcile with his various claims that it was not safe to have contact with the police. Regarding his family's contact with the police, he said he couldn't remember what year it was because he wasn't in the country. However, he said he had a copy of that police report that he could submit as evidence. Regarding his family's contact with the HRCSL, he said that the HRCSL issued a letter and sent it to him in Australia but that it was subsequently destroyed on the advice of an Australian based lawyer. He explained to the delegate that he showed the HRCSL letter to his lawyer who advised him it wasn't necessary to submit it, and indicated that her advice was to destroy it (which the applicant agreed to on the basis of that advice). The applicant also said he

showed the lawyer the police report, but her advice was that it wouldn't be accepted by immigration. The applicant indicated that he still had a copy of the police report and the delegate advised him at the end of the SHEV interview that he had seven days to submit it. However, it appears nothing was provided.

31. Included in the review material is a copy of [Ms A's] SHEV application. Her claims about the events involving the man and what followed were broadly consistent with her father's claims, in particular that:

- She was pursued by a man in Sri Lanka who had told her that he loved her
- Her father confronted the man and they had a physical altercation
- The man threatened to kill her family
- The man and other men came armed to her family home that evening while she and her father were not there. The men threatened her mother and pushed her to the ground
- Her mother called her father and warned him not to come home. Her father picked her ([Ms A]) up and they stayed that evening with a friend
- The next morning, she and her father entered their home through a back door and by the early hours of the following morning they were on a boat to Australia
- She does not think there were any plans to come to Australia before the incident with the man
- It was not safe to go to the police about such matters, especially for women
- After she arrived in Australia, her mother went to the police about the man because of ongoing harassment. The police would not hear the complaint, so her mother went to The Human Rights Organization of Sri Lanka to seek assistance (copy of letter attached).

32. As above, [Ms A] provided a letter from The Human Rights Organization of Sri Lanka in support of her separate SHEV application and it was before the delegate. It appears it is the same letter the applicant referred to in his SHEV interview. He indicated to the delegate that he wanted to provide it but was given advice by a lawyer in Australia to destroy it. I provided the applicant a copy of that letter as part of my invitation to comment and invited his response. I advised the applicant that the phone number ([specified]), web address ([specified]) and email address ([specified]) recorded on the letter's header didn't appear to be that of The Human Rights Organization of Sri Lanka. I also provided information to the applicant that an internet search of telephone number [specified] indicated it is or was associated to an organisation named '[Agency 1]'⁵ and that a news report dated [in] August 2021 indicated a person [with the email contact name] was subject to a disciplinary inquiry by [Department 1] for running an organisation called '[Agency 1 variant]' aimed at defrauding [specified clients]. As a result, his [professional] title was revoked. The report also states investigations revealed he had collected money from the [clients] to award titles and to get visas for them to go abroad.⁶ I also noted in the invitation to comment that The Human Rights Organization of Sri Lanka letter makes no mention of his daughter being pursued for marriage but rather, that she was threatened with abduction by unknown armed persons when travelling to and from school. As noted earlier, the applicant did not provide a response to the invitation to comment.

⁵ [Details deleted.]

⁶ [Details deleted.]

33. There were other aspects of the applicant's evidence that were concerning. For example, he indicated in the SHEV interview that he knew nothing about his daughter's suitor, including his name and occupation. The delegate raised a concern that in her application [Ms A] said his name was [name] and that he was [an Occupation 1]. The delegate put to the applicant that he found it difficult to accept his daughter wouldn't have passed this information to her father and that it suggested the applicant withheld this information to give the impression the young man was more powerful. The delegate also raised a concern that the applicant would flee Sri Lanka in the circumstances claimed if he was being harassed by an armed Tamil [Occupation 1] rather than reporting the incident to the police, and that this led the delegate to doubt he was being threatened as claimed. In response, the applicant said that at the relevant time going to the police was best avoided as the police were harassing people, taking them under suspicion, and torturing them to death. The applicant also conceded that his daughter may have given him the man's name when he was not paying attention, or that he may have forgotten that she had given his name given the passage of time. In his IAA statement, the applicant said that any inconsistencies in his evidence identified by the delegate is because he has forgotten things due to the passage of time. In the invitation to comment, the applicant was provided a further opportunity to comment on whether he knew the identity of his daughter's suitor. However, no response was received. I also note the applicant's evidence throughout the SHEV process that he had no intention of leaving Sri Lanka prior to the purported events of [the date in] October 2012. As part of the invitation to comment I advised the applicant that the fact his wife and son in Sri Lanka were issued passports about three months prior to his departure indicated that his family members were intending to travel abroad prior to that date. As already noted, no response was received.
34. I am prepared to accept the applicant's daughter may have been propositioned by a young Tamil man in 2012. However, I have significant concerns with the applicant's evidence in respect of the events that followed the purported confrontation with the man on [the date in] October 2012 which leads me to conclude he has not provided a truthful account about events in Sri Lanka. In particular, I find the applicant's claim in the SHEV interview that his wife reported to the police on [the following day] the purported events of the previous day, including that her husband and daughter were missing, unpersuasive. Although the applicant indicated in both his SHEV statement and entry interview that he had not personally involved the police I consider that if his wife filed a report as claimed (or attempted to) that he would have indicated as such. I also find his evidence that it was suspected the young man had an association with the police and that it was generally not safe to contact the police in 2012 due to the risk of harassment and torture not particularly supportive of the claim that his wife filed (or attempted to file) a report with the police. For the same reasons, I also consider the applicant's evidence in the SHEV interview that his family reported further incidents to the police unpersuasive. I also consider if he did have a copy of a genuine police report that supported his claims and evidence, he would have provided it when requested by the delegate. I also find the applicant's claim that his wife reported the purported further incidents of harassment to the HRCSL (or another Human Rights organisation) unconvincing. In particular, I have significant doubts that a lawyer would have advised the applicant to disregard a genuine police report and/or genuine letter from a Human Rights organisation, if it supported his case. While I note the letter purportedly from The Human Rights Organization of Sri Lanka was not provided by the applicants in support of their application, I note it forms part of the review material and may be seen as corroborative of the applicant's evidence in the SHEV interview that his family were harassed and that his wife contacted such an organisation. However, for reasons outlined in the invitation to comment, I have significant concerns as to the genuineness of the letter and when I consider the prevalence of document fraud in Sri Lanka⁷ I

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

give it no weight. Like the delegate, I also found the applicant's evidence about whether he knew the identity of the young man and his decision to depart Sri Lanka 24-48 hours after the purported events of [the date in] October 2021 problematic. In particular, that he appeared to make no enquiries as to who the man was both prior to and following his departure from the country and in circumstances where he has claimed that his wife and family have faced ongoing harassment and problems over many years. I also consider the fact his wife and son who remain in Sri Lanka were issued passports months prior to his departure not insignificant. While I acknowledge that aspects of the [Ms A's] SHEV application supports her father's claims and evidence, when I weigh all the evidence, it leads me to doubt that the applicant and/or his daughter were genuinely being pursued by an armed group prior to their departure from Sri Lanka. When I consider the evidence discussed, I find the applicant's explanation in his IAA statement that the problems with his evidence is due to him forgetting events that occurred nine years ago unpersuasive. I have also had regard to the general IAA submission about assessing an applicant's credibility and I am not satisfied the applicant has provided a truthful account about events in Sri Lanka. On all the evidence, I am not satisfied the applicant was involved in an altercation with his daughter's suitor or that he and his family have been pursued or threatened by an armed group, or any other person or group, at any time. I am not satisfied the applicants departed Sri Lanka for reasons connected to the young man propositioning [Ms A] in 2012. I am not satisfied the applicants face a real chance of harm in connection to events that transpired in Sri Lanka in 2012 now, or in the reasonably foreseeable future.

35. Although not advanced as a claim for protection in his SHEV application, I note the applicant's evidence in his entry interview regarding the Liberation Tigers of Tamil Eelam (LTTE). He said he was not part of the LTTE but indicated that he had previously been rounded up by the army on suspicion of supporting the LTTE. He said he was last taken before the last war in 2010 and held for two to three hours. The applicant also mentioned in his entry interview that his brother had provided some support for the LTTE. The applicant's failure to mention the LTTE claims throughout the SHEV process or to the IAA leads me to doubt the reliability of it or, that if it is true, it leads me to consider the applicant doesn't believe these past events will be a problem for him on return to Sri Lanka.
36. Country information indicates that LTTE support during the conflict was at times imputed on the basis of ethnicity and many Tamils, particularly in the north and east, reported being arrested and detained by security forces during the conflict.⁸ However, the applicant's evidence soon after he arrived in Australia that he was taken before the last war in 2010 is difficult to reconcile with country information that the war ended in May 2009.⁹ On the evidence, I am not satisfied the applicant was taken by the army on suspicion of supporting the LTTE or that his brother provided some support to the LTTE. However, if I am wrong about that, I have considered later in this decision whether the applicants face a real chance of harm in Sri Lanka on this basis.

Return to Sri Lanka

37. In the SHEV interview, the applicant said that his daughter [Ms A] is gay and has married in Australia. I accept this claim and I accept his evidence to the IAA that his daughter has been granted protection in Australia for reason of her sexuality. The applicant advised the delegate that although he and his wife supported his daughter's relationship, if he returned to Sri Lanka with his daughter he would be unable to support her in that country. He explained that such

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

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

relationships in Sri Lanka are taboo in Sri Lankan society. He said they would face humiliation, embarrassment and even threats. The applicant's daughter has been granted protection in Australia for reason of her sexuality and I am not satisfied there is a real chance she would return to Sri Lanka with the applicants now, or in the reasonably foreseeable future.

38. In his IAA statement, the applicant claims that when he and his son return to Sri Lanka they will be questioned as failed asylum seekers and asked about [Ms A]. He claims they will be asked why [Ms A] was granted a visa in Australia and why they were refused. He further claims that the Sri Lankan authorities and community will learn that his daughter is gay and that this will cause problems for him and his son. In the IAA submission, it is submitted that LGBTI people are persecuted in Sri Lanka by the authorities and non-state actors, and society will not allow the applicants to live there as they know that the applicants have accepted and supported [Ms A's] relationship choices. It is also submitted that the applicants would be 'forced' to reveal [Ms A's] sexuality when questioned by the state authorities and community members.
39. I accept the applicants will be questioned by the Sri Lankan authorities on return to Sri Lanka, including in respect of their status as returnee asylum seekers (discussed later in this decision). However, I am not satisfied that as part of this process they will be forced or otherwise compelled to reveal [Ms A's] sexuality. I am also not satisfied that the Sri Lankan authorities would be aware of [Ms A's] presence in Australia, let alone that she has sought protection here, given she departed Sri Lanka illegally by boat in 2012. Nor am I satisfied the applicants would have a genuine interest or intention in publicly declare that [Ms A] is in Australia, or that she has sought or been granted protection. Even if they did, I am not satisfied they would be forced or otherwise compelled to tell members of the Sri Lankan authorities or community that she is gay.
40. The US Department of State reports that Sri Lankan law criminalises consensual same-sex sexual conduct between adults and that those convicted of engaging in same-sex sexual activity in private or in public face 10 years' imprisonment. Although prosecutions were rare, human rights organisations reported police used the threat of arrest to assault, harass, and sexually and monetarily extort LGBTI individuals.¹⁰ DFAT assesses that LGBTI individuals in Sri Lanka face a moderate risk of official discrimination and a moderate level of societal discrimination on a day-to-day basis. The level and frequency of discrimination differs, depending on the socioeconomic status, religion and geographic location of the individual.¹¹ There is little indication in the reporting before me that family members of the LGBTI community face harm from the Sri Lankan state or community.
41. On the information, I am not satisfied the applicants would be forced to reveal to anyone in Sri Lanka that [Ms A] is in Australia, that she has been granted a protection visa, or that she is gay. Nor am I satisfied the applicants have a genuine intention or desire to reveal that information. Even if I were to accept [Ms A's] presence and immigration status in Australia was or became known in Sri Lanka, there is no credible evidence before me to indicate this would lead the applicants to face a real chance of harm for this reason. Further, even if I were to accept [Ms A's] sexuality might become known to the authorities and/or community (which I do not) I consider the chance the applicants would face serious harm on this basis remote. I am not satisfied the applicants face a real chance of harm in Sri Lanka due to [Ms A's] sexuality, her presence in Australia, her immigration or visa status, or any combination of these factors.

¹⁰ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

42. The applicant indicated in the SHEV interview that in around 2012 the Sri Lankan police were taking Tamils on suspicion of LTTE involvement and harming them. He said that people generally lived in fear of the military and police, and it is the same today. As noted earlier, country information indicates that during the conflict LTTE support was at times imputed on the basis of Tamil ethnicity. However, the information also indicates that the overall situation for Tamils in Sri Lanka has improved considerably since that time.
43. Sri Lankan government and NGO sources reportedly advised a 2019 UK Home Office fact-finding mission that former LTTE cadres would only be of interest if there was a pending criminal case against them, and that mere membership of the LTTE would not make someone of interest.¹² DFAT assessed in 2019 that 'high-profile' individuals with links to the LTTE would continue to be of interest to the Sri Lankan authorities, and indicated that aside from the LTTE leadership, former members who have committed terrorist or serious criminal acts during the conflict, or who provided weapons or explosives to the LTTE, may be considered high-profile. DFAT also assessed that even former 'low-profile' LTTE members who have since come to the attention of the Sri Lankan authorities would still be detained and may be sent to a rehabilitation centre. DFAT described low profile former LTTE members to include former combatants, those employed in administrative or other roles, and those who may have provided a high level of non-military support to the LTTE during the war. DFAT reported that Tamils, including those with imputed links to the LTTE, are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links, and that under the previous government even Tamils with links to the LTTE were generally able to lead their lives without concerns for their security as a result of past LTTE associations.¹³
44. In relation to family members of former LTTE members, DFAT reported in 2019 that the Sri Lankan Government acknowledged that former LTTE members and their families may continue to face discrimination both within their communities and from government officials. DFAT reported it could not verify claims that people had been arrested and detained because of their family connections with former LTTE members, but understood that close relatives of high-profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring.¹⁴
45. In the applicants' circumstances, I am not satisfied they are, or would be perceived as, former high or low level LTTE members. Even if I accept the applicant was previously rounded up or arrested by the army on suspicion of supporting the LTTE as recently as 2010 I am not satisfied the applicants would be perceived by the authorities, or any other group, to have undertaken activities that amount to being part of the LTTE leadership, committing terrorist or serious criminal acts during the conflict, or providing weapons or explosives to the LTTE. I am also not satisfied that the applicants were (or were perceived to be) LTTE members who were former combatants, employed in any role, or that they provided high level non-military support to the LTTE during the war. Even also accepting the applicant's brother provided some support to the LTTE, even when considered cumulatively, the country information before me does not support a claim that persons with a profile like the applicants would be of adverse interest to the Sri Lankan government authorities on the basis of familial LTTE links. The applicants have not claimed to fear harm in Sri Lanka on account of actual or imputed LTTE links, including familial links and, on the evidence, I am not satisfied they face a real chance of harm in Sri Lanka on this basis now, or in the reasonably foreseeable future.

¹² UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

¹³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

46. Several sources told a 2019 UK Home Office fact-finding mission that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil, but they do suffer discrimination along with other minorities.¹⁵ As noted above, DFAT assessed in 2019 that Tamils are no longer considered vulnerable to mistreatment by virtue of their ethnicity (including those with imputed links to the LTTE). DFAT also assessed that all Sri Lankans face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment, and housing. DFAT defines 'low risk' as meaning it is aware of incidents but has insufficient evidence to conclude they form a pattern. DFAT assessed that some Tamils report discrimination in employment, particularly in relation to government jobs. DFAT also assessed that there is no official discrimination on the basis of ethnicity in public sector employment, rather the limited Tamil appointments are a consequence of factors such as disrupted education due to conflict and language constraints. DFAT further reported that Tamils have a substantial level of political influence and their inclusion in political dialogue increased since the previous change of government in 2015. DFAT assessed that, while monitoring of Tamils in day-to-day life has decreased significantly under the previous Sirisena government, surveillance of Tamils in the north and east continued, particularly those associated with politically sensitive issues. Physical violence against those being monitored is not common.¹⁶
47. DFAT also reported that the government no longer restricts travel to the north and east of the country, removing security checkpoints on major roads in 2015, and that military involvement in civilian life has decreased. DFAT indicate that in the Northern Province the military occupy some land and remain involved in some aspects of civilian life, particularly the economy. DFAT also report there was a heightened security posture in the north following the April 2019 Easter Sunday attacks which has subsequently eased. Reporting does not indicate that Tamils are at risk of harm based on their prior place of residence.¹⁷
48. Country information reports that in November 2019, Gotabaya Rajapaksa, who served as defence secretary during the final phase of Sri Lanka's civil war, won Sri Lanka's presidential election. Later, his brother and former President, Mahinda, was appointed Prime Minister.¹⁸ In 2019, prior to the election, DFAT reported that local sources, both Tamil and non-Tamil, expressed concern that the human rights improvements achieved since 2015, including in relation to freedom of expression, could be reversed if Mahinda Rajapaksa, or an individual close to him, returned to power.¹⁹ I consider the situation in Sri Lanka is significantly different from when the Rajapaksas were previously in power (Mahinda as President and Gotabaya as Defence Secretary). The country information from DFAT and other sources indicates that Sri Lanka is no longer in the midst or aftermath of a civil war, the LTTE has been eradicated, and while the authorities remain sensitive to its potential re-emergence there is no indication of such a resurgence or the emergence of a similar group. When I consider this in conjunction with reporting from DFAT and other sources which consistently indicates significant reforms and improvements for Tamils in recent years, I consider it speculative to conclude that the election of Gotabaya Rajapaksa and/or his brother as Prime Minister will lead to a reversal of reforms or a deterioration of conditions for Tamils in Sri Lanka and/or increase the risk for people in Sri Lanka with profiles like the applicants. On the evidence, I am not satisfied that the 2019 change of government changes or undermines the assessments in the other country information before me.

¹⁵ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

¹⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹⁸ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

49. In its 2020 Sri Lankan Human Rights Report, the United States Department of State reported that Tamils, especially in the north and east, reported that security forces regularly monitored and harassed members of their community, especially activists and journalists. Tamil journalists reported that military officers had requested copies of photographs, lists of attendees at events, and names of sources for articles. They also reported that the military requested journalists refrain from reporting on sensitive events, such as Tamil war commemorations or land occupation protests. The report also states that Tamils maintained that they suffered long-standing, systematic discrimination in university education, government employment, housing, health services, language laws, and procedures for naturalization of noncitizens.²⁰ As noted above, DFAT have previously attributed some of these complaints as a consequence of disrupted education because of the conflict as well as language constraints, rather than because of an official policy of discrimination.
50. Overall, the weight of the country information before me does not support that being Tamil, or being Tamil from a certain part of Sri Lanka in itself gives rise to a real chance of persecution, or that persons with a profile like the applicants face any real chance of adverse attention from the state on this basis. Nor am I satisfied that the political developments in Sri Lanka over the past 22 months indicate that Tamils, like the applicants, will face a real chance of harm on return to Sri Lanka now, or in the reasonably foreseeable future. While I acknowledge there have been reports of mistreatment of Tamils, particularly in the north of Sri Lanka and against those suspected of links to the LTTE and other politically sensitive issues, the weight of the country information before me, including from DFAT, indicates that Tamils are not being systematically targeted and subjected to serious harm because of their race. I am not satisfied the applicants face a real chance of harm in Sri Lanka due to their ethnicity as Tamils, their prior place of residence, as Tamils from the north, or any combination of these factors now, or in the reasonably foreseeable future. Nor am I satisfied the applicants chance of facing harm is elevated due to past events in Sri Lanka or that they face a real chance of being imputed with LTTE links arising from their ethnicity now, or in the reasonably foreseeable future. Considering the information as a whole, while I accept that the applicants as Tamils may experience a level of official or societal discrimination, I am not satisfied that any such treatment they may face would constitute serious harm.
51. I note the applicant's evidence in his SHEV statement that his wife informed him that between 2015 and 2017 there were instances of people being killed in or near his village. One person was [an Occupation 2]. The perpetrators of these killings are 'unknown gun-men groups'. The applicant also advised in the SHEV interview that the CID (Criminal Investigation Department) had tortured people in recent times. The information before me indicates there have been reports of gang related violence and extra-judicial killings in the north of Sri Lanka in recent years. Several local and international organisations have also alleged torture by Sri Lankan military, intelligence and police forces, mostly involving people with imputed links to the LTTE.²¹ In 2020, the HRCSL documented 260 complaints of physical and mental torture from January to August in addition to 37 complaints from prisoners. Interviews by human rights organisations found that torture and excessive use of force by police, particularly to extract confessions, remained endemic. The HRCSL noted that many reports of torture referred to police officers allegedly "roughing up" suspects to extract a confession or otherwise elicit evidence to use against the accused. The US Department of State also reported that in 2020 there were reports that the government or its agents committed several arbitrary or unlawful killings. For example, journalists reported at least five separate incidents of police killing

²⁰ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

²¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

suspected drug dealers during arrests or raids. Further, prison guards at a prison in Gampaha District opened fire on prisoners, killing 11 and injuring more than 100, according to human rights activists and press reports.²² I accept there have been reports of arbitrary or unlawful killings in Sri Lanka and reports of torture by the police in recent years. However, the information does not indicate that persons with profiles like the applicants face a real chance of harm on this basis. I also give weight to DFAT's assessment that Sri Lankans face a low risk of mistreatment on a day-to-day basis. While DFAT assesses individuals detained by the Sri Lankan authorities face a moderate risk of mistreatment, I consider the chance the applicants would be detained by the authorities and harmed in this way remote. On the evidence, I am not satisfied the applicants face a real chance of being killed or tortured now, or in the reasonably foreseeable future.

52. In the SHEV interview, the applicant advised the delegate that he had diabetes and that he had an issue with his stomach, arm and back. He said he took prescription medication for diabetes and blood pressure. In his IAA statement, the applicant confirms he continues to suffer from high blood pressure and diabetes. He states he sees his general practitioner quarterly and takes regular medication.
53. Reporting from DFAT and the UK Home Office indicates that Sri Lanka's public health system offers universal free health care and has had a long record of strong performance, but that regional disparities existed in the quality of care and facilities, particularly between urban and rural areas.²³ According to February 2020 research compiled by specialists, Sri Lankan doctors are well trained and equipped to deal with diabetes and its complications. The research reports that most of the commonly used diabetes drugs are available in Sri Lanka and that the government hospitals dispense most of the essential medications free of charge to the patients who attend the clinics.²⁴ The February 2020 research also reports that most General Practitioners and primary health care clinics manage thousands of hypertensive patients in Sri Lanka. The availability of essential medicines prescribed for chronic non-communicable diseases such as hypertension is reportedly higher than other types of medicines. Healthy Lifestyle Centres screen patients for raised blood pressure and any resulting complications. The most common used medications for hypertension are available in Sri Lanka.²⁵
54. I accept the applicant may require medication and medical treatment in the reasonably foreseeable future. The information indicates the applicant's current treatment is medication for diabetes and blood pressure. The reporting from the UK Home Office indicates that diabetes and hypertension are not uncommon conditions treated by general practitioners and health care clinics in Sri Lanka and that common medications for these conditions are available. I accept that health services in Sri Lanka, compared to Australia, may be more limited and of a lower quality. However, the applicant has not claimed he would be denied health treatment and the information indicates that a level of health care is available in Sri Lanka, including in the north and Tamil populated areas, and does not indicate that health factors such as the applicant's would contribute to a person having a risk profile, or that limits on medical treatment in Sri Lanka is the result of systematic and discriminatory treatment for one or more

²² US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412

²³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Medical treatment and healthcare", July 2020, 20200806140038

²⁴ UK Home Office, "Country Policy and Information Note Sri Lanka: Medical treatment and healthcare", July 2020, 20200806140038

²⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Medical treatment and healthcare", July 2020, 20200806140038

of the s.5J(1)(a) reasons. I am not satisfied the applicant faces a real chance of harm in relation to any health condition now, or in the reasonably foreseeable future.

55. The applicants departed Sri Lanka illegally by boat and I accept that if returned to Sri Lanka they would do so as failed asylum seekers returned from Australia. As noted by the applicant, the information indicates that he and his son would be questioned by the Sri Lankan authorities on return.
56. Having regard to the country information before me, I am not satisfied there is a real chance the applicants would be harmed by the Sri Lankan authorities by virtue of them being Tamil returnees or returnee asylum seekers. The International Organisation for Migration (IOM) noted in October 2019 that claiming asylum abroad is not an offence in Sri Lanka and as such when someone returns who has been absent for a number of years, they would not be questioned about this and there were no media reports of returnees being interrogated on such grounds. IOM indicate that the police would only be interested in returnees if there were outstanding criminal offences. Other sources advised a 2019 UK Home Office fact-finding mission that they were not aware of ordinary Tamil returnees being targeted or facing difficulty on return from abroad.²⁶ DFAT assess that all returnees are subject to the same standard procedures on return, regardless of ethnicity, and are not subjected to mistreatment during processing at the airport.²⁷
57. DFAT indicate that returnees will be processed by the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times, the TID (Terrorist Investigation Division) who check travel documents and identity information of returnees against the immigration and intelligence databases, as well as determining whether a returnee has any outstanding criminal matters. DFAT note that all returnees travelling on a temporary travel document are subject to a standard procedure to confirm their identity which often includes interviewing the returnee, contacting the police in their home area, contacting family and neighbours, and checking criminal and court records. Processing arrivals at the airport can take several hours, primarily due to the administrative processes and staffing constraints at the airport. DFAT also note that returnees are processed in groups and cannot leave the airport until the group has been processed, although returnees are free to go to the bathroom and to talk to one another during this time.²⁸ I accept the applicants may return to Sri Lanka on a temporary travel document. I am satisfied on the information before me that they have no identification concerns and I am not satisfied that they are persons with a criminal or security record that would raise the concern of these authorities. Further, I am not satisfied that any processing delays or investigative processes to which the applicants may be subject would constitute serious harm.
58. DFAT report that some returnees, including those in the north and east suspected of LTTE links, have been subjected to monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT also states it is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits. DFAT assess that surveillance of

²⁶ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

²⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

²⁸ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

returnees contributed to a sense of mistrust of returnees within their community. DFAT also report that some returnees reported social stigma from within their communities on return, and that in some communities people resent the financial support returnees are provided. DFAT also notes that limited job availability in the north and east further contributes to reintegration issues for returnees securing employment and housing. Overall, DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.²⁹

59. While I accept that on return the applicants may face social stigma or societal discrimination within their local community due to their profiles as returnee asylum seekers, or reintegration issues, I am not satisfied they would face treatment that would constitute serious harm. I accept there is indication from DFAT that authorities visit or telephone some returnees. However, even accepting that this may occur, on the information before me, I am not satisfied it would constitute harm, or that this, in combination with any societal discrimination together would constitute serious harm.
60. I note my invitation to comment invited the applicants' response to the recent country information that indicated that returning asylum seekers, including those who departed Sri Lanka illegally, are unlikely to face mistreatment. As already noted, no response was received.
61. I accept on the information before me that returnees with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport or on their return home.³⁰ However, as noted above, I am not satisfied the applicants are persons who hold an adverse profile with the Sri Lankan authorities due to any actual or perceived links to the LTTE, including familial links.
62. For these reasons, and considering the applicants' individual circumstances, I am not satisfied they face a real chance of serious harm due to their asylum application or time spent in Australia, or due to being failed or returning Tamil asylum seekers from Australia now, or in the reasonably foreseeable future, if they return to Sri Lanka.
63. The information before me indicates there are penalties under the Immigrants and Emigrants Act (IAEA) for departing Sri Lanka illegally.
64. DFAT report as part of this process, most returnees will provide a statement, be fingerprinted and photographed by the Police Airport Criminal Investigations Unit, and transported to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each returnee. DFAT advises that bail is normally granted to fare-paying passengers of a people smuggling venture whereas facilitators or organisers of people smuggling ventures, including the captain and crew of the boat, are usually held in custody. Bail conditions are imposed on a discretionary basis and according to DFAT, this can involve monthly reporting to police at the returnee's own expense. Apprehended individuals can remain in police custody at the CID Airport Office for up to 24 hours after arrival. Should a Magistrate not be available before this time – for example, because of a weekend or public holiday – returnees who are charged may be held in an airport cell for up to two days. DFAT is not aware of mistreatment of returnees during this process.³¹

²⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

³⁰ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

³¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

65. I accept that as the applicant departed Sri Lanka irregularly by boat, he will be considered to have committed an offence under the IAEA. According to DFAT, the minimum age of criminal responsibility in Sri Lanka is 12 years and no charges are imposed against children under 12 years of age or those persons who were younger than 12 at the time of the alleged offence. As the child applicant was younger than 12 years at the time he left Sri Lanka I am not satisfied he would face any charges, fine, or period of detention, in relation to his illegal departure.
66. DFAT indicate that persons who have departed Sri Lanka illegally may face penalties that can include up to five years imprisonment and a fine. A fine varies from LKR 3,000 (approximately AUD 25) and up to LKR 200,000 (approximately AUD 1,633). Well-placed sources told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163). In practice, penalties are applied to such persons on a discretionary basis and, if the departee pleads guilty, in the form of a fine.³²
67. On return to Sri Lanka, I find if the applicant pleads guilty to his illegal departure he would be charged and fined under the IAEA and then released. In the event that he elected to plead not guilty to the offence under the IAEA, he would either be granted bail on a personal surety or have a family member act as guarantor.³³ There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face a real chance of imprisonment, but it is highly likely that he will be found guilty and fined. As noted above, DFAT report that returnees are not subjected to mistreatment during processing at the airport. While the applicant may be briefly detained in an airport holding cell, I am not satisfied that this would constitute serious harm.
68. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. DFAT also report that some returnees charged under the IAEA report having to travel long distances to attend court hearings and have found this disruptive to their livelihoods. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the IAEA appear in court every three to six months and that they, in addition to their own court hearings, may be summonsed as witnesses in cases against the facilitators or organisers of people smuggling ventures.³⁴
69. On the evidence before me, I find the imposition of any fine (which can be paid in instalments³⁵), surety or guarantee would not of itself constitute serious harm. Nor am I satisfied that any lifestyle disruption or costs associated with any reporting conditions or court appearance/s would constitute serious harm to the applicant. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being applied to illegal departees with a profile such as the applicant. I am not satisfied there is a real chance that the applicant would face imprisonment.
70. Additionally, I am satisfied that the application of the provisions and penalties of the IAEA do not amount to discriminatory treatment. The law is not discriminatory on its terms, nor does the country information before me indicate that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process the applicant may face on return to Sri Lanka, and any penalty he may face because of his illegal departure, would not constitute persecution for the purpose of the Act.

³² DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

³³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

³⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

³⁵ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

71. I find that the applicants do not face a real chance of persecution due to their travel to Australia or illegal departure.
72. I have accepted that if returned to Sri Lanka the applicants, due to their ethnicity, may experience a level of official or societal discrimination. I have also found they may face some level of societal discrimination, social stigma, or monitoring as returnee asylum seekers. Having regard to the applicants' evidence in its entirety, including the country information, even when considered cumulatively, I am not satisfied they face a real chance of treatment that would constitute serious harm now, or in the reasonably foreseeable future. I am not satisfied they face a real chance of harm due to past events in Sri Lanka, due to any actual or imputed LTTE links, due to their ethnicity, due to their prior place of residence, as Tamils from the north, due to the applicant's health, due to [Ms A's] sexuality, her presence in Australia, or her immigration or visa status, as failed asylum seekers from Australia, due to their illegal departure, or due to their travel to and time spent in Australia, or any combination of these factors. I consider the chance the applicants would be killed or tortured remote.

Refugee: conclusion

73. 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).

Complementary protection assessment

74. 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

75. 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.
76. 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.
77. I have accepted that the applicants may face some level of societal discrimination, social stigma, or monitoring as returnee asylum seekers. I also accept there will be a period of adjustment as they reintegrate into the community and life in Sri Lanka. They may also face some level of official or societal discrimination due to their ethnicity. The country information confirms that the trend of monitoring Tamil civilians in day-to-day life has eased since the end

of the conflict. Having considered the applicants' own circumstances, and evidence discussed above, I am not satisfied that any monitoring, social stigma, discrimination, or reintegration issues they may face amounts to significant harm as defined in the Act. I am not otherwise satisfied they face a real risk of harm as Tamils, or Tamils from the north.

78. I accept the applicant may need further treatment in relation to health issues. However, having regard to the evidence before me, I am not satisfied that any health condition he may have or any difficulties he may face accessing treatment would result in a real risk of significant harm as defined. The information before me indicates that medications and health services are available in Sri Lanka, including in the north and Tamil-populated areas. While I accept those services may be more limited and of a lower quality compared to Australia, the information before me indicates this is a consequence of a general lack of institutional capacity to respond to mental health care needs and not due to an intention to inflict pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or severe pain or suffering or an intention cause extreme humiliation.
79. I have also accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally, that he will be subjected to a number of administrative procedures, and that he may be detained for several hours at the airport and potentially detained in a holding cell for a number of days. On the country information, I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport. While I accept that he may be subjected to a brief period of detention in an airport holding cell, it does not amount to the death penalty, an arbitrary deprivation of life, or torture. Further, there is no intention to inflict pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention. While I accept he may be subjected to questioning and may be required to pay a fine or provide a surety on return to Sri Lanka, I am not satisfied that this amounts to significant harm. I find that the questioning, imposition of a fine and the potential of being held in detention, individually or cumulatively not to amount to the death penalty, arbitrary deprivation of life, torture or that there is an intention to inflict pain or suffering, severe pain or suffering or cause extreme humiliation. I am not satisfied this, or any other process the applicant may be subjected to in connection his illegal departure, amounts to significant harm as defined by the Act.
80. I have otherwise found that the applicants do not face a real chance of any harm in Sri Lanka for the reasons claimed. Based on the same information, and for the reasons set out above, I find they do not have a real risk of suffering significant harm in Sri Lanka.
81. After having regard to the applicants' circumstances, I find that they do not face a real risk of suffering significant harm.

Complementary protection: conclusion

82. 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

83. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a 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 dependent child. A 'dependent child' of a person is defined in r.1.03 of the Regulations to include a child of the person who has not turned 18 or has turned 18 and is either dependent on that person or incapacitated for work due to loss of bodily or mental functions.
84. As neither of the applicants meets the definition of the refugee or the complementary protection criterion, it follows that they do not meet the family unit criteria in either s.36(2)(b)(i) or s.36(2)(c)(i). It is therefore unnecessary to determine whether they are members of the same family unit in the relevant sense.
85. I have accepted that [Ms A], who lodged a separate SHEV application, has been granted a protection visa in Australia. However, neither of the applicants has sought to rely on their membership of her family unit. There has been no claim by or on behalf of the applicants that they are members of her family unit as defined, nor have they provided information to establish that fact and it is not apparent on the information before me that either applicant is a member of the same family unit as [Ms A]. I am not satisfied the applicants are members of the same family unit as [Ms A] for the purpose of this assessment.

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.