



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00980

Date and time of decision: 14 March 2017 11:31:00
Lesley Hunt, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Sri Lanka and of Tamil ethnicity. He arrived in Australia by boat [in] August 2012. [In] October 2015 he applied for a Safe Haven Enterprise Visa (SHEV).
2. [In] September 2016 a delegate of the Minister for Immigration and Border Protection refused the visa. The delegate accepted that the applicant is a Tamil and a Hindu and was born in [District 1] in the Uva Province in Sri Lanka in 1980. The delegate accepted that the applicant married in 2010 in Vavuniya in the Northern Province and departed Sri Lanka legally on his own passport in December 2011 to join his wife in [Country 1]. The delegate did not accept that the applicant was arrested by the CID in 2010, or that his wife's [sibling] was a fighter with the Liberation Tigers of Tamil Eelam (LTTE), or that the applicant was hiding between September 2011 and December 2011, or that the applicant is of any interest to the Sri Lankan authorities. The delegate found that the applicant does not face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. I also considered the recent country information report on Sri Lanka published by Australia's Department of Foreign Affairs and Trade (DFAT) on 24 January 2017. As current country information is directly relevant to determining the applicant's protection needs and the delegate relied on the 2015 version of this report, I am satisfied there are exceptional circumstances justifying its consideration: s.473DC.

Applicant's claims for protection

5. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - The applicant claims to have been subjected to harassment by the Sri Lankan police and army because he is a Tamil. He states that all Tamils are perceived to be "Tigers" (LTTE) and Sinhala people often call him names and humiliate him and the authorities often ask him where he is going and ask for his identification. Sinhala people are not treated in this manner.
 - The applicant claims that in 2009 he met a young Tamil woman from [city]. They fell in love and married in Vavuniya in the Northern Province, against the wishes of his parents. The applicant travelled to Vavuniya in July 2010 to marry and to explore business opportunities there.
 - The applicant claims that in September 2010 [officers] from the Criminal Investigation Department (CID) came to his home in Vavuniya and took him to [an] Army Camp. He was interrogated about why he came to Vavuniya and why he married his wife. He was suspected of having links with the LTTE. He was verbally abused but not physically assaulted. He was held for [number] days and released and told that he may be asked to report again to the camp.

- The applicant returned to [Suburb 1] (near Colombo). In November 2010 the applicant's wife, who remained in Vavuniya, told him that the CID had come in search of him in Vavuniya. The applicant advised his wife to leave Sri Lanka and she went to [Country 1] in January 2011. He thought that if she remained in Vavuniya the authorities may continue to target him as they suspected he had links to the LTTE.
- Sometime in September 2011 unknown Sinhala men (possibly from the CID) came to the applicant's home in [Suburb 1], near Colombo. The applicant went to his neighbour (an influential Sinhala person) for help. His neighbour was not willing to help him so the applicant fled from the area immediately. He went to a friend's home in [a location], north of Colombo, and remained hiding there. He then fled Sri Lanka believing his life was in danger from the CID. He left Sri Lanka legally and flew to [Country 2] intending to travel on to [Country 1] however he was refused entry in [Country 2] and returned to Sri Lanka.
- The applicant's wife is registered as an asylum seeker with the United Nations High Commission for Refugees (UNHCR) in [Country 1]. She works in [Country 1] as [occupation].
- The applicant departed Sri Lanka legally in December 2012, travelled to and entered [Country 1] on a [visa] issued through a travel agent in Colombo. He registered as an asylum seeker with the UNHCR in [Country 1] in February 2012. He left [Country 1] illegally and travelled to Australia via [another country]. He left [Country 1] because he could not work there and was harassed by police.
- The applicant believes he would be seriously harmed by the CID because his wife's [sibling] was in the LTTE. As he fled Sri Lanka and claimed asylum in Australia the risk of being harmed has increased as the Sri Lankan authorities believe all Tamils who claim asylum in western countries are LTTE members. Since arriving in Australia the applicant has learnt that the CID has been to his parent's home in [District 1] asking about the applicant.
- The applicant has never met his wife's [sibling] and [he/she] is thought to have escaped to India. The applicant last had contact with his wife in December 2015 and believes she is still in [Country 1] awaiting the outcome of her refugee application to the UNHCR.
- The applicant's representative provided country information regarding the history of the LTTE, the war between the LTTE and the Sri Lankan military and human rights abuses perpetrated in Sri Lanka particularly against Tamils including after the end of the war in May 2009. The representative summarised the applicant's claims and submitted that because he is married to a person whose [sibling] was a fighter with the LTTE he faces a real risk of being subjected to inhuman treatment if returned to Sri Lanka.

Refugee assessment

6. 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

7. 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.

Does the applicant have a well-founded fear of persecution?

Nationality and Identity

8. The referred material includes copies of the applicant’s Sri Lankan Passport, Birth Certificate, National Identification Card, Marriage Certificate, and other documents. Based on the documentation provided and the applicant’s oral evidence, I accept that the applicant is a national of Sri Lanka and no other country. I therefore find that Sri Lanka is the receiving country for the purposes of the Act.

Fear of harm because of Tamil ethnicity

9. In his written statement of claims the applicant states that since his early days he has been subjected to harassment by the Sri Lankan police and army because he is Tamil. He claims it is not safe to travel around if you are Tamil as the authorities perceive all Tamils as “tigers” (LTTE); they ask Tamils to produce their identification cards and Sinhalese people are not treated in this way.
10. I note that the war between the militant Tamil (LTTE) and the Sri Lankan military took place from 1983 to May 2009 - most of the applicant’s life – however the fighting was mainly concentrated in the North and East of Sri Lanka. I note that the applicant lived most of his life in the Uva Province in the South of Sri Lanka and in Colombo and has only spent several months in Vavuniya in the Northern Province from July to November 2010 after the war had concluded. However the war saw the introduction of emergency regulations and tightened security procedures throughout the entire country and as such I accept that the applicant was subjected to harassment in his home area as claimed.
11. Country information supports the applicant’s claims in this regard. The Australian Department of Foreign Affairs and Trade (DFAT) states that that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces under the previous government of Mahinda Rajapaksa.¹ The United Nations High Commission for

¹ DFAT “Country Information Report: Sri Lanka”, 18 December 2015.

Refugees (UNHCR) reports that generally members of the minority Tamil and, to a lesser extent, Muslim communities were reportedly more often subjected to arbitrary detention, abductions or enforced disappearances and other human rights abuses.²

12. Whilst I accept that the applicant was subjected to harassment and discriminatory treatment in the past, I note that he was nonetheless able to complete his secondary education in 1996 and then maintain reasonably continuous employment from 1996 until late 2011 either in a [workplace], or as [occupation], or as a self-employed [businessman]. He does not claim to have been detained under the emergency regulations in his home area or physically harmed and he was not denied access to education or employment. I am satisfied that the harassment and discrimination experienced by the applicant in the past because of his Tamil ethnicity does not amount to serious harm.
13. Deciding the applicant's claims for protection requires a future assessment of harm. In assessing the chance of the applicant being harmed because of his Tamil ethnicity in the reasonably foreseeable future in Sri Lanka I note the following.
14. The applicant claims that in 2010 he was detained for [number] days when he was in Vavuniya in the Northern Province and in September 2011 men, possibly from the CID, came to look for him in [Suburb 1], near Colombo; however I note that the applicant has never been arrested or charged with any offence under the Prevention of Terrorism Act (PTA) or Emergency Regulations. The applicant does not claim that he or any member of his family, other than his [sibling]-in-law whom he has never met, have ever been associated with or involved with the LTTE or any political group or organisation or involved in any militant Tamil activities or protests against the Sri Lankan government. I also note the applicant's evidence at the SHEV interview in March 2016 that he travelled regularly between Vavuniya and Colombo from July 2010 to January 2011 and in so doing passed through police and military checkpoints without difficulty.
15. Furthermore, as noted by the delegate the war in Sri Lanka ended in May 2009 when the SLA took control of the North and East and the militant Tamil LTTE no longer exists as a fighting force in Sri Lanka. In addition, there was a change of government in Sri Lanka since the applicant's departure and, according to DFAT, under the new government of Maithripala Sirisena the forced registration of Tamils no longer occurs and the monitoring and harassment of Tamils in their day to day life has generally ceased.³
16. I note the country information provided by the representative which refers to the continuation of human rights abuses in Sri Lanka; however the information provided does not point to Tamil ethnicity alone as the cause or motivator for the abuse. I note other sources of country information which indicates Tamil ethnicity of itself does not warrant international protection.⁴ For example the UK Home Office states: "Simply being a Tamil does not of itself give rise to a well-founded fear of persecution or serious harm in Sri Lanka".⁵
17. I accept that human rights abuses continue to occur in Sri Lanka, however given the profile of the applicant, I find that the chance of him being subjected to harm because of his Tamil ethnicity is remote. In making this finding I note that the monitoring and harassment of Tamils

² UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012.

³ DFAT "Country Information Report: Sri Lanka", 18 December 2015

⁴ Ibid; UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012.

⁵ UK Home Office, "Sri Lanka: Tamil separatism", 19 May 2016.

is greatly reduced⁶, the applicant has not been charged under the emergency regulations or the PTA, he does not claim to be a member or supporter of the LTTE, he regularly travelled through checkpoints between Colombo and Vavuniya without difficulty, and he does not claim that any member of his family have ever been detained or charged in the past in relation to any security, criminal or other matters.

18. I also note that the applicant departed Sri Lanka legally on a passport in his own name twice, once in October 2011 and again in December 2012, and does not claim to have faced any difficulty in obtaining his passport, extending his passport, or exiting and re-entering Sri Lanka. The applicant states that he is in regular weekly contact with his parents and [sibling] who continue to live in [town], Uva Province, and he does not claim that they have experienced harm for reasons of their Tamil ethnicity or any other reason.
19. After assessing all the evidence I am satisfied that the applicant does not face a real chance of harm because of his Tamil ethnicity in the reasonably foreseeable future in Sri Lanka. His fears of persecution in this regard are not well-founded.

Fear of harm because of links with the LTTE

20. The applicant claims he will be harmed because his wife's [sibling] was a member of the LTTE and fought with the LTTE. He claims he was detained by the CID in September 2010 when he was living with his wife in Vavuniya. He claims he was held for [number] days at [an] Army Camp, interrogated about his reasons for coming to Vavuniya and marrying a woman from Vavuniya. He claims he was suspected of having links with the LTTE because of his wife's [sibling]'s involvement, and was verbally abused and threatened during the interrogation. He states he was released without being charged; however he was told that he may be asked to report again to the camp. The applicant returned to [Suburb 1], near Colombo regularly to check on his business until November 2010 when he returned to live in [Suburb 1]. His wife remained in Vavuniya and told him that the CID had come in search of him again. The applicant thought his life was in danger because of his connection with his wife and so for this reason he advised his wife to leave Sri Lanka, which she did in January 2011.
21. Country information indicates that the priority of both the previous Rajapaksa government and the current Sirisena government is to prevent a resurgence of the LTTE and any moves towards Tamil separatism.⁷ I found the applicant's oral evidence about his claim of being detained in September 2010 in Vavuniya to be coherent and given the country information regarding the Sri Lankan authorities' vigilance in preventing a resurgence of the LTTE I find his claim of being detained and questioned when he travelled to Vavuniya, an area previously under LTTE control, to be plausible. I am prepared to accept that the applicant, as a young Tamil male whose wife's [sibling] was a member of the LTTE, was detained and questioned by the CID in September 2010 in Vavuniya about his links with the LTTE.
22. In assessing the chance of the applicant facing harm in this regard in the future in Sri Lanka I note that the applicant was released without charge after being held for [number] days. I note the applicant's evidence at the SHEV interview that he was verbally abused and threatened in

⁶ Ibid; UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012; United States Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016.

⁷ UK Home Office, "Sri Lanka: Tamil separatism", 19 May 2016; UNHCR "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012.

detention but not harmed physically or in any other manner. Numerous reports⁸ indicate that if a person is detained by the Sri Lankan authorities there is a real risk of ill-treatment or harm. I note that under the PTA the Sri Lankan authorities would have been able to detain the applicant for a longer period of time if they held a genuine belief or suspicion that he was an LTTE supporter or an advocate of Tamil separatism. That the applicant was released after [number] days and subjected to verbal abuse and threats only is a strong indication that the applicant was not viewed as a person with links to the LTTE or Tamil separatism. I note and accept the claim that the CID returned to the applicant's wife's home in Vavuniya and asked the applicant's wife about his whereabouts. However it is not claimed that the CID indicated that they were intending to detain or arrest or interrogate the applicant or cause the applicant harm during this visit.

23. I note the applicant's claim that in September 2011 [men] he thinks were from the CID came to his home in [Suburb 1], near Colombo, to ask him questions. He stated at the SHEV interview that they came frequently to the area and to his house as well. They left a phone number for him to contact them on however he did not do this. The men were in civilian dress. He claims that on one occasion in September 2011 when they came to his house the men allowed him to go to a Sinhala neighbour for assistance and he escaped by passing through a gap between the houses and running down the laneways. He claims that following this incident he hid for three months at friends' houses [until] he made arrangements to leave Sri Lanka in October 2011.
24. I found the applicant's oral evidence regarding these claims to be confused and unconvincing. I also note that the applicant confirmed at the SHEV interview that he continued to manage his [business] in [Suburb 1], Colombo throughout this time. Also the applicant departed Sri Lanka legally, on a passport in his name, through the international airport, with no difficulty in October 2011. I note he returned immediately to Sri Lanka as he was not issued with an on-arrival visa in [Country 2] and he re-entered Sri Lanka with no difficulty. In November 2011 the applicant attended the passport office in Colombo and obtained a new passport, and was also issued officially with a new driver's licence and an international driver's licence in Colombo, all without any difficulty. The applicant departed Sri Lanka again legally in December 2011 on a passport in his name and travelled to [Country 1] with no difficulty. I note the applicant's claim at the SHEV interview that he had to pay a Sinhalese friend so that he would be cleared at the international airport without any problems. However I found this aspect of the applicant's evidence to be lacking in detail and unconvincing. I do not accept that the applicant had to pay a Sinhalese friend in order to be cleared without difficulty at the international airport.
25. After assessing all the evidence I do not accept that the applicant was sought after, approached or questioned in September 2011 in [Suburb 1] by [men] he thinks were from the CID or that he escaped from them in the manner claimed.
26. I note the applicant's claim that since he arrived in Australia in August 2012 the CID have been to his parent's home in [District 1] twice asking about the applicant. Given that the applicant was released without charge in September 2010 in Vavuniya and he had contact with Sri Lankan authorities many times after 2010 when obtaining legal documents and departing and re-entering Sri Lanka, and given that I do not accept that he was questioned by Sri Lankan authorities as a person of adverse interest at any time after September 2010, I have strong doubts that the authorities questioned the applicant's parents as claimed. I find that if the applicant's parents were questioned it would be because he departed Sri Lanka more than eight months earlier with a [visa] entitling him to enter and remain in [Country 1] for one

⁸ USDOS, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016; International Truth and Justice Project Sri Lanka, "A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015", 1 July 2015.

month only and the authorities' inquiries are more likely to relate to immigration matters due to his lack of re-entry to Sri Lanka. I do not accept that the Sri Lankan authorities attended the applicant's parents' home after August 2012 because they suspected the applicant of having links with the LTTE.

27. After assessing the evidence I am satisfied that the Sri Lankan authorities do not have any ongoing adverse interest in the applicant as a person suspected of links with the LTTE and have not had an adverse interest in him since he departed Vavuniya and returned to his home in 2010.
28. In assessing the chance of the applicant facing harm in the future in Sri Lanka because of links with the LTTE I note that the UNHCR and the UK Home Office have identified groups of people who may be at risk of being harmed in Sri Lanka. The UK Home Office identifies: (i) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the Diaspora and/or a renewal of hostilities within Sri Lanka; (ii) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government; (iii) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses; and (iv) A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.⁹
29. I note that this is not an exhaustive list of persons at risk of harm on return to Sri Lanka; however I am satisfied that the applicant does not fit the profile of persons identified by the UK Home Office as people who may be at risk of harm in Sri Lanka.
30. The UNHCR identifies the following cohorts of people who may be at risk of harm in Sri Lanka. (i) persons suspected of certain links with the Liberation Tigers of Tamil Eelam (LTTE); (ii) certain opposition politicians and political activists; (iii) certain journalists and other media professionals; (iv) certain human rights activists; (v) certain witnesses of human rights violations and victims of human rights violations seeking justice; (vi) women in certain circumstances; (vii) children in certain circumstances; and (viii) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in certain circumstances.¹⁰
31. In relation to persons suspected of links with the LTTE the UNHCR states that these may, depending on the individual circumstances of the case, include: 1) Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka; 2) Former LTTE combatants or "cadres"; 3) Former LTTE combatants or "cadres" who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, "computer branch" or media (newspaper and radio); 4) Former LTTE supporters

⁹ UK Home Office Reports, "Country Information and Guidance, Sri Lanka", August 2016.

¹⁰ UNHCR "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012.

who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE; 5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; 6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.¹¹

32. While I am prepared to accept that the applicant's [sibling]-in-law was a fighter with the LTTE, in assessing the chance of harm to the applicant in this regard I note, as stated previously, that he was detained for [number] days, questioned about his [sibling]-in-law's involvement with the LTTE and his relationship with the LTTE and released without charge. I note that this happened in September 2010, more than six years ago. I have found that since that time no further action has been taken against the applicant by the Sri Lankan authorities in relation to this matter and his possible links with the LTTE. He has exited Sri Lanka legally twice and re-entered Sri Lanka legally once with no difficulty going through immigration and security clearances. He has been issued with a passport and licences through official channels with no difficulty. The applicant lost contact with his wife in 2015 and has not lived with her since mid-2012, nearly five years ago. I note the applicant's evidence at the SHEV interview that his wife departed Sri Lanka legally and entered [Country 1] on a [visa] without any difficulty. There is no evidence to indicate that any member of the applicant's family have faced harm on suspicion of links with the LTTE. The applicant is not from an area that was previously under LTTE control and has spent only a few months in such an area. I am satisfied, after assessing the evidence that the applicant is not, and is not perceived by the Sri Lankan authorities to be a person who supports the LTTE or Tamil separatism and as a result may be at risk of harm in Sri Lanka.
33. I note and accept that the applicant registered as an asylum seeker with the UNHCR in [Country 1]. He provided a letter from the UNHCR dated [date]/2/12 as evidence in this regard. He submitted another UNHCR document which indicates that he registered with the UNHCR on [date]/2/12 and he had a UNHCR interview scheduled for [date]/2/13. The document indicates that the applicant did not appear for the interview and is regarded as "not of concern" and "Asylum claim abandoned". I note the applicant's evidence that he left [Country 1] because he could not work or do business there and there were lots of robberies and police harassment in [Country 1] and he was being asked for money by the UNHCR and the police. However, notwithstanding these difficulties, I find that the applicant's decision to abandon his asylum claim in [Country 1] undermines his claim to fear harm in Sri Lanka.
34. After assessing the evidence I find that the applicant does not face a real chance of harm because of links with, or imputed support for the LTTE. His fears of persecution in this regard are not well-founded.

Fear of harm as a Tamil failed asylum seeker who claimed asylum in a western country.

35. The applicant last departed Sri Lanka legally on a valid passport in December 2012. I note that his passport was extended until November 2013. As he has been outside Sri Lanka for more than four years, his passport has expired and he last departed Sri Lanka legally but with a visa for entry to [Country 1] for one month only, I accept that the Sri Lankan authorities may assume that he has applied for protection in a western country. I accept that if he is returned to Sri Lanka he will return as a Tamil failed asylum who claimed asylum in a western country

¹¹ UNHCR "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012.

and this may be apparent to the Sri Lankan authorities. I note that he may be issued with a travel document in order to facilitate his return to Sri Lanka.

36. The most recent information from DFAT indicates that for “returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person’s claimed home suburb or town police, contacting the person’s claimed neighbours and family and checking criminal and court records. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion. DFAT further assesses that detainees are not subject to mistreatment during processing at the airport.”¹²
37. As the applicant departed Sri Lanka legally on a valid passport issued by the relevant Sri Lankan authorities to the applicant in his name and with a lawful visa enabling him to enter and remain temporarily in [Country 1] I find that the applicant will not be regarded as a person who departed Sri Lanka illegally. He will therefore not face charges under the Immigration and Emigration Act. If the applicant does not have a current Sri Lankan passport he will be issued with a temporary travel document for return travel and entry to Sri Lanka. I find that on return to Sri Lanka the applicant will undergo standard procedures as outlined in paragraph 36. I am satisfied that the applicant does not face a real chance of being subjected to harm during that process.
38. Information from DFAT indicates that the risk of torture or mistreatment for the majority of returning asylum seekers is low and continues to reduce. Overall monitoring has reduced under the Sirisena Government and according to DFAT community fear of mistreatment has also decreased.”¹³
39. Other sources of information before the delegate indicate that the Sri Lankan government is vigilant in ensuring there is no resurgence of the LTTE or any other Tamil separatist movement and in so doing have detained, arrested and mistreated former LTTE members who returned to Sri Lanka.¹⁴ However as the applicant is not from the North or the East of Sri Lanka and spent only a few months in Vavuniya, and is not a member of the LTTE nor is he perceived by the Sri Lankan authorities as being a member or supporter of the LTTE, and does not and is not imputed to advocate for Tamil separatism, I find there is no real chance that the applicant will be detained, arrested, mistreated or subjected to harm in Sri Lanka as a Tamil failed asylum seeker returning from a western country, or for any other reason. I find the applicant’s claims in this regard are not well-founded.

Fear of harm on cumulative grounds

40. I have considered the applicant’s claims individually and cumulatively. I am satisfied that the applicant does not face a real chance of serious harm because of the combined factors of being Tamil, having links (real and imputed) with the LTTE, and returning as a Tamil failed asylum seeker who sought asylum in a western country.

¹² DFAT, “Country Information Report: Sri Lanka”, 24 January 2017.

¹³ DFAT, “Country Information Report: Sri Lanka”, 24 January 2017

¹⁴ Ceylon News, “TID arrests another Tamil man on return from abroad”, 19 May 2016; Tamil Net, “SL military continues to arrest Tamils from East returning from Middle-East”, 31 May 2015; Tamil Net, “16 Batticaloa Tamils arrested within last 100 days at Colombo airport, 3 May 2015; Sri Lanka Mirror, “10 Tamils arriving in Lanka arrested”, 4 March 2015.

Refugee: conclusion

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

Complementary protection assessment

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

Real risk of significant harm

43. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.

Does the applicant have a real risk of suffering significant harm?

44. I have considered the applicant's claims that he fears being harmed in Sri Lanka because of his Tamil ethnicity, his links (imputed and real) with the LTTE, and his return to Sri Lanka as a failed asylum seeker who sought asylum in a western country. As outlined in the preceding pages I have found that the applicant does not face a real chance of serious harm in Sri Lanka in relation to his claims.
45. I note that the "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear".¹⁵ As I have found that the applicant does not face a real chance of serious harm in relation to his claims I find also that he does not face a real risk. In relation to the treatment he faces on return as a failed asylum seeker returning from a western country, I am satisfied that the applicant does not face a real risk of being arbitrarily deprived of his life; of the death penalty; of being subjected to torture or cruel or inhuman treatment or punishment; or degrading treatment or punishment. I find that the procedures the applicant will go through on return to Sri Lanka, as outlined in paragraph 36 above, will not involve significant harm to the applicant.
46. I find that the applicant does not face a real risk of significant harm now and in the reasonably foreseeable future in Sri Lanka.

¹⁵ *MIAC v SZQRB (2013) 210 FCR 505* per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...