



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03784

Date and time of decision: 17 July 2018 09:38:00
F Kerr, 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 Hindu Tamil from Sri Lanka. On 6 February 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 18 October 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 28 November 2011 the applicant's representative provided a submission to the IAA. The submission largely restates the applicant's claims and argues that the delegate failed to give them proper consideration, failed to take into consideration all the applicant's information and evidence and/or made factual errors about his evidence, thereby falling into error and to that extent, I do not consider it contains new information. The submission also refers to case law which I consider legal argument and not new information.
4. The submission refers to, and extracts from, country information in the form of reports and articles which were not before the delegate and which is new information. None of the new information contains what may be regarded as personal information in the s.473DD sense. All of the new information pre-dates the delegate's decision. I accept the applicant was not formally represented at his SHEV interview. He did, however, have legal assistance in preparing his application. At the beginning of his SHEV interview, the delegate explained the importance of the applicant providing all his claims and information in support as soon as possible because if his application was refused he may not have another opportunity to do so. He was also told that any additional information he wished to provide may be taken into account if provided before the decision was made. Shortly after his SHEV interview further documents were provided to the delegate on behalf of the applicant; that information is before me. A period of around five months then elapsed before the delegate's decision which I consider more than adequate for the applicant to provide to the delegate any further information for the delegate's consideration. The delegate considered a range of country information from credible, authoritative sources some of which refer at length to the UN Special Rapporteur's report. Those sources are before me as is a report by the International Truth & Justice Project, Sri Lanka, published more recently than the one referred to in the new information. Overall, I am not satisfied that there are exceptional circumstances to justify my consideration of the new information.
5. The referred material includes two emails sent by the applicant's brother but signed (electronically) by the applicant. The emails provided to the delegate a document in a Sri Lankan language (16 May 2017) and subsequently, an English language translation of the same document (31 May 2017). While the emails were sent by the applicant's brother, it is in my view clear that the material was provided in support of the applicant's claims for protection as well as his own. Similarly, his representative's submission also refers to the applicant's brother, S's claims for protection and states that the applicant's testimony is similar to S's and suggests this goes to their credibility. I have had regard to that submission only to the extent that I consider it relevant to the applicant's claims for protection.

Applicant's claims for protection

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

- His father is [an occupation]. The applicant fears he will be harmed because of the imputed association to the Liberation Tigers of Tamil Eelam (LTTE) through his father's past history of [assisting] many Tamils who moved from conflict areas to the applicant's area in Negombo.
- His father was accused of helping the LTTE [in projects] and was detained on a number of occasions for varying periods of time on suspicion of helping the LTTE.
- On the last occasion, a friend [offered something valuable] for his father's release in February 2012. His father's case is still ongoing and the [valuable] has not been returned.
- Even after his father was released, he was visited at home by the Criminal Investigation Department (CID). Often his father wasn't at home. They would talk to his mother and ask her about his father and about him and his [family members]. The authorities suspected they were helping or supporting the LTTE.
- His father went into hiding not long after his release in February 2012.
- The CID continued to visit and ask the applicant if he was involved with the LTTE. They looked around the house to see if there were any extra people, possibly LTTE, there.
- One day they told his mother that if they could not find his father, they would take one of her sons in his place.
- His father arranged for his sons to leave Sri Lanka. His elder brother, R, was caught by the authorities trying to leave by boat. He was imprisoned for 14 days. The applicant and his other brother, S, signed a surety to release him as the court would not have accepted their father's signature as there was an ongoing investigation against him. His father came to court but waited outside in a taxi because he didn't want to be seen by the authorities.
- Not long after he and his brother arrived in Australia, he spoke to his mother and she told him his father had been taken and held for a week by the [City 1] police. His father and brother R are now both in hiding in Sri Lanka.
- The CID have been to their home four or five times since he and his brother left for Australia. They are looking for him, his father and [family members].
- He cannot return because the CID suspect his father is a people smuggler getting LTTE members out of Sri Lanka and because his father complained to a number of organisations about his treatment by the CID. He will also be in trouble because of the surety he signed for R's release; R is still in hiding and the applicant will be held accountable for that.

Refugee assessment

7. 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

8. 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.

Applicant's background

9. The applicant has provided a number of documents in support of his identity. I accept that the applicant is a Hindu Tamil from Negombo in the Western District of Sri Lanka and that for the purposes of this assessment Sri Lanka is his receiving country.

Father's problems with the CID

10. In the written statement submitted with his SHEV application the applicant said his [relative] had emailed his brother in Australia, S, some documents about his father's arrests. They included a copy of a letter in English dated [in] April 1994 signed by a Sri Lankan solicitor which appears to be a request for bail. In his written statement he said the letter relates to his father making a complaint about assault by police during an arrest in 1993. He stated he had no knowledge of this arrest until this document was read to him in Tamil. The original document in Tamil has not, however, been provided. He told the delegate in his SHEV interview that this incident was talked about at home which is why he brought the letter. He says the incident was related to his father's work and because his father was suspected of [assisting] the tigers (LTTE) the CID took him.
11. The letter indicates that his father was remanded in custody [in] March 1994 in relation to an assault. When the delegate put to him that there was nothing to indicate his father's detention on that occasion was related to the LTTE, he reiterated that he only knew what he'd been told. While the letter indicates that the suspect (his father) complains that he was assaulted by the complainant and not vice-versa, there is nothing on the face of the document to corroborate the applicant's claims that it relates to a complaint made by his father about being assaulted by the police in the course of being arrested on suspicion of helping the LTTE. Elsewhere in his written statement, the applicant referred to three incidents in which his father was detained; he did not otherwise claim that his father was detained in 1994 on suspicion of LTTE involvement. I am not satisfied it has any relevance to

the applicant's claims and I do not accept that the applicant's father was detained in 1994 on suspicion of helping the LTTE.

12. The applicant provided two letters in support of his claim that his father was detained in 1998/1999. The letter from the ICRC confirms that his father was arrested "according to himself" on [a date in] October 1998, detained in [a named] Prison where he was visited by ICRC delegates [in] January 1999 and released [later in] January 1999. I note the ICRC letter does not indicate the reason for his father's detention. A second letter is dated [in] June 1999; it is written on the letterhead of [an agency], addressed to the applicant's father and refers to a letter written by his father [earlier in] June 1999. It refers to his father's imprisonment and requests that he inform the [agency] as soon as he is released from prison. The letter appears to suggest that at the time he wrote to the [agency] the applicant's father was in prison which is somewhat at odds with the ICRC letter which indicates that the applicant's father had already been released by the time he wrote to the [agency].
13. The second occasion he claims his father was detained was in 2005. In the applicant's written statement he states he has provided a copy of a Detention Order regarding his father's arrest in 2005 and that the order mentions that he is suspected of "facilitating the LTTE members to proceed abroad in an illegal manner". He states that when it was read to him in Tamil he was very surprised to hear that his father had been suspected of being involved with people smuggling, it was the first he had heard of such accusations, and his father being suspected of that puts him, the applicant, at even greater risk of being detained and beaten if he returns to Sri Lanka.
14. The only document he has provided which answers the description of a 'Detention Order' is a document in English dated [in] October 2009. It is headed "The Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005 Detention Order"; it names his father and indicates that he was the subject of an order for detention for [number] days from [that date in] October 2009. To that extent, contrary to his written statement, the document does not corroborate his claim that his father was detained in 2005 on charges of people smuggling.
15. I do not in any case place any weight on this document. Firstly, the applicant claims he had no knowledge of this charge against his father until the document was read to him in Tamil. He does not state when he first became aware of this charge but his written statement indicates that his [relative] recently emailed the document to him. However, only an English language translation has been provided; no original document in Tamil has been provided and I have great difficulty accepting that if the applicant was aware of such serious charges against his father he would not have raised them earlier. Secondly, the applicant has not claimed that his father was the subject of a detention order in October 2009. If he had been, this document indicates he would have been scheduled for release [in] January 2010. This is difficult to reconcile with the 'Certification to Testify Imprisonment' subsequently provided and the applicant's claim that on that occasion his father was arrested in January 2010 when, according to the Detention Order he would still have been in detention. Thirdly, the address given for the applicant's father does not correspond with the address given by the applicant in his SHEV application as the address where his family was living at that time. Fourthly, the font size of the applicant's father's name is not consistent with the remainder of the document. Noting the prevalence of document fraud in Sri Lanka¹, I have some reservations about the genuineness of this document and I place no weight on it for that reason.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 24 January 2017 CISED50AD105 at 5.38

16. When asked about his father's 2005 detention, the applicant stated it was during the ceasefire when many LTTE people were coming to Negombo looking [to resettle] so the CID took his father again. When the delegate asked whether he had any paperwork, he said there were documents; the authorities wanted [amount] lakh to free his father or a [specified valuable], they didn't have that money so a friend of his father's gave them [the valuable] and the case is ongoing; the documents will only be released once his father's case is finished. When the delegate put to him that in his statement he said his father's friend [offered the valuable] for his father's release in 2012 not 2005, the applicant said he thought it was 2005 but he had trouble remembering dates. He then stated that if the delegate gave him some time he could provide original documents, contrary to his earlier statement that it was only when his father's case was finished that documents would be released. I note that no further documents relating to the 2005 incident have been provided.
17. The third time he says his father was detained was in 2010. In his SHEV interview the applicant was asked why he had no paperwork to verify this claim. He said that those documents were not provided because the authorities wanted to keep his father in Sri Lanka. He also said his father's case was ongoing; he wasn't really freed by the courts, that's why his friend [offered the valuable]. When the delegate asked him how his father's friend was taking it, given his father had disappeared and his father's friend's [valuable] was at risk of being forfeited, he was non-responsive and reiterated that they were keeping the [valuable]. He again said that if the delegate wanted those kinds of documents had could provide them.
18. Subsequently, the delegate was provided with a document described as 'Certification to Testify Imprisonment' which appears to corroborate his claim that his father was detained in prison from 2010 and released [in] February 2012. It indicates he was in [prison] from [a date in] November 2010 rather than [in] January 2010. I accept that this could be a typographical error as the copy of the original document provided in a Sri Lankan language appears to give a date [in] January 2010. However, for the reasons discussed further below, even if I accept that his father was detained for that period of time, I do not accept it had anything to do with the LTTE.
19. I accept that the applicant's father was detained in [a named] Prison for three months from [October] 1998, to [January] 1999. There is some corroborating evidence and I also consider this claim not inconsistent with country information before me regarding the vulnerability of Tamils in terms of the implementation of security measures both during and after the war. It is not apparent on the face of the ICRC letter that his father was detained on suspicion of helping the LTTE but given the security environment at the time, I am willing to accept this is plausible.
20. I also accept there was a further incident in 2005. The delegate did not accept the applicant's claims that his father was detained on that occasion and it is the only incident for which the applicant was unable to provide documentary evidence which, given he has provided documents relating to each of the other incidents, is a significant anomaly. I have also taken into account the very unsatisfactory nature of his evidence regarding whether his father's friend [offered the valuable] to secure his father's release in 2005 or 2012. The applicant was, however, quite young at the time and is relying to a large extent on what he has been told by older members of his family. As his representative submits, it was a common occurrence for Tamil men to be arbitrarily arrested and/or detained during the conflict solely on the basis of ethnicity and imputed support for the LTTE because of that.² While I have some reservations, I am prepared to give the applicant the benefit of the doubt and I accept

² Ibid at 3.8

that his father was detained in 2005 for a period of six months on suspicion of aiding the LTTE.

21. I take a different view in relation to the third incident in which he claims his father was detained. I am willing to accept that the applicant's father was detained for just over two years from January 2010. For the following reasons I do not, however, accept that this was in relation to assisting the LTTE. Firstly, the 'Certification to Testify Imprisonment' does not, on its face, give any reason for his father's imprisonment. Secondly, the applicant claims his father was released after his friend [offered the valuable] as surety in exchange for his father's release and that his father's case is ongoing. The 'Certification to Testify Imprisonment' indicates his father was released on bail. The country information before me indicates that persons administratively detained under the *Emergency Regulation* or the *Prevention of Terrorism Act (PTA)*, which were used against Tamils suspected of assisting the LTTE, did not have access to legal counsel and even for those who succeeded in obtaining a lawyer, there was no effective legal remedy.³ Suspects could be detained for up to 18 months or more without charge; many were held for substantially longer periods.⁴ Judges need the approval of the Attorney General's office to authorise bail for persons detained under the PTA which was normally not granted.⁵ None of this country information is consistent with the applicant's father being granted bail. I find that the applicant's father's imprisonment from January 2010 to February 2012 was not because he was suspected of helping the LTTE because of his work as [an occupation] and is otherwise unrelated to the applicant's claims for protection.
22. While I have accepted that his father was detained in 1998 and 2005, I do not accept that after this, his father was a person of ongoing adverse interest to the authorities because of his work helping Tamil clients [with projects] and by extension, the applicant is at risk of harm from the authorities. Both these incidents concerning his father occurred during the war when Tamils were subject to a range of discriminatory and frequently arbitrary security arrangements⁶ and I accept that his role in helping Tamils wishing to escape areas of fighting may have aroused some suspicion that he was helping people associated with the LTTE which, in turn, led to interest from the authorities and his consequent detention. I also accept it is plausible that he was beaten on those occasions. It is apparent, however, that on both occasions he was released and the applicant has not claimed that he was subjected to any further action in the form of regular reporting to the authorities or being sent for rehabilitation, both of which were routinely imposed for both militants and civilians suspected of involvement with the LTTE.⁷ Like the delegate, I am satisfied that following investigation, he was cleared of any involvement with the LTTE and not subject to any further action. I have not accepted that his subsequent imprisonment was related to charges of helping the LTTE and I find that after his release in 2005 he was not of ongoing adverse interest to the authorities and was not subject to any further action on that basis. As I do not accept he was of any interest after his release in 2005, I do not accept the applicant's claim that after his father's release in February 2012, the CID visited their house regularly to ask about him, his father and his brothers, or that they asked the applicant if he was involved with the LTTE and looked around the house to see if there were any extra people, possibly LTTE, there.

³ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010 CIS19345

⁴ US Department of State, "Country Reports on Human Rights Practices for 2015 Sri Lanka", 13 April 2016 OGD95BE926320

⁵ *ibid*

⁶ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010 CIS19345

⁷ US Department of State, "Country Reports on Human Rights Practices for 2015 Sri Lanka", 13 April 2016 OGD95BE926320

23. The applicant was asked in his SHEV interview about where his father was now. He stated he did not know. He said he'd seen him when he came out in 2012 but about two to three months later he disappeared. He said his father was living with friends and relatives who supported him, the business was no longer operating, his case was still ongoing, but he hadn't been to court in case the authorities take him again. I do not find it credible that if a friend of his father's had [offered the valuable], his father would simply disappear and risk his friend forfeiting his [valuable]. I do not, in any case, accept that his father's 2010-2012 imprisonment was related in any way to suspicions of LTTE involvement. If his father was living with relatives as claimed and was wanted by the authorities it is entirely implausible that the authorities would not have been able to locate him in the period from 2012 until now.
24. I do not accept that the applicant's father is in hiding from the authorities. I do not accept that the CID continue to look for him, that they suspect the applicant and his brothers were involved as well, or that they told his mother that if they couldn't find his father, they would take one of her sons instead, or that the CID have been to their home four or five times since he and his brother left for Australia looking for him, his father and [brothers] and I find these claims to be fabrications designed to boost his claims for protection.
25. I note that in his SHEV interview the applicant did not refer at all to the claim in his written statement that his father had been found and held for a week by the [City 1] police. Nor did he refer to the claim that his brother R is also now in hiding, that his father had complained to a number of organisations about his treatment by the CID, or that he himself would be in trouble if he returned because of the surety he signed for R's release because R is now in hiding. The applicant stated on more than one occasion in his SHEV interview that his other brother, R, was still at home in Sri Lanka. I do not accept that R is in hiding and given his failure to refer to any of these other matters in his SHEV interview, I am not satisfied he is at risk of harm from the authorities for any of these reasons.

Young Tamil male/imputed political opinion generally

26. The applicant stated it was because of complaints from Sinhalese people about the influx of Tamils into Sinhalese areas that his father was accused of helping the LTTE. Ethnic tension has been cited as one of the reasons for the conflict in Sri Lanka.⁸ There also ample information from a range of credible sources that Tamils historically suffered longstanding, systematic discrimination in university education, government employment, and other matters controlled by the government.⁹ The UK Home Office noted in 2012 that President Rajapaksa refused to acknowledge, let alone address, the Tamil minority's legitimate grievances against the state and, using the spectre of a revived LTTE, continued to use emergency laws enacted during the war to restrict freedom of expression and association, and increase pressure of human rights activists, journalists, trade unionists and others holding dissenting views.¹⁰
27. However, it is now over nine years since the end of the war and five years since the applicant left Sri Lanka and in that time, there have been major political and other developments in the country. The Sirisena Government has prioritised human rights and reconciliation and has made significant progress, including replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict-era back to its former owners; releasing some individuals detained under the Prevention of

⁸ DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017 CISED50AD105 at 2.1

⁹ US Department of State, "Country Reports on Human Rights Practices for 2015 Sri Lanka", 13 April 2016 OGD95BE926320

¹⁰ UK Home Office "Sri Lanka: Country of Origin Information (COI) Report" 7 March 2012 3523

Terrorism Act (PTA) and committing to reform the PTA. It also established an Office of National Unity and Reconciliation (ONUR) to develop a national policy on reconciliation.¹¹

28. The international community has welcomed the Government's moves to engage constructively with the United Nations including co-sponsoring a resolution in the UN Human Rights Committee which is said to signal its willingness to address long-standing allegations of past human rights abuses and violations.¹² The government is also reported to have taken some important symbolic steps towards promoting reconciliation and changing the majoritarian political culture, permitting the national anthem to be sung in both Sinhala and Tamil on Independence Day in February 2016, de-proscribing a number of Tamil groups around the world¹³, and commemorating the end of the war not with 'Victory Day' but the more inclusive 'Remembrance Day'.¹⁴
29. Sources also note the security situation continues to improve. There is greater freedom of movement and a reduction in the military's involvement in civilian life although a low-level, visible military presence remains in the north.¹⁵ While some monitoring of civilians continues in those areas with a large military presence, its prevalence has greatly reduced.¹⁶ In any case, the applicant is from the Western Province. He claimed in his SHEV interview that on one occasion in around 2010 he was detained by the authorities which I consider entirely plausible given the security measures to which Tamils were routinely subject. I do not accept it was related to his father's 'problems' with the authorities. The authorities had five years in which to take action against the applicant and I consider it implausible that, if they had any interest in the applicant because of his father, they would not have taken action before that. Further, the applicant has not claimed that he was ever monitored, harassed, arrested or subject to any other kind of ongoing interest by the security forces after that. This appears to have been an isolated incident and I consider the chances of him being subject to monitoring or any other attention from the military, particularly given his lack of profile, to be remote.
30. Assessing his claims overall, I am not satisfied that the applicant was of any adverse interest to the authorities at the time he left Sri Lanka. I have accepted that his father was detained on two separate occasions on suspicion of helping the LTTE and that he experienced some mistreatment. The country information indicates these were unfortunately common experiences for Tamils. However, I have not accepted the third occasion was in any way related to the LTTE and I consider the applicant has exaggerated the level of ongoing adverse interest in his father and, by extension, he and his brothers, and the threats he faced prior to his departure. I do not accept that the applicant's father is in hiding from the authorities or that he is of any ongoing adverse interest or suspicion. The applicant does not have a personal profile that, in my view, would increase the authorities' interest in him on his own account or because of his father. I have not accepted that the authorities continue to ask after him and I am not satisfied that if he is returned to Sri Lanka he is at risk of suffering harm whether because of his ethnicity, age, gender, father's previous detentions, his imputed political opinion or for any other reason claimed now or in the reasonably foreseeable future.

¹¹ DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017 CISED50AD105 at 2.29

¹² UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 4.0 March 2017 OG6E7028822 at 6.1.2

¹³ Ibid at 6.1.3

¹⁴ DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017 CISED50AD105 at 2.30

¹⁵ Ibid

¹⁶ Ibid at 3.9

Illegal departure/returning asylum seeker

31. The applicant left Sri Lanka by boat on a people-smuggling venture. I accept that he left Sri Lanka illegally and that on his return he will be perceived as a returning asylum seeker from the west. I also accept that both these things will have repercussions for him on return.
32. On arrival at Colombo airport, involuntary returnees undergo a series of routine checks by the Sri Lankan authorities to verify travel documents and identity, and check for any outstanding criminal matters, including checks against immigration and intelligence databases.¹⁷ All returnees are subject to the same processes regardless of ethnicity and religion.¹⁸
33. The applicant states that if he is forced to return to Sri Lanka he will be identified and arrested on the spot; he will be interrogated, tortured and imprisoned because of his father. While I accept he is likely to be arrested (see below) I otherwise reject this assertion. For the reasons set out above, I have not accepted that at the time the applicant left Sri Lanka he was a person of interest to the authorities because of his father and I do not accept that if he returns to Sri Lanka he will be identified by the authorities while undergoing arrival checks and subjected to harm because of him. I accept his representative's submission that the government remains sensitive to the potential re-emergence of the LTTE and that some returning asylum seekers have been targeted in the past if they were suspected of having links to the LTTE. However, I have not accepted that the applicant had a profile with the authorities because of his father. I have found that the last time the applicant's father was detained on suspicion of LTTE involvement was in 2005 and it is entirely implausible that over ten years later and in the absence of any evidence of interest from the authorities in the intervening period, the applicant would be of any interest because of his father's previous detentions in 1998/99 and 2005.
34. Moreover, the most recent country information before me indicates that unlike in the past, even those who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment; the police interest now, if any, is not in any previous involvement with the LTTE, but on whether the person has committed any criminal act such as using a forged identity to leave Sri Lanka.¹⁹ There is no evidence before me that the applicant has committed any criminal act such as using a forged identity to leave Sri Lanka or that he has been involved in diaspora activities to such an extent that it may be interpreted as a threat to the unitary Sri Lankan state and for that reason, place a person at risk of harm on return²⁰ and I reject the submission that the applicant's identity may have been flagged with the Sri Lankan authorities as mere speculation. As I do not accept that he has a risk profile, I similarly reject the submission that he may be monitored on return. The country information does not indicate that the mere fact of having claimed asylum or having spent time abroad will lead to adverse interest on return or a real chance of harm and DFAT's assessment is that detainees are not subject to mistreatment during processing at the airport.²¹
35. Departing Sri Lanka by other than an authorised port of departure (seaport or airport) is an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act).²² Returnees who depart the country irregularly are generally considered to have committed an offence under the I&E

¹⁷ DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017 CISED50AD105 at 5.19

¹⁸ *Ibid* at 5.2

¹⁹ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 4.0 March 2017 OG6E7028822 at 2.4.10

²⁰ *Ibid* at 3.1.5

²¹ DFAT "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 5.20

²² *ibid* at 5.17

Act which means he is liable to be charged under the I&E Act and arrested at the airport.²³ Returnees are transported to the closest Magistrates Court at the earliest available opportunity after investigations have been completed although they can remain in police custody at the CID airport office for up to 24 hours after arrival, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held at a nearby prison.²⁴ DFAT has been advised by Sri Lanka's Attorney-General's Department that no returnee who was merely a passenger on a people smuggling boat has been given a custodial sentence; rather, a fine is issued to act as a deterrent towards departing illegally in future which can be paid by instalment.²⁵ In cases where a returnee pleads guilty, they will be fined and released.²⁶ If they plead not guilty, returnees are immediately granted bail by the magistrate on personal surety or may be required to have a family member act as guarantor, in which case the person may need to wait until a family member comes to court to collect them.²⁷

36. The applicant was a passenger on a people smuggling boat; he does not claim to have been involved in, or accused of, organising or facilitating people smuggling. Based on DFAT's advice I find that if he pleads guilty he will be fined and released. If he pleads not guilty, he will either be granted bail immediately on personal surety or may have to wait until he can be collected by a family member if required to have a guarantor. There are rarely any conditions in relation to the bail and if they are, they are imposed on a discretionary basis; the person will only need to return to court when the case against them is being heard (or if required to give evidence as a witness in another case).²⁸
37. His representative submitted that given the credible and extensive reports that the CID and Terrorist Investigation Department (TID) continue to routinely use torture in the routine criminal investigations, the applicant will be exposed to serious harm. I do not accept this. DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce including for those suspected of offences under the I&E Act.²⁹ Given this and the likelihood that he will spend no more than a few days in detention before he can be brought before a Magistrate and bailed, I find the prospect that he will be harmed in prison to be remote. There is information before me that previously, Tamil returnees were at risk after arrival processing due to a practice of waiting until returnees had left the airport before making arrests.³⁰ However, contrary to his representative's submission the more recent information before me indicates that such a 'practice' no longer happens.³¹ The applicant did not claim any inability to pay the fine and I find that the imposition of a fine will not amount to serious harm.
38. It is the case that prison conditions in Sri Lanka are poor due to old infrastructure, overcrowding, and a shortage of sanitary and other basic facilities.³² Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an

²³ *ibid* at 5.21

²⁴ *ibid*

²⁵ *Ibid* at 5.22

²⁶ *Ibid*

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid* at 4.22

³⁰ Immigration and Refugee Board of Canada, "Treatment of Tamil returnees to Sri Lanka", 1 February 2013 CIS28614

³¹ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 4.0 March 2017 OG6E7028822 at 12.2.18

³² US Department of State, "Country Reports on Human Rights Practices for 2015 Sri Lanka", 13 April 2016 OGD95BE926320

evaluation of the nature and gravity of the loss of liberty.³³ Even considering the possibility that he arrives on a weekend and is detained until he can appear before a magistrate and then until bail is granted, the period of detention will be, at the most, a few days. In my view, this does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm.

39. In considering the totality of the treatment that the applicant will experience including being detained and investigated for several hours at the airport, then potentially being detained on remand for a number of days during which he will be held in overcrowded and unsanitary conditions, and having to pay a fine, I find that this treatment does not amount to serious harm. Further, I find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.³⁴ In this case, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. Accordingly, I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is a returning asylum seeker or an illegal departee.
40. Taking into consideration those of his claims which I accept, and considering them against his individual profile and the country information before me, I am not satisfied that, even when taken together, the applicant is at risk of serious harm if he is returned to Sri Lanka either now or in the reasonably foreseeable future.

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

³³ *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

³⁴ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

- the person will be subjected to degrading treatment or punishment.
44. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes during which he will be identified as an illegal departee and a returning asylum seeker. As discussed above, he is likely to be investigated and detained for several hours at the airport, and depending on the availability of a magistrate, may be detained for a number of days pending bail for the offence of illegal departure, and fined accordingly. I am not satisfied, however, that this treatment amounts to significant harm. I have found he is not a person of interest to the Sri Lankan authorities and I do not accept there is a real risk of torture or that he will be mistreated while being held and investigated at the airport or in remand, or face a total period of detention of more than a few days in the worst case scenario.
45. The conditions to which he may be subject if detained on remand for a few days are likely to be poor, a situation the Sri Lankan authorities are trying to address.³⁵ However, I do not accept that this amounts to significant harm. The treatment does not consist of the death penalty or arbitrary deprivation of life. I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. Nor am I satisfied that it amounts to serious pain or suffering, pain or suffering that is cruel or inhuman in nature, or extreme humiliation. I similarly find that the imposition of a fine under the I&E Act for his illegal departure does not amount to significant harm within the meaning of s.5(1) and s.36(2A).
46. I am not otherwise satisfied that the applicant is at risk of significant harm. As discussed above, I have not accepted that at the time he left Sri Lanka the applicant was a person of interest to the authorities for any reason and have found that there is not a real chance that he faces harm for any reason, now or in the reasonably foreseeable future if he is returned to Sri Lanka. On the basis of the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for any of the claimed reasons.
47. I am not satisfied that his claims, when taken together, mean that there is a real risk of significant harm within the meaning of ss.36(2A) and 5(1) now or in the reasonably foreseeable future if the applicant is returned to Sri Lanka.

Complementary protection: conclusion

48. 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.

³⁵ DFAT "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 4.25

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.