



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06652

Date and time of decision: 2 July 2019 13:40:00
R Adolphe, 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 Tamil. He arrived in Australia [in] October 2012 as an unauthorised maritime arrival. On 3 March 2017 he made a valid application for a Class XE, Safe Haven Enterprise Visa (SHEV).
2. On 22 May 2019 a delegate of the Minister of Immigration refused to grant the visa. The delegate was not satisfied that the applicant faced a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.

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).
4. The IAA received an email from the applicant that contained photographs of two documents. Copies of the same documents are contained in the review material. These documents have been considered below and are not new information.
5. No other information was obtained or received.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is a Tamil male from [Town 1], Northern Province, Sri Lanka
 - He had two [uncles] who were LTTE members. One died fighting in the war when he was very young. The other was arrested in Colombo in 2005 and was imprisoned and tortured. He was released in 2010 with weekly reporting duties.
 - His mother received an exemption from joining the Liberation Tigers of Tamil Eelam (LTTE) in 2008 for his older brother as he was the eldest male of their household.
 - As [one of the] eldest son he was expected to join the LTTE. The applicant went to work with the LTTE for six months. He cleaned guns, prepared food, checked for landmines, guarded prisoners and collected water for fighter.
 - He was sent home by the base leader as he had not completed training.
 - He hid with his mother and siblings in a space underneath the house for two months.
 - In January 2009 they fled their home and escaped to a refugee camp in [Town 2].
 - In 2011 he returned with his family to [Town 1].
 - His [uncle] breached his reporting duties and was detained for a further year and was released in 2012.
 - The Criminal Investigation Division (CID) officers stopped the applicant and questioned him about his uncle and his own LTTE involvement. He was threatened, harassed and slapped.
 - He sought the assistance of people smugglers and fled Sri Lanka.

- Since coming to Australia the CID have visited his mother and asked about the applicant's whereabouts.
- He has attended an annual Hero's Day event in Australia on at least four occasions.

Factual findings

7. The applicant has consistently claimed that he is a Tamil Hindu male from [Town 1] in the Northern Province of Sri Lanka. He provided his National Identity Card (NIC) a copy of his passport and a translation of his birth certificate. I note the applicant's date of birth is different to that indicated on in the English translation of his birth certificate. This issue was raised at the SHEV interview and the interpreter confirmed with the delegate that the translation was incorrect and the date that appeared on his original document is consistent with his other forms of identity. I am satisfied that the applicant is a [age] year old Tamil Hindu male from Sri Lanka. I am satisfied that he is a national of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.
8. The applicant also provided consistent information with regards to his family composition. He claimed that he has an older and younger brother and that his father separated from his mother and moved away from the family after his younger brother was born and he was approximately three years old. He claimed to have had no contact with his father since the separation and has heard only that he remarried and is possibly living in [Town 2]. His residential history indicates he lived with his mother and siblings in his [grandmother's] house for the majority of his childhood. He told the delegate in the SHEV interview that his younger brother lives with his mother and his older brother has married and lives with his wife. He also stated at interview that all his family continue to reside in [Town 1]. The applicant was forthright in answering questions regarding his family composition and I accept that his immediate family is made up of two brothers and his mother who live in [Town 1].
9. Central to the applicant's reasons for fleeing Sri Lanka is his claimed links to the LTTE and the Sri Lankan authorities' adverse interest in him personally for this association. The applicant's claims partially rely on a familial association to the LTTE via his relationship to two uncles. He claimed that one uncle in particular was a LTTE member and was imprisoned by the authorities for a number of years and he was targeted because of his family link to him. He also claimed to have performed unpaid work for the LTTE at a base located at [Location 1] in 2008. He claimed that he was harassed, threatened and assaulted by the CID in 2012 and departed Sri Lanka because of his fears they would harm him.
10. With regards to his own personal involvement in the LTTE the applicant described that he was required to go work for the LTTE as unlike his older brother he did not have an exemption from service. He claimed that in 2008 his mother had travelled to [Town 3] and received an exemption for her eldest son from the LTTE as he was the eldest male head of the family and they were a poor family. His brother carried the letter with him and produced it to the LTTE officers when questioned about his absence from participating in the war. The applicant explained that as the next eldest son the duty fell to him to join the LTTE. He described being fearful of doing so as bodies were often being returned to community members of fallen cadres from the war. He told the delegate that his grandfather knew one of the LTTE base leaders at [Location 1] and at the time in 2008 as there was no active conflict there, his mother took him there to provide services to the LTTE without participating in active conflict duties. He described staying there for six months providing duties such as checking the roads for bombs, guarding prisoners, providing meals and water and cleaning weapons. He stated that he did not receive any training or receive any wages for this work. The delegate asked the

applicant what the name of this base leader was to which he responded that he did not know. The applicant claimed that his service at [Location 1] came to an end at the end of 2008 when a high ranking official became aware the applicant was not officially a LTTE member through the absence of number markings on his neck and wrist and that he had not received any LTTE combat training. He told the applicant to return home and he would make arrangements for him to receive the training.

11. Although the applicant's written and oral evidence were broadly consistent regarding having worked for the LTTE, I have concerns as to the credibility of his evidence. I consider his evidence that his mother took serious steps to ensure her eldest son was spared from joining the LTTE yet around the same time also made arrangements for the applicant to work for the LTTE to be at odds. He has reasoned that he was forced to work with the LTTE in some capacity so his family used their connections to place him in a non-combat role. However, I have doubts regarding critical elements of this claim. For example, I have difficulty in believing that he would not know basic information about the base leader who had made his placement possible particularly given he alleges there was a family connection to him and also given the period he says he spent at the camp. In my view, it is also difficult to believe that at the end of the war as the LTTE troops were facing significant losses, an LTTE leader would send a male of fighting age home to his family to await the arrangements to attend training.
12. He claimed that once he returned home that he hid with his mother and siblings in a hole that had been dug in his grandparent's house so that the LTTE could not find him. In January 2009, after two months of hiding in the hole, he fled [Town 1] with his family and made their way to a refugee camp in [Town 2]. He claimed that he and his family were displaced for a period of approximately two years in refugee camps before returning to [Town 1] in 2011.
13. Turning to the applicant's claim of a familial LTTE connection, the applicant's written statement was that he had one [uncle] "STK" who was a LTTE member and that he died fighting in the war when the applicant was very young. At the SHEV interview the delegate asked the applicant about STK and his role in the LTTE to which he replied that he was a high profile member in charge of one of the bases. He seemed particularly unsure of any other details although I am mindful that the applicant claimed he was very young when this relative is said to have died. However, while I accept he would be unlikely to have a personal recollection in such circumstances I have difficulty in accepting that had the applicant been related to a high profile LTTE member he would have at the very least been told information from family members about him and been able to provide more meaningful evidence regarding his claim that STK was a high profile LTTE leader. In any event, I note that the applicant made no further claims relating to STK or any difficulties faced on account of this particular familial connection.
14. The applicant's evidence regarding his other uncle's ("SVK") LTTE involvement was more detailed but at times shifting and confusing. In his written statement he stated that SVK was forcefully recruited to fight for the LTTE. Later in the same statement he claimed that SVK was working as a carpenter in Colombo and was detained by the CID in 2005 on LTTE suspicion. He also stated in his written statement that their family did not know the whereabouts of his uncle for about five months after his arrest and that they attended court to discover he was being held in prison in Colombo. At the SHEV interview the applicant told the delegate that SVK was a LTTE member and had transported weapons between Colombo and [Town 4]. He did not mention that he was a carpenter. He also told the delegate that his family in [Town 1] found out the news of his arrest one month after he had gone missing from some friends of his uncle. This differs from his other evidence that his family had sought assistance from the Sri Lankan legal system and attended court to find out the information regarding SVK's whereabouts.

15. The applicant claimed that SVK was held in prison by the authorities in Colombo for five years from 2005 until 2010. He was released with reporting conditions detained a second time for another year from 2011 and returned to [Town 1] to live with his mother (the applicant's grandmother) in 2012. The applicant did not make any claims that he had faced any difficulties on account of his relationship to his uncle STK who had died when he was very young. However, he did make claims that he was targeted on account of his relationship to SVK and specifically claimed that this treatment only began after SVK returned to [Town 1] in 2012.
16. The applicant stated that the CID began visiting his house and asking him questions and requesting that he attend their office for enquiries. The applicant claimed that he did not comply with this request and as a result he began getting stopped in the street by CID officials. He claimed that they were interested in knowing both his own LTTE involvement and information about his uncle. In his written statement he stated that the CID officer had a paper file on him and showed him the LTTE letter which was used to excuse his elder brother of service. As his name was not on the paper and he was not excused they told him that he must have been involved in the LTTE. He claimed that he was threatened with imprisonment in a torture chamber in [Prison] if he did not admit he was LTTE and they hit him across the face when he denied any involvement. At the SHEV interview the delegate asked the applicant how the CID had obtained the letter excusing his brother of service that his mother had acquired from the LTTE four years earlier. Confusingly the applicant told the delegate that the CID did not have this letter. The delegate reminded the applicant of what was written in his statement and the applicant reasoned that whilst his family had stayed in refugee camps in [Town 2] the authorities had seen this letter. The applicant's responses in my view lacked credibility.
17. As mentioned earlier, the applicant also claimed that the CID had personally targeted him regarding information about his uncle. At interview the delegate asked the applicant what the CID had asked him regarding his uncle and he stated only that he was asked if his uncle was in the LTTE and the location of weapons. The delegate asked him why he thought that he was being targeted regarding his uncle when he had two brothers one of which was older. I found the applicant's responses to this aspect of his claims particularly unconvincing. He told the delegate that the authorities would not target his brother because he suffered from asthma which I do not regard as a plausible reason that would prevent the authorities from pursuing someone of interest. He also stated that he was the closest to his uncle. I note that the applicant was only twelve years old when his uncle purportedly was sent to prison and even on his release the applicant and his uncle lived in different residences. He told the delegate that he did not visit his uncle in the Colombo prison and I also note that the applicant was overseas working in [Country] for part of his uncle's second period in prison.
18. I have had regard to the applicant's statements in his arrival interview when he first arrived in Australia and that are some broad consistencies in that he mentioned his uncle had been abducted for four years and that he had problems with the CID. However when given the opportunity to provide further evidence he was unable to provide meaningful responses to the delegate beyond some very basic assertions.
19. Whilst I accept that [Town 1] as the last strong hold of the LTTE during the conflict¹ the applicant may have faced difficulties of living amongst conflict and also that his family like hundreds of thousands were displaced at the end of the war,² I am not satisfied with the

¹ Landinfo, "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

² Austrian Centre for Country Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

applicant's other evidence regarding his LTTE involvement and familial association and consider it is not credible. I do not accept that he worked for the LTTE for six months in 2008. I am not satisfied with his evidence that he had two uncles involved in the LTTE and I do not accept that he was personally targeted because of a familial connection to the LTTE by the CID prior to departing Sri Lanka in 2012.

20. The applicant said that he obtained a genuine passport from the Sri Lankan authorities in [2011] by personally making an application and paying a fee to the government issuing authority. This is consistent with the copy of a Sri Lankan passport that he has provided in his name with his photo that was issued in Colombo. I consider that the issuance of a passport to the applicant in 2011 strongly indicates to me that he was not a person of concern to the authorities at this time.
21. Based on the evidence before me I accept that the applicant sought the assistance of people smugglers and departed Sri Lanka illegally by boat.
22. The applicant has claimed that since coming to Australia the CID have sought his whereabouts and told the delegate that his mother had only recently informed him they had visited in 2017. He also stated that his brothers have been stopped and asked about him. The delegate asked the applicant what his mother had told him about the visits. His answers to the delegate were vague and he claimed that the CID had only asked his mother for his whereabouts. I have serious concerns regarding the applicant's responses and his inability to provide any meaningful information about these visits. I have had regard to the fact he was in Australia at the time of these alleged visits, however, given the seriousness of the claim and that he stated he is in regular and frequent contact with his mother the superficiality of his evidence was in my view telling. He provided the delegate with a document post interview which states that [in] July 2017 the Terrorist Investigation Department (TID) in Colombo requested the [Town 1] police inform the applicant he was required to attend their offices in Colombo [in] July 2017 to answer their enquiries. He did not provide any further information to the delegate regarding the circumstances in which his mother received this document. I also note that duplicates of the documents were also provided to the IAA by the applicant without any accompanying details. Importantly, the applicant had not previously advanced any claims that there had been a request made by the authorities for him to report to the TID office in Colombo in July 2017, despite this having said to have occurred well before his November 2018 SHEV interview. I am not satisfied the applicant was a person of interest to the Sri Lankan authorities in 2012 and I have difficulty accepting that he was summoned by the TID some five years after he departed Sri Lanka. I am not satisfied with the applicant's evidence. I have serious concerns regarding the veracity of the document provided. I do not accept the CID have visited the applicant's mother since he departed Sri Lanka and I do not accept that he was required to attend the TID office in Colombo in July 2017.
23. With respect to claims regarding his brothers he stated that the CID stopped them and asked them about his whereabouts. He provided this information at the end of the interview only when asked directly by the delegate if his brothers had ever been approached by the CID. Again, he provided no meaningful detail such as when this occurred or the frequency and I am not persuaded that it occurred. I do not accept his brothers have been stopped by the CID and questioned about the applicant's whereabouts.

24. The applicant has claimed that whilst in Australia he has attended Martyr's Day or Hero's Day celebrations. He stated that he did so to commemorate the Tamils people who sacrificed their lives for freedom. In his written statement he claimed that many people took photographs and videos of the events and they are publically available. He stated that he knows photographs have been taken of him however, there is no evidence any such photographs or videos exist. At interview when the delegate provided the applicant the opportunity to elaborate on any claims of harm he feared for this participation. He only stated that he attended the event and marched in the front. I am willing to accept the applicant attended Hero's Day as a Tamil living in the diaspora. I am not satisfied that there are any publicly available photographs or video of the applicant at these events. I am satisfied that his attendance at such events was for the purpose of commemorating the Tamil lives lost at war as he has stated and not undertaken for the sole purpose of strengthening his protections claims.
25. The applicant disclosed as part of his SHEV application that since being in Australia he has been charged with driving whilst under the influence of alcohol and on a separate occasion, driving whilst his licence was suspended. He has not claimed that as a consequence of these charges he fears harm upon return to Sri Lanka. Whilst I accept he has been charged with these offences since he arrived in Australia, I do not consider they are relevant to his claims for protection.

Refugee assessment

26. 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

27. 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.
28. I accept that the applicant is a Tamil male from the north of Sri Lanka who was subjected to a few years of displacement at the end and immediately after the civil conflict. I do not accept that he worked for the LTTE or that he has any familial connections with the LTTE including

through any uncles. I do not accept that at the time he departed Sri Lanka in 2012 he was of any ongoing interest to the authorities in Sri Lanka including the CID or any other arm of the government.

29. I accept that as a young Tamil male from [Town 1] the applicant faced some difficult experiences during and immediately after the war. Country information indicates that the security forces in the Northern Province in the years immediately after the war seemed to hamper resettlement, re-establishment of a functioning civil society and a sustainable local economy.³ As a displaced person returning to [Town 1] in 2012 I consider he was subject to such problems. However, more recent country information before me indicates that conditions for Tamils in Sri Lanka have improved considerably since the applicant departed in 2012, even those from the North, particularly since the 2015 election.⁴ The current Sirisena government was elected in January 2015 on a platform of post-conflict reconciliation, transitional justice, good governance and anti-corruption and economic reform.⁵ Indications of improvement since the Sirisena government took office include a proactive engagement with the United Nations and the International community particularly around human rights, military checkpoint removal on major roads, the establishment of the Office of Missing Persons, returned land to people displaced during the civil war, cases of persons detained under the Prevention of Terrorism Act (PTA) receiving review and the release of some Tamil detainees.⁶
30. Despite these positive developments, the information before me⁷ also indicates that the Sirisena Government has struggled with the enormity of issues it faced in the aftermath of a long and brutal civil war. Implementing the government's commitments has been slow and issues for some Tamils remain. Close relatives of former high profile LTTE members or those who have played a significant role in Tamil separatist activities and those that have a criminal history or an outstanding arrest warrant have been identified as being at risk of being detained or mistreated. I am not satisfied that the applicant holds or would be perceived to hold a profile of a person at risk. I am not satisfied that his family have any connections to the LTTE and the fact that all his family members continue to live in their home area without issue, including his brothers and uncle, strongly indicates he will not face issues on this basis upon return to Sri Lanka.
31. I have accepted that the applicant attended Hero's Day commemorative events held in Australia whilst he has been residing here. The International Truth and Justice Project report noted witness testimony of surveillance of diaspora events, and witnesses who believed they had been abducted because of participation in commemorations in Sri Lanka in 2015 and

³ Landinfo, "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

⁴ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UN Human Rights Council, "Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka", 23 July 2018, CIS7B839419490; United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

⁷ US Department of State, "Country Reports on Human Rights Practices for 2017 – Sri Lanka", 20 April 2018, OGD95BE927333; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UN Human Rights Council, "Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka", 23 July 2018, CIS7B839419490; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; International Truth and Justice Project (ITJP) "UNSTOPPED: 2016/17 TORTURE IN SRI LANKA", 14 July 2017, CISED50AD4849; Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881

2016.⁸ However, other credible sources note the Sirisena Government has prioritised human rights and reconciliation and there have been significant improvements in human rights. Symbolic changes have occurred such as the name change in 2015 of the day commemorating the end of the conflict from 'Victor Day' to 'War Heroes Remembrance Day' and for the first time gave official approval for memorial events to take place in the north and east.⁹ Furthermore, UK Home Office note in 2017 that participating in diaspora activities, such as attending demonstrations, is not in itself evidence that a person will attract adverse attention on return to Sri Lanka. I am not satisfied that the applicant's participation in these diaspora events, even if known and considered in light of his profile as a Tamil male originating from the North, will lead the authorities to believe the applicant is a person who had a significant role in a pro-Tamil separatist event. I am not satisfied that the authorities would perceive the applicant as a person who would be involved in a resurgence of Tamil separatism or be regarded as a threat to the State of Sri Lanka.

32. The UK Home Office also stated in 2017 that in its opinion, Tamil ethnicity would not in itself warrant international protection.¹⁰ The weight of the other evidence overall does not suggest that the applicant as an ordinary Tamil male from [Town 1] will face harm on the basis of his ethnicity or origins from the north in the reasonably foreseeable future. I am not satisfied that the applicant faces a real chance of any harm on the basis of his ethnicity, his origins in the north or his activities in Australia.
33. The evidence suggests that the applicant's Sri Lankan passport is still current, however as he has indicated the original of this document remains in Sri Lanka I accept that he may be returning to Sri Lanka on temporary travel documents. I also accept that the manner in which he may be returned may cause the authorities to suspect that he is a person who is returning to Sri Lanka having sought asylum in Australia. I also accept that he may be identified as a person who departed Sri Lanka illegally in 2012.
34. In relation to the processes the applicant would be subjected to as a returnee at the airport the country information I indicates they are standard, non-discriminatory procedures and apply to all returnees regardless of ethnicity and religion.¹¹ DFAT understands that detainees are not subject to mistreatment during their processing at the airport.¹² The process may take several hours and involves some investigation by police to confirm the returnee's identity which may involve interviewing the returnee, contacting the person's claimed hometown police and/or contacting the person's claimed neighbours and family. Once identity is confirmed the authorities carry out criminal and court record checks.¹³ There is no credible evidence that the authorities have an adverse in the interest the applicant
35. Country information indicates that there may be some practical challenges for returnees to Sri Lanka such as limited reintegration assistance which can make it difficult to find suitable housing and employment on return. DFAT has noted that those with skills are in high demand in the labour market and are best placed to find well-paid employment.¹⁴ I note that the applicant has work experience from Sri Lanka, [Country] and Australia. I also note that his mother continues to reside in their family home in [Town 1] with his younger brother and his

⁸ International Truth and Justice Project, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849

⁹ DFAT, "Sri Lanka – Country Information Report", 24 January 2017, CISED50AD105

¹⁰ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

¹² Ibid

¹³ Ibid

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

older brother and his wife also live in the same province. The applicant has not suggested that he will face difficulties obtaining employment or housing upon return to Sri Lanka and I am not satisfied that there is a real chance that his capacity to subsist with be threatened.

36. DFAT notes that there is anecdotal evidence of returning asylum seekers from the North that reported being subject to regular visits and phone calls from police. It also suggests that as a returning asylum seeker the applicant may experience social stigma from his community members.¹⁵ I accept that the applicant may be subject to some initial monitoring by the authorities and some societal discrimination, however, I am not satisfied that this treatment amounts to serious harm in this case.

37. It is an offence under the Immigration and Emigrants Act (I&E Act) to enter or exit Sri Lanka other than via an authorised port.¹⁶ I accept that when the applicant departed Sri Lanka in 2012 with the assistance of people smugglers he would very likely be found to have committed an offence under the Act, be arrested and charged by the police at the airport upon arrival.¹⁷ DFAT reports that at the earliest opportunity after investigations have been completed those charged are brought before a Magistrate who then makes a determination as to the next steps for each individual. Those arrested can remain in police custody in an airport holding cell for up to two days until a Magistrate becomes available. The Attorney-General's Department have stated that they distinguish between those suspected of being passengers and those suspected of facilitating or organising the irregular migration of people from Sri Lanka. They have further stated that no returnee who was a mere passenger on a people smuggling venture has received a custodial sentence for departing Sri Lanka illegally.¹⁸ Guilty pleas attract a fine which is usually issued on a discretionary basis and act as a deterrent. The fine, which can vary from AUD 25 to AUD 1,760, can be paid in instalments. A person who enters a not guilty plea is usually granted bail on the basis of a personal surety.¹⁹

38. I accept that the applicant may be questioned at the airport for processing and it is possible he may be further held in an airport holding cell for several days. I also accept that as passenger, he may be liable to pay a fine, and possibly be subject to further costs associated with processing. I am not satisfied that the applicant would not be able to pay the fine or any associated court costs if applicable. In any event, the country information does not support that the the I&E Act is discriminatory on its face or in its application or enforcement. I am not satisfied that it amounts to systematic and discriminatory conduct. I am also not satisfied that the questioning, temporary detention and the imposition of a fine or any associated court costs constitute serious harm for this applicant. I am not satisfied that the applicant faces a real chance of persecution for his illegal departure.

39. The applicant does not have a well-founded fear of persecution.

Refugee: conclusion

40. 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).

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

Complementary protection assessment

41. 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

42. 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.
43. I accept that as an asylum seeker returning to the Northern Province the applicant may face some stigma from local community members and routine checks and monitoring from authorities upon return. I am not satisfied that the stigma, checks and monitoring would amount to or result in a real risk of his facing significant harm as defined for the purposes of s.36(2A). I am not satisfied such treatment meets the threshold of pain or suffering that that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am also not satisfied that there is a real risk he will be subject to the death penalty, be arbitrarily deprived of his life or tortured. I am not satisfied that there is a real risk of significant harm on this basis.
44. I also accept that as someone who has committed the offence of illegal departure under the I&E Act, the applicant will very likely be investigated and held for several hours at the airport, and possibly detained for some days at the airport pending appearance before a Magistrate. I accept he will be subject to the judicial processes related to the charge and the penalties under the I&E Act. I am not satisfied however that this treatment amounts to the death penalty, or arbitrary deprivation of life or torture. The evidence does not suggest that there is an intention to inflict or cause pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation such that it would amount 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 in this regard, or when considered in conjunction with the treatment he may face as a returning asylum seeker.
45. I have otherwise concluded that on return to Sri Lanka the applicant does not face a real chance of any harm. Based on the same information, I find the applicant does not have a real risk of suffering significant harm on return to Sri Lanka.

Complementary protection: conclusion

46. 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.