



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06866

SRI LANKA
IAA reference: IAA19/06870

SRI LANKA
IAA reference: IAA19/06867

SRI LANKA
IAA reference: IAA19/06869

SRI LANKA
IAA reference: IAA19/06868

Date and time of decision: 12 August 2019 17:29:00
D Corrigan, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicants (the applicants) claim to be Sri Lankan nationals. They arrived in Australia [in] June 2013. On 30 November 2016, they lodged an application for a Safe Haven Enterprise Visa (SHEV). The first applicant (the applicant) makes claims for protection, the second applicant (the applicant wife), relies on his claims and makes additional claims. The third and fourth applicants are their dependent children born in Sri Lanka and the fifth applicant is their dependent child born in Australia. None of the children raise any separate claims for protection.
2. In a decision dated 10 January 2018, a delegate of the Minister refused to grant the visas. The delegate found that the applicants did not face a real chance of serious harm or significant harm on account of their Tamil ethnicity, their actual or perceived link to the Liberation Tigers of Tamil Eelam (LTTE) or their being failed Tamil asylum seekers who had departed illegally and a website disclosure and applicant wife's mental health.
3. On 26 February 2018, the IAA (with a different reviewer) affirmed the delegate's decision not to grant the applicants protection visas. [In] June 2019, the Federal Circuit Court of Australia quashed the decision and directed the IAA to reconsider and determine the applicant's application according to law.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been received.
5. I have considered whether I should exercise the power under s.473DC to get and request new information and to invite the applicant wife to give new information, orally at interview or in writing on the applicant's claimed LTTE involvement in 2006-08 and the reasons for his delay in disclosing that involvement. Whilst I have taken into account that the applicant wife was married to the applicant during that period and she was not interviewed by the delegate and information could be sought from her, I have decided not to exercise this power. I do so for the following reasons. The delegate in her decision did not accept this late claim and the applicants have not sought to put forward any further information or submissions to the IAA about this despite having had the opportunity to do so. I also note that when this late claim was made in a post-interview submission, the applicants were represented and if the applicant wife had relevant information, this could have been provided to the delegate. I also note that the applicants and their representatives made no complaint to the delegate (during the interview or there afterwards) about the applicant wife not having been invited to interview or made any request for her to attend an interview. Moreover, I am of the view that any information that the applicant wife would likely give would be of limited probative value in establishing that the applicant was involved in the LTTE in the key manner he has claimed (working in LTTE [two branches]) given it was not her who is claimed to be involved and the secretive nature of such claimed employment. I also note that in post-interview submission, the applicants' representatives have given detailed reasons for the delay in making these claims which I have fully addressed in my reasoning in this decision.

6. In this decision, I have obtained and considered new information, namely the latest Department of Foreign Affairs and Trade (DFAT) report concerning Sri Lanka.¹ This report is consistent with the one referred to by the delegate but it is significantly more recent and it is a highly authoritative source. It provides relevant information concerning the situation of Tamils, those with perceived or actual links to the LTTE, failed Tamil asylum seekers who departed illegally and persons with mental health issues. I consider there are exceptional circumstances to justify considering this new information under s.473DD(a).

Applicants' claims for protection

7. The applicants' claims can be summarised as follows:
- They are Tamils from the north of Sri Lanka.
 - The applicant worked for the LTTE as a paid civilian from 1997 until 1999. He was [employed in a certain capacity].
 - From 2006 until 2009, the LTTE required the applicant to make payments to them from [Business 1].
 - From March 2006 until September 2007, the applicant worked for [one] branch of the LTTE and from September 2007 until 2008 he worked for [another branch].
 - In May 2009, the applicants surrendered to the army and were placed in an Internally Displaced Persons (IDP) camp in [City 1]. In August 2009, the applicant was questioned by the Criminal Investigation Division (CID) about his involvement with the LTTE and he told them about his period of civilian employment.
 - Three weeks later, the applicant was questioned again by a CID officer. He was afraid of what would happen to him so he made a plan to escape the camp.
 - The applicant went to work and did not go back to the camp in the evening. He took a train to Colombo and met an agent who arranged a passport, visa and legal work in [Country 1]. Three days later he left the country. He was questioned for 45 minutes at the airport in Colombo before being allowed to depart but the authorities did not appear to know that he had escaped from an IDP camp.
 - In January 2010, the applicant began work in [Country 1] and remained there working until July 2010.
 - While the applicant was overseas, his family in the camp was questioned about his whereabouts. At this time the applicant wife's mental health began to deteriorate and she was hospitalised. His family was eventually released from the camp and allowed to return home.
 - The applicant was encouraged by his family to return from [Country 1] to assist the family due to his wife's illness. He returned to his home town and work at [Business 1]. He had no issue returning through the airport where he was met by the agent who had arranged his travel.
 - Three days after the applicant returned, the CID visited him, checked his passport and documents and asked him to register at their camp. They asked him to sign a document which was in Sinhala which they said was about his former employment with the LTTE.

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

They then demanded monthly payments from his business and in April 2013 when he could not pay, they threatened that he should go to the camp and see the “4th Floor”.

- [In] May 2013, the applicants fled to Colombo and departed for Australia by boat [in] May 2013.
- The applicant’s relatives were questioned by the CID after their departure. The applicants’ fears harm because of his involvement with the LTTE and as failed asylum seekers.
- The applicant wife experienced terrible things during the war. She watched her father being shot and killed by a bullet that pierced through his chest, and also witnessed her brother-in-law and sister being injured. She has been questioned several times by the CID in relation to the applicant’s activity and she fears that she will continue to be targeted because of her association with him. If she is forced to return to Sri Lanka she will not have access to adequate medical care and the stress of being forced to return, in addition to being deprived of medical care, will make her mental health deteriorate even further.

Refugee assessment

Well-founded fear of persecution

8. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

Country of reference

9. The applicants have provided copies their birth certificates and they have not claimed to have any other nationality other than Sri Lankan and there is nothing before me to suggest that they are not. I find that they are Sri Lankan nationals and that Sri Lanka is their receiving country.

Tamil, LTTE and extortion claims

10. The applicants’ claims have been consistent and generally credible in a number of respects and are in accord with country information which indicates that the majority Tamil civilian populations in the areas controlled by the LTTE were required to interact with the LTTE as a

matter of course and the LTTE was supported by both voluntary and forced recruitment of Tamils.² It is also in accord with country information concerning the experiences of Tamils from former LTTE controlled areas after the war due to shortages in housing which was damaged or occupied by the military during the conflict.³ I accept the following:

- The applicant worked for the LTTE as a paid civilian from 1997 until 1999. He was [employed in a certain capacity].
- From 2006 until 2009, the LTTE required the applicant to make payments to them from [Business 1].
- In May 2009, the applicants surrendered to the army and were placed in an IDP camp in [City 1]. In August 2009, the applicant was questioned by the CID about his involvement with the LTTE and he told them about his period of civilian employment.
- Three weeks later, the applicant was questioned again by a CID officer. He was afraid of what would happen to him so he made a plan to escape the camp.
- The applicant went to work and did not go back to the camp in the evening. He took a train to Colombo and met an agent who arranged a passport, visa and legal work in [Country 1]. Three days later he left the country. He was questioned for 45 minutes at the airport in Colombo before being allowed to depart but the authorities did not appear to know that he had escaped from an IDP camp.
- In January 2010, the applicant began work in [Country 1] and remained there working until July 2010.
- While the applicant was overseas, his family in the camp was questioned about his whereabouts. At this time the applicant wife's mental health began to deteriorate and she was hospitalised. His family was eventually released from the camp and allowed to return home.
- The applicant was encouraged by his family to return from [Country 1] to assist the family due to his wife's illness. He returned to his home town and work at [Business 1]. He had no issue returning through the airport where he was met by the agent who had arranged his travel.
- Three days after he returned, the CID visited the applicant, checked his passport and documents and asked him to register at their camp. They asked him to sign a document which was in Sinhala which they said was about his former employment with the LTTE. They then demanded monthly payments from his business and in April 2013 when he could not pay, they threatened that he should go to the camp and see the "4th Floor".
- [In] May 2013, the applicants went to Colombo and departed for Australia by boat [In] May 2013.

11. I do not accept the applicant's claim (first made in a post-interview submission) that from March 2006 until September 2007, the applicant worked for [one] branch of the LTTE and that from September 2007 until 2008 he worked for [another branch]. I do so because of he did not at all refer to such an important claim in his arrival interview, his SHEV application and at his SHEV interview and I do not accept it credible or plausible that he would not have previously mentioned this if it was true. I note that he was represented by a migration agent

² DFAT, "Sri Lanka - Country Information Report", 24 January 2017.

³ Ibid.

in the preparation of his SHEV application and during the SHEV interview. At the start of the SHEV interview, he was informed by the delegate that his evidence was protected by Australian privacy laws and the details would not be shared with the Sri Lankan government and public. He was also asked if there was anything in his application that he would like to add or change and he did not refer to this. After a natural justice break where he was given the opportunity to speak with his representative, he was asked if there was anything else he would like to say in regards to his application and he again did not refer to this important claim. I consider that he was given an ample opportunity to put forward this claim. I note the representative has submitted that the Tamil community in Australia are giving its members the opposite advice to immigration representatives about whether to disclose their LTTE links and that the applicant was fearful of disclosing all the information about his LTTE involvement as he feared that the Australian Security Intelligence Organisation would detain him for many years and separate him from his family (including his wife who has had mental health issues for many years). The representative has also submitted that the Tamil community has a reasonably justifiable fear based on the Australian government's close working relationship with the Sri Lankan government to stop asylum seekers from departing. However, I note the applicant had been willing during his arrival interview and in his SHEV application and interview to reveal to disclose an association with the LTTE and I do not consider this to be a satisfactory explanation.

12. In making my findings, I have had regard to the various country information reports in the referred materials (including the country information referred to by the representative such as from the International Truth and Justice Project, the United Nations Special Rapporteur on Torture, the United States Department of State, Human Rights Watch and Amnesty International) concerning the human rights situation in Sri Lanka generally and specifically for Tamils and those with actual or perceived links to the LTTE. I note the representative has raised concerns about DFAT's assessment of the risk profile of people with links to the LTTE. I have noted these concerns in making this assessment and considered the latest DFAT report in the context of all the relevant country information that was before the delegate including recent reports about the use of torture in Sri Lanka. I have given substantial and greatest weight to latest DFAT report because it is authoritative and more recent 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 applicants come from) have significantly improved since the ending of the war in 2009 and from when they 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. Members of the Tamil community have described a positive shift in the nature of their interactions with the authorities, including feeling able to question their motives or object to monitoring. DFAT 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 and disappearances are no longer common.⁴

13. I note that the UK Home Office has stated that even persons who have past connections to the LTTE would not necessarily warrant international protection, unless they are, or are perceived to be, active in post conflict Tamil separatism and thus a threat to the state. 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. 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.⁵
14. I have taken into account the risk profiles of persons with actual or imputed political links that the UNHCR have stated may give rise to a need for international protection.⁶ However, I note the applicant's involvement with the LTTE occurred a very long time (two decades) ago and was of a very low level with him merely being [employed in a certain capacity]. He has not claimed that any other family members were involved in the LTTE. After the end of the conflict in 2009, he was not arrested or sent to a rehabilitation camp. He was able to depart and return to Sri Lanka in 2010 on his own passport without difficulties and able to carry on a business after he had returned from [Country 1]. Whilst I accept that he was targeted by two corrupt CID officers who extorted money from him by using the threat of his former LTTE involvement, I do not consider that this was sanctioned by the Sri Lankan government or indicative of the Sri Lankan authorities having an adverse interest or a concern due to this previous involvement. The applicants have not claimed to have been involved in any post-conflict Tamil separatist activities in Sri Lanka, [Country 1] or Australia. I find that the chance that the applicants will be imputed with any pro-LTTE or Tamil separatist political opinions by any state or non-state actor upon their return to be remote and not real.
15. I have accepted that the applicant was subjected to extortion by the LTTE in his [business] but this was a very long time ago during the war and country information indicates that the LTTE no longer exists as an organised force in Sri Lanka and that any former LTTE members within Sri Lanka would only have a minimal capacity to exert influence on Sri Lankans, including those returning from abroad.⁷ Accordingly, I find that the chance that the applicants will face extortion (or any form of harm) at the hands of the LTTE to be remote and not real.
16. I have accepted that the applicant was subject to extortion by two CID officers who threatened him to come to the camp and the "4th floor" prior to his departure from Sri Lanka but from the evidence before me that their sole motivation for doing so was financial gain. However, I note that these events occurred a long period of time ago (over six years). I have taken into account country information that police officers are not well paid in Sri Lanka and there have been reports of petty corruption such as taking bribes instead of issuing traffic fines to supplement the income of individual officers. However, I note that DFAT in their latest report do not specifically refer to the use of extortion by the authorities and country

⁴ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

⁵ United Kingdom Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 31 March 2017.

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

⁷ Ibid.

information also indicates a generally improved situation for Tamils.⁸ Considering their particular circumstances (including the long passage of time) and the country information overall, I find that the chance of the applicants being the subject of extortion (or similar or associated harm) by these two officers (or other officials) and to be remote and not real.

17. Whilst I accept that the applicants may face a low risk of official or societal discrimination, I note that the applicant operated his own [businesses] in Sri Lanka and I do not consider their capacity to subsist will be threatened or that any discrimination they may face would amount to serious harm.
18. Taking into account their particular circumstances and the country information considered as a whole, I do not accept that the applicants face a real chance of serious harm at the hands of the authorities or anyone else (including the LTTE) on account of these claims.

The applicant wife's claims

19. I accept that the applicant wife experienced terrible things during the war including that she watched her father being killed and that she also witnessed her brother-in-law and sister being injured. I accept that that her brother is missing. I accept this as during the course of the conflict between July 1983 and May 2009 tens of thousands of people were killed on both sides⁹ and that the applicant's wife would have been adversely affected by this and that she experienced significant losses. Given the long passage of time and that these events occurred during the war, I do not accept that the applicants face a real chance of any harm on account of these tragic events.
20. It is claimed that the applicant wife has been questioned several times by the CID in relation to the applicant's activity and she fears that she will continue to be targeted because of her association with him. However, this questioning occurred in the context of the time she spent in the IDP camp and I accept that it may have been part of the screening process based on the applicant's former association with the LTTE. I also accept that she may have been questioned about the applicant's whereabouts after he left Sri Lanka to work in [Country 1]. However, there is no claim that she was harmed during the course of this questioning.
21. The applicants have provided medical evidence to support the claims about the applicant wife's medical conditions. In 2010 she was diagnosed with [a mental health condition]. She has provided a copy of the diagnosis from [a hospital] which states that she was hospitalised for the condition [in] August 2010. I accept that she was hospitalised because of this and that her health was so poor that the applicant had to return from [Country 1] to support his family. The applicant has also provided a letter dated [October] 2017 from a [medical centre]. The letter states that she is highly symptomatic for Post-Traumatic Stress Disorder (PTSD), anxiety and depression. I accept that she has a history of mental illness and currently has PTSD, anxiety and depression.
22. The Sri Lankan law forbids discrimination against any person with physical, sensory, intellectual, or mental disabilities in employment, education, air travel, other public transportation, and access to health care.¹⁰ DFAT states that free health care is available to all Sri Lankans via the public health system, though facilities vary including in the north and east partly as a result of the destruction of facilities and the loss of human capital in the war and some medicines and treatments may need to be purchased from private providers.

⁸ Ibid.

⁹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017.

¹⁰ US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016.

Mental health services “are scarce and institutional capacity to respond to mental health needs is weak. Mental illness is not widely discussed in Sri Lankan society and the stigma attached to those who seek treatment discourages others from doing so.” Whilst the Sri Lankan mental health services are limited, country information indicates that Sri Lanka is a relatively poor country with its gross national income per capita only approximately USD 3,800 in 2016.¹¹

23. The United Kingdom Home Office reported that there were 22 Psychiatric In-Patient Units in Sri Lanka at the end of year 2012. This includes National Hospital (Colombo), Colombo South (Kalubowila), Lady Ridgeway Hospital – for children (Borella), Colombo North (Ragama), Teaching/General Hospitals in Kalutara, Galle, Badulla, Kandy, Peradeniya, Kurunegala, Trincomalee, Batticaloa, Ampara, Kalmunai, Jaffna, Anuradhapura, Vavuniya, Ratnapura, Nuwara-Eliya. In other General and Base hospitals where acute psychiatric units are not available, psychiatric patients are admitted to general medical units or wards. There were 78 outpatient clinic centres and 200 outreach clinics in Sri Lanka by 2008. It has been increased to 86 outpatient clinic centres and 250 outreach clinics by year 2012. Clinics are conducted by Consultant Psychiatrists and specialist medical officers. Follow up community care services are available to the clients with mental health problems by the Psychiatric Nurses, Community Support Officers and Psychiatric Social Workers. There are 22 Community Support Centres attached to Medical Officer of Health Areas, island wide, to help the community when they have mental health problems. In addition, care giver societies have been established to look after the patients in the community. Day treatment facilities are available in all inpatient units in the government sector.¹²
24. I accept that mental health services in Sri Lanka are scarce and general health facilities can vary in quality. However, general and mental health services are available in Sri Lanka, if the applicant wife wishes to engage with them and there is nothing to indicate that she will be denied access to treatment on the basis of any of the reasons specified in s 5J(1). I also note that evidence that she had previously sought assistance for her mental health in [Sri Lanka] and was hospitalised and treated. Given the country information considered as a whole, I find that any difficulties she may encounter accessing mental or physical health services would be due to a lack of resources. The evidence before me does not indicate that access to general and/or mental health services is selective or applied in a discriminatory manner. I find that the limited general and mental health services in Sri Lanka does not involve systematic and discriminatory conduct and does not amount to persecution within the meaning of s.5J(4).
25. Considering the country information as a whole and their particular circumstances, I find that the applicants do not face a real chance of serious harm or persecution on account of these claims.

Failed Tamil asylum seekers, illegal departure and website disclosure

26. According to the information before me, the applicants’ names, nationalities, dates of birth and means of arrival in Australia were published in a document regarding the number of people in immigration detention on the Department’s website in early 2014. I find that as a consequence of the data breach, the authorities (and others) in their home country may have learned of their detention in Australia at that time. I find that the authorities (and others) may be aware that the applicants travelled to Australia as Irregular Maritime Arrivals and

¹¹ DFAT, “DFAT Country Information Report Sri Lanka”, 23 May 2018.

¹² United Kingdom Home Office, “Sri Lanka: Country of Origin Information Report”, 07 March 2012; Ministry of Health and Indigenous Medicine, “Annual Health Bulletin – 2013 – Sri Lanka”, 01 January 2013.

have therefore worked out that they did so for the purpose of seeking asylum. However, the country information before me considered as a whole does not support a finding that Tamils who have sought asylum in Western countries, such as Australia, are imputed with adverse political profile and subjected to serious harm upon return to Sri Lanka.

27. In making my findings, I have had regard to the country information in the referred materials and in the representative's post-interview submission. I have given greatest weight to latest DFAT report because it is authoritative and more recent 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. 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.¹³
28. I accept it is possible that the applicants may be subject to monitoring for a period by the Sri Lankan authorities and face social stigma as returning failed asylum seekers. I also accept that they will need to re-establish themselves in Sri Lanka. However, I note that the first applicant was able to operate [businesses] in Sri Lanka and I do not consider their capacity to subsist will be threatened. I do not consider the treatment (monitoring and social stigma) they may face as returning failed asylum seekers constitutes serious harm.
29. 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.¹⁴ I have already found that there is not a real chance that the applicants will be imputed with a pro-LTTE or Tamil separatist political opinion and I have not accepted their claims of now being of adverse interest to the Sri Lankan authorities or anyone else and I am not satisfied that any investigations would lead to a real chance of them being harmed. I do not accept that the applicants face a real chance of serious harm due to being failed Tamil asylum seekers and the website disclosure.

¹³ ¹³ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

¹⁴ Ibid.

30. DFAT have stated that most Sri Lankan returnees are questioned upon return and where an illegal departure from Sri Lanka is suspected, they can be charged under the Immigration and Emigrants Act (I&E Act). DFAT understands the Sri Lankan Police Airport Criminal Investigations Unit at Colombo's Bandaranaike International Airport makes most arrests. In the process, police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are former LTTE members. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. The magistrate then makes a determination as to the next steps for each individual; crew and facilitators or organisers of people smuggling ventures are usually held in custody. Apprehended individuals can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.¹⁵
31. Penalties for illegal departure can include imprisonment of up to five years and a fine. In practice those individuals who were mere fare paying passengers of a people smuggling venture are issued a fine which acts as a deterrent to depart illegally in future. The Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger has been given a custodial sentence for departing illegally.¹⁶ The evidence before me does not suggest that the applicants were involved in facilitating people smuggling or organising the vessel that was used to travel from Sri Lanka and I do not accept that there is a real chance that they will be perceived as such by the Sri Lankan authorities.
32. A guilty plea will attract a fine and can be paid in instalments and the defendant is free to go. The fines vary and can be LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,760). Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of a personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. Children over 14 can be charged; no bails or fines are imposed for children under 14.¹⁷ I do not accept that the applicant children face prosecution for illegal departure.
33. I accept that the applicants may be questioned and detained at the airport for processing by authorities for up to 24 hours with the possibility that they may be further held at an airport holding cell for up to two days. The information from DFAT does not indicate that females or children are at any particular risk during this period. I have taken into account the medical situation of the applicant wife and that this may exacerbate her symptoms but given the shortness of the time of detention that they face and the information from DFAT about the treatment of persons who have illegally departed the country, I do not accept that their brief detention would constitute serious harm nor do I accept that there is a real chance that they will be tortured or face any other form of serious harm during this.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

34. If the applicant and applicant wife do plead not guilty, there is no suggestion they will not be able to secure bail. I note that this is a first offence and I accept that they may have to pay a fine but I note that this may be paid in instalments. The evidence before me does not indicate that the applicants will be unable to pay the fine or any possible associated court costs.
35. I am not satisfied that the questioning, brief detention, the imposition of a fine, monthly reporting and any associated court costs if they arise would constitute serious harm. I am not satisfied that the applicants face a real chance of serious harm due to their illegal departure from Sri Lanka.
36. In any event, country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I find that it is a law of general application that is not applied or enforced in a discriminatory manner and not for reasons of race, religion, nationality, membership of a particular social group or political opinion and therefore does not constitute persecution.

Overall assessment

37. Considered cumulatively, I do not accept that the treatment the applicants may face upon return (including social stigma, monitoring, questioning and official and social discrimination and being subject to a short term detention and having to pay a fine, report monthly and meet possible court costs if they arise) amount to serious harm or constitute persecution.
38. Considering the applicants' profile overall (including their being Tamils from the north, their past interaction with the Sri Lankan authorities, the applicant's actual or imputed links with the LTTE, the applicant wife's physical and mental health, and their being failed Tamil asylum seekers who departed illegally and the website disclosure), I find that they do not face a real chance of serious harm or persecution for any reason. Their fear of persecution is not well-founded.

Refugee: conclusion

39. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

40. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

41. 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.
42. For the reasons given above, I have found that the applicants would not face a real chance of serious harm for any of the reasons claimed including their being Tamils from the north, their past interaction with the Sri Lankan authorities, the applicant's actual or imputed links with the LTTE, the applicant wife's physical and mental health and their being failed Tamil asylum seekers who departed illegally and the website disclosure. I also find that they do not face a real risk of significant harm for these reasons.
43. After considering the totality of the information before me, I find that any difficulties the applicant wife may face in accessing mental or physical health treatment in Sri Lanka and the stress of her returning to Sri Lanka will not amount to significant harm. It will not amount to the arbitrary deprivation of life or the carrying out of the death penalty. The consequences of scarce medical resources do not fall within the concept of arbitrary deprivation of life.¹⁸ I note that the Department's Complimentary Protection Guidelines state that the absence or inadequacy of medical treatment in the country of return will not generally amount to a violation of Article 7 and therefore will not generally meet the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied that it will constitute torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as there would be no necessary element of intention; rather I find that any of these difficulties will be due to a lack of resources of the Sri Lankan state.
44. I do not accept that the treatment the applicants may face upon return (including social stigma, limited mental health services, monitoring, questioning and official and social discrimination including from employers, having to pay a fine, monthly reporting and possible court costs if they arise and being subject to a short term detention) amounts to significant harm even when considered cumulatively. I find that the treatment that the applicant and applicant wife face for illegal departure is one faced by the population of the country generally if they depart the country illegally and is not faced by them personally. While I have found above that the applicants will not receive a custodial sentence, I have considered the conditions the applicants may face if they are held while waiting to come before the magistrate. The evidence of DFAT does not indicate that any prisoners subject to short periods of detention and awaiting prosecution under the I&E Act have been subject to the death penalty or have been otherwise arbitrarily deprived of their life or that they have been tortured. There is also no indication in the country information that authorities or others, through any act or omission intentionally inflict pain or suffering such as to meet the definition of cruel or inhuman treatment or punishment, nor any intention to cause extreme humiliation. I am not satisfied that there is a real risk that the applicants will be arbitrarily deprived of their lives, 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 they will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicants face a real risk of significant harm for any reason.

¹⁸ *MZAAJ v MIBP* [2015] FCCA 151, upheld on appeal in *MZAAJ v MIBP* [2015] FCA 478.

Complementary protection: conclusion

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

Member of same family unit

46. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include spouses and dependent children.
47. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.