



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA18/06016

Date and time of decision: 14 January 2019 13:22:00

D Corrigan, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan national. On 26 May 2017, he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. In a decision dated 20 November 2018, a delegate of the Minister refused to grant the visa. The delegate accepted that the applicant had done work for the Liberation Tigers of Tamil Eelam (LTTE), but he did not accept that the authorities suspected him of being a LTTE or that he was of interest to them when he departed Sri Lanka in 2013. He found the chance that the applicant would face serious or significant harm on account of being a Tamil male and a real or perceived association with the LTTE and as a failed Tamil asylum seeker to be remote and not real.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). The IAA received a submission from the applicant's representative. To the extent that it discusses the findings of and other matters before the delegate this is not new information for the purpose of s.473DC(1) of the Act.
4. The submission includes a reference and a quote from the Advanced Unedited Version of a report on Sri Lanka published by the Committee Against Torture after the 30 November 2016. Attached to the submission is an Advanced Unedited Version of the United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights whilst countering terrorism, dated 23 July 2018. Also attached is a report from the International Crisis Group, Sri Lanka: Stepping Back from a Constitutional Crisis, dated 31 October 2018. Further attached is a Time magazine report related to a march of supporters of Mahinda Rajapaksa – the URL link indicates that this article is dated 6 November 2018. All of this is new information. All of these reports substantially predate the delegate's decision and no explanation has been provided as to why they could not have been provided to the delegate before he made his decision or why any credible, personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. I note the applicant was represented at the primary stage and a detailed post-interview submission was made. I am not satisfied that these reports and their contents could not have been provided to the delegate, before he made his decision. Nor am I satisfied that they are credible, personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
5. Included in the submission is a statement that the applicant's father was killed by the army which is new information. However, the applicant has not made that claim at any stage of the primary process despite being represented and having had ample opportunity to disclose this at the interview and prior to the delegate making his decision. Nor does this new information include any details of when and how this claimed event occurred and no explanation has been provided as to why this claimed event was not previously made and I consider it to be lacking in probative value. I am not satisfied that there are exceptional circumstances to justify considering this information. Nor am I satisfied that this is credible (in the sense of capable of being believed), personal information or that it could not have been provided to the delegate before he made his decision.

6. The submission includes a statement that "More recently 25 Tamil asylum seekers were returned a group from Australia" which is new information. However, no source, or a copy of that information or an extract of this information has been provided. Practice Direction for Applicants, Representatives and Authorised Recipients (Practice Direction 1) dated 1 December 2018, specifically states that in respect of new information such as country information reports or media article that the source of the information must be identified and that hyperlinks to publicly available documents are not acceptable. The applicant's representative is a migration agent and must be aware of these requirements. Accordingly, I find that Practice Direction 1 has not been complied with and under s.473FB(5) and in all the circumstances I have decided to not accept this new information. Even if I did, given the lack of a source and that the information is generally lacking in probative value in assessing the applicant's claims, I would not be satisfied that there are exceptional circumstances to justify considering the information.
7. The submissions urge the IAA to get new information from the Department of Foreign Affairs (DFAT) related to the volatile situation in Sri Lanka at the present time. I have considered this request, but given my consideration of the country information in respect of the applicant's claims that is set out below and taking into the IAA's statutory objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3, I have decided not to get or request any new information from DFAT or any other source.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - He is a Tamil who did work for the LTTE but was not a member. From about 2005 -2006 he did [work] in a business owned by the LTTE. Later he learned that the [place of work] was also being used as a place to transport weapons for the LTTE navy (Sea Tigers) and that members worked onsite undercover.
 - In 2006 he started trading [goods] from the army controlled area to the LTTE. He had a gun for self-defence and was trained in how to use it. He provided support in two battles but did not fire his weapon.
 - Once the army started to move into the area in about September 2007 he stopped this work for the LTTE. He then started [specified work].
 - Based on a number of incidents, he was concerned that the authorities were looking for him and this prompted him to flee the country. He arranged to go to [Country 1] in around June 2008 departing legally with his own passport. He stayed in [Country 1] for about five years but needed to leave. During this period, his wife informed him that she was visited by the authorities and that enquiries were made about him.
 - At the beginning of 2013, he travelled back to Sri Lanka and stayed there for about 10 days in Colombo. He then departed lawfully for [Country 2] and [Country 3] and then travelled unlawfully to Australia via [Country 4].
 - He may have a large sum of money owing regarding previous [goods] purchases that he had carried out behalf of the LTTE. He also fears that people may be angry with him for previously reporting their illegal [activities] to the LTTE.

Refugee assessment

9. 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

10. 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.

Country of reference

11. The applicant has provided a translated copy of his birth certificate and he has consistently maintained that he is a Sri Lankan national. I accept that he is a Sri Lankan national and I find that Sri Lanka is his receiving country.

Involvement with the LTTE

12. The applicant has given generally credible and consistent evidence regarding his involvement with the LTTE. I accept that in 2005-06, he worked at a [place] where LTTE members worked undercover and where [percentage] of the proceeds went to the LTTE and where the Sea Tigers received weapons. I accept that he helped [undertake specified work] to hide weapons. I accept that from 2006 to about [2007] until the army came into his area, he assisted the LTTE by helping bring in [supplies] from army controlled areas and buying them at an inflated price and give them to the Sea Tigers. I accept that the LTTE provided him with [equipment] and money.
13. I accept in 2006, the LTTE provided the applicant with some training in self-defence and the use of a gun. I accept that he carried guns when he went out to collect supplies but his evidence did not indicate that he ever fired these in battle. I accept that he was involved in one sea battle in which he was on the coast line and he helped by [undertaking non-fighting work]. I accept that he was involved in another battle where he was sleeping in a Sea Tigers’ base when the army approached and he assisted by [undertaking non-fighting work].

14. I accept that the applicant purchased [goods] in his own name on behalf of the LTTE and they would pay him in instalments for these purchases. I accept that after a while, the LTTE stopped paying him in instalments and that he may still have debts owing as a result of these purchases. However, over a decade has passed since these events and given this very long period of time, I am not satisfied on the evidence before me, that there is a real chance that he would be subjected to any harm by the sellers of these [goods] or by the Sri Lankan authorities upon his return to Sri Lanka. I also accept that he reported persons who had been [undertaking activities] without the permission of the LTTE and that these persons were subject to fines by the LTTE. The applicant has claimed these people would still be angry at him because they had to pay the LTTE "a lot of money". However, over a decade has passed since these events and given this very long period of time, I am not satisfied on the evidence before me, that there is a real chance that he would be subjected to any harm by these persons upon his return to Sri Lanka.
15. I accept that the applicant was closely involved with the LTTE over the period 2005-2007 and he carried out various low-level support activities for them. However, he has not claimed to have been a member of the LTTE or involved with them on a political level.

Incidents that led him to depart Sri Lanka in 2007-2008

16. The applicant has given evidence about a number of incidents which he claims led him to fear for his life and to travel to [Country 1] in June 2008. He stated that on one occasion he had been living at his "in-laws" when it was noticed that there were army boot marks in the front garden and his father-in-law warned him not to go outside otherwise he could be shot. He claimed that on a second occasion, his father-in-law saw boot prints at the entrance to their gate of their yard and a man hiding behind coconut trees. I am of the view that the applicant's claims and fears based on this evidence are highly speculative. The applicant himself did not claim to have actually seen anyone or been approached by anyone. I do not find it plausible or credible if the Sri Lankan authorities or anyone were searching for him or interested in targeting him that they would not have taken more concrete steps to do so such as attempting to enter the house. I do not accept that these incidents are evidence that the applicant was of adverse interest to the Sri Lankan authorities or anyone else or that they led to him departing Sri Lanka.
17. The applicant described another incident when he was working a [occupation]. He stated that he would normally stay overnight at a house closer to the [place of work] as they would rise early at about 3am to [work]. The normal course of events during the working week would be for him to go to his brother-in-law's place at about 6pm and his brother-in-law would then take the applicant to the [specified] house. However, they did not [work] on Sundays. On one such Sunday when he did not go to his house, his brother-in-law told him that he saw that there was a man standing in front of his place. The applicant surmised that person must have been waiting for him (the applicant). When his brother-in-law saw that person he ran away. I am of the view that the applicant's claims and fears based on this evidence are highly speculative. The applicant himself did not claim to have actually seen anyone or been approached by anyone. I do not find it plausible or credible if the Sri Lankan authorities or anyone were searching for him or interested in targeting him that they would not have taken more concrete steps to do so such as attempting to enter the house. I do not accept that this incident is evidence that the applicant was of adverse interest to the Sri Lankan authorities or anyone else or that they led to him departing Sri Lanka.
18. At the SHEV interview, the applicant then described another incident when he moved to his parent's house in [place]. The applicant claimed that about one week after moving to his

parents' house there was an army "roundup". He claimed that someone had tipped the army off to his presence. However, whoever had done this had given the army incorrect directions. They had told the army that he was living in the [number] house from the church when he was actually living in the [number] house from the church. He stated that the army had gone to the other house and asked the female occupant about where her husband was. In asking about the husband's whereabouts the army personnel (for unknown reasons) had addressed the female occupant as a [occupation] (as the applicant's wife was). The female had then told the army personnel that she was not a [occupation] and that her husband was in the field. When her husband had returned from the fields he told his wife that the army had also questioned him about his (the applicant's) whereabouts. These people then reported this incident to the applicant. The applicant claimed that as the army had described the female in the other house as a [occupation] they must have been looking for him, as his wife was the only [occupation] living in the area. Although the army personnel had only referred to the applicant as "him" and did not name him, the applicant was certain that it was him that they were looking for. Later in the SHEV interview he stated that they must have mentioned him by name. I am of the view that the applicant's claims and fears based on this evidence are highly speculative. The applicant himself did not claim to have actually seen anyone or been approached by anyone. I do not accept that this incident is evidence that the applicant was of adverse interest to the Sri Lankan authorities or anyone else or that they led to him departing Sri Lanka.

19. Even when considering all these incidents cumulatively, I am of the view that the applicant's claims and fears based on this evidence are highly speculative. The applicant himself did not claim to have actually seen anyone or been approached by anyone. I do not accept that these incidents are evidence that the applicant was of adverse interest to the Sri Lankan authorities or anyone else or that they led to him departing Sri Lanka.

Travel in and out of Sri Lanka

20. The applicant has given evidence that an uncle (who was an agent) arranged for him to obtain a passport and accompanied him to Colombo and remained with him until his departure in June 2008. The applicant has claimed that his uncle was a very influential person and spoke lots of languages and knew lots of people and bribed people to get the job done. The applicant remained in [Country 1] until February 2013 before returning to Sri Lanka for 10 days before travelling to [Country 2]. He did not claim to have any problems returning to or departing Colombo airport on these occasions.
21. Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. According to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including "stop" and "watch" electronic databases. "Stop" lists include names of those individuals who have an extant court order, arrest warrant or order to impound their Sri Lankan passport. "Watch" lists include names of those individuals whom the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities. The UK Home Office reported that the 'watch list' comprised minor offenders and former LTTE cadres. DFAT assesses those on a watch list are likely to be monitored.¹

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018.

22. I have taken into account the applicant's claims re the use of an agent and bribery; however, I consider his ability to return to and depart Sri Lanka on his own passport in 2013 without any problems or interrogation to strongly indicate that he was not of any adverse interest to the Sri Lankan authorities.

Events when he was in [Country 1]

23. The applicant has claimed that when he was in [Country 1] the authorities continued to look for him. He claimed that they visited his wife's parent's house and they found and took his [equipment]. He claimed that on another occasion they came looking for him and took his wife in for questioning and allowed her to return back to her parent's house. He has also claimed that the authorities visited again another two times looking for him and on the second time his wife told them that he was in [Country 1]. The applicant also claimed at the SHEV interview that when he was in [Country 1], the uncle whom he worked with at the [place of work] was tortured by the army.
24. I have not accepted that the incidents that the applicant described in 2007-08 were indicative of any adverse interest in him by the authorities or anyone else and there is nothing before me to indicate that the applicant was of any particular adverse interest to the Sri Lankan authorities before he left for [Country 1]. Whilst I accept that his uncle may have been tortured by the army, I consider the applicant's ability to return to and depart Sri Lanka legally on his passport without any problems or interrogation detracts from his claims that he was of adverse interest to them. Given all the circumstances, I do not find it to be plausible or credible that Sri Lankan authorities searched for him when he was in [Country 1] or that they detained or questioned his wife or took his tractor.
25. Considering all the evidence, I find that the applicant has not been of any adverse interest to the Sri Lankan authorities or imputed with any pro-LTTE opinion at any time.

Cousins

26. In his written statement, the applicant claims that a cousin of his (who his uncle tried unsuccessfully to get documentation to go to [Country 1] at the same time he did), was later shot dead by the Sri Lankan authorities. It was also claimed that another of his cousins was also shot dead at around the same time. Even if I accept that these cousins were shot dead, there is nothing before me to indicate what the circumstances of these shootings were or that there was any link to the applicant. On the evidence before me, I am not satisfied that these events meant that the applicant was of adverse interest to the authorities or that he faces a real chance of any harm if he returns to Sri Lanka.

Tamil male

27. In making my findings, I have considered the country information referred to the applicant's representatives concerning human rights in Sri Lankan and the situation for Tamils. However, I have given greater weight to the latest DFAT report because it is recent, authoritative and based on DFAT's on the ground knowledge and discussions with a range of sources as well as taking into account relevant and credible open source reports including those of the UNHCR, western governments and human rights organisations and Sri Lankan non-governmental organisations. Furthermore, it has been specifically prepared with regard to the current caseload for decision-makers in Australia. Based on the country information before me, conditions in Sri Lanka, particularly in the north and east (where the applicant comes from) have significantly improved since the ending of the war and from when the applicant left the

country. DFAT have assessed that monitoring of Tamils in day-to-day life has decreased significantly under the current government though surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. They state that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015 and that the current government includes 29 Tamils and President Sirasena presides over a diverse coalition of parties that includes Tamil members. DFAT state that they are not aware of any evidence to suggest that Sinhalese, Tamil, Muslim or other parties face any differences in treatment and that they understand Tamils do not receive unwarranted attention from authorities because of their political involvement. They assess that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. They assess that there is no official discrimination on the basis of ethnicity in public sector employment but that limited Tamil appointments are a result of a number of factors including disrupted education because of conflict and language constraints. DFAT have stated that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members has reduced significantly since the ending of the conflict.²

28. The United Kingdom Home Office has also reported that a person being of Tamil ethnicity would not in itself warrant international protection. They have further stated that general a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport, would not warrant international protection. Their report cited the findings from the Upper Tribunal in *GJ & Others* that the Sri Lankan authorities' approach is based on sophisticated intelligence, both as to activities within Sri Lanka and in the diaspora. The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE during the civil war. In post-conflict Sri Lanka, an individual's past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.³
29. I have taken into account that the submitted articles and information in the delegate's decision about the appointment of Mahinda Rajapaksa as Prime Minister on 26 October 2018 and the concerns that this may lead to a decline in human rights in Sri Lanka particularly for Tamils and political opponents and given these some weight. I note that when the delegate made his decision it was unclear, who, if anyone was currently Sri Lanka's lawful prime minister.⁴ I have taken this situation into consideration and acknowledge the situation is volatile and that there will be anxiety within the Tamil community. Aljazeera have stated that "Rajapaksa's return would certainly mean the reversal of the few gains that have been made on transitional justice and accountability. It would also signal the end of a joint process towards transitional justice at the Human Rights Council, which began with a landmark UN resolution in 2015. For a beleaguered Tamil population in the north and east of the country, the concern will be that history could repeat itself with the threat of further discrimination and violence looming. With no real accountability processes for previous crimes committed, Rajapaksa's return could see Tamil activists and perceived dissidents targeted once again."⁵ Notwithstanding this, the above commentary highlights the potential future risk for Tamil activists and perceived dissidents. While the risk of harm for these groups may be heightened under a future Rajapaksa government, I find this is otherwise consistent with the current evidence that

² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

³ UKHO, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017.

⁴ The Guardian, "Sri Lanka MPs pass no-confidence vote against disputed PM Rajapaksa", 14 November 2018.

⁵ Aljazeera, "What happens if Rajapaksa heads Sri Lanka's government?", 1 November 2018.

those targeted are individuals indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government. I note that Maithripala Sirasena continues as President of the country and that these concerns appear speculative and that the articles do not report an actual worsening of the human rights situation for Tamils and political opponents.

30. The applicant and his immediate family members were not members of the LTTE. Whilst I accept that he undertook some support tasks for the LTTE, these were now many years ago and I have found he was not previously targeted for this and these were low profile. Since his departure he has not been involved in any Tamil diaspora activities. I do not accept, on the evidence before me, that the applicant will be imputed with any pro-LTTE or Tamil separatist political opinion upon his return to Sri Lanka by the authorities or anyone else.
31. The applicant has employment experience in a number of occupations (including a [Occupation 1], a [Occupation 2] and in [Industry 1] in Sri Lanka and [Industry 2] in [Country 1]). There is nothing before me to indicate that upon return to Sri Lanka, his capacity to subsist would be threatened. Whilst the country information indicates that the applicant may face a low risk of societal or official discrimination due to being a Tamil, given his profile and particular circumstances, I do not accept that there is a real chance that he will face serious harm upon return at the hands of the Sri Lankan authorities or anyone else on account of these claims.

Failed Tamil asylum seeker who departed illegally

32. I have considered the chance of the applicant facing harm on his arrival at Colombo airport or afterwards on account of being a failed Tamil asylum seeker.
33. In its most recent report, DFAT reported that between 2008 and 2017, over 2,400 Sri Lankans departed Australia for Sri Lanka. Many others have returned from the US, Canada, the UK and other European countries, and most of these returnees are Tamils. The Sri Lankan government claims that failed asylum seekers are welcome back with the Sri Lankan Prime Minister publicly stated this during a 2017 visit to Australia. However, DFAT have also noted that returnees may face practical difficulties upon return. There is limited reintegration assistance available and some returnees have reported social stigma from community members upon return. DFAT notes that the biggest challenge facing returnees are bureaucratic inefficiencies, rather than official discrimination, which can result in delays in obtaining official documentation and support. The Sri Lankan government has reportedly decreased systematic surveillance of returnees, although DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the North as recently as 2017. DFAT assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within the communities. However, UNHCR conducted interviews with returnees in 2016 and only 0.3 per cent indicated they had any security concerns following their return.⁶
34. I accept it is possible that the applicant may be subject to monitoring for a period by the Sri Lankan authorities and face social stigma as a returning failed asylum seeker. I also accept that he will need to re-establish himself in Sri Lanka. However, he has previously worked in a number of occupations in Sri Lanka and he has family members there. I do not consider the treatment he may face as a returning asylum seeker constitutes serious harm.

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

35. DFAT have reported for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal 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 hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.⁷ The applicant has not claimed that there are any outstanding court orders or arrest warrants in relation to him. I have already found that he is not of any adverse interest to Sri Lankan authorities and I am not satisfied that any investigations would lead to a real chance of him being seriously harmed. I note that the applicant was able to leave the country lawfully on his own passport, he was not previously suspected of being a LTTE member, he has not been involved in any Tamil separatist activities and he does not have a criminal history. The applicant's representative has submitted that should the applicant be returned to Sri Lanka as part of a larger group of failed Tamil asylum seekers, there could be extensive amounts of delay as DFAT have stated that returnees can exit the airport until all have been processed. It is further submitted that should one member of the group of returnees who are processed "en masse" attract adverse attention for whatever reason, member of the group of returnees are likely than not to be affected which could expose member of the group process "en masse" to be persons of interest and that members of such a group could all be imputed with a political opinion that they did not hold due to one member of such a group being found to be a person of interest. Whilst I accept that the applicant could experience delay in exiting the airport, I find the representative's submissions, highly speculative and I do not accept that he faces a real chance of being imputed with any political opinion or of being harmed if he returns in a group. I do not accept, on the evidence before me, that the applicant will face a real chance of serious harm due to being a failed Tamil asylum seeker.
36. I am not satisfied that the applicant faces a real chance of serious harm on account of these claims.

Overall assessment

37. Considered cumulatively, I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning and official and social discrimination) amount to serious harm. Considering his profile on a cumulative basis (including that he is a Tamil male from the north, his past involvement with the LTTE, his uncle's involvement in the LTTE, the death of his cousins and his being a failed Tamil asylum seeker), I find that he does not face a real risk of serious harm for any reason.

Refugee: conclusion

38. 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

39. 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

⁷ Ibid.

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

40. 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.
41. For the reasons given above, I have found that the applicant would not face a real chance of serious harm on account of his being a Tamil male from the north, his past involvement with the LTTE, his uncle's involvement in the LTTE, the death of his cousins and his being a failed Tamil asylum seeker. The real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm on these bases even when considering his profile cumulatively.
42. I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning and official and social discrimination) amounts to significant harm. I am not satisfied that there is a real risk that the applicant will be arbitrarily deprived of his life, be subject to the death penalty or be subject to torture. Nor does the evidence before me indicate that there is a real risk that he will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for any reason.

Complementary protection: conclusion

43. 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

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.