



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06991

Date and time of decision: 11 September 2019 11:14:00
M Brereton, 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 Tamil from Jaffna in the Northern Province of Sri Lanka. He departed Sri Lanka illegally in April 2013 and went to [Country 1], then on to Australia. He arrived on Christmas Island [in] April 2013. On 9 May 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 13 August 2019, a delegate of the Minister for Immigration (the delegate) refused to grant the visa.
2. The applicant claimed to fear harm from the Sri Lankan authorities because of a real or imputed association with the Liberation Tigers of Tamil Eelam (LTTE), arising from his brothers' and other relatives' associations with the LTTE.
3. The delegate accepted the applicant's claims as to identity, origin and most of his claims as to his past history. The delegate did not accept that the applicant had been of recent interest to the Sri Lankan authorities and having regard to the changed circumstances in Sri Lanka, did not accept that the applicant faced a real chance or real risk of relevant harm should he return.

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) (the review material).
5. On 6 September 2019, the applicant, through his agent, provided a submission and attached information to the IAA. Parts of the submission refer to and make argument in respect of claims and information that were before the delegate and to that extent are not new information.
6. The applicant refers to circumstances that have arisen in Sri Lanka in 2019 and has provided new information relating to these circumstances. This information was not before the delegate and is new information. Some of these reports pre-date the delegate's decision, although all are dated 2019. The applicant has made a general submission that he received only limited assistance from a migration agent (not the current agent) when preparing his SHEV application and was unrepresented during the interview with the delegate on 9 January 2019 (the interview). These media reports refer to individual persons (although no one said to be linked to the applicant in any way) and to that extent may contain credible personal information.
7. At the interview, the delegate asked the applicant a number of times about what harm he feared if he was return to Sri Lanka now, given the changed political and security circumstances. The applicant referred to his claimed personal profile and said that the government looks on people like him as enemies. He did not provide any country information, including in the seven months between the interview and the delegate's decision. He did not provide any post-interview submission. There is no information before me that indicates he sought any legal advice or assistance after the lodgement of his application. I consider that the applicant was put squarely on notice during the interview that the delegate was considering country information about the changed circumstances in Sri Lanka. While I accept that the applicant was not represented and that one of the articles

was not published prior to the delegate's decision, there is no other reason proposed why he was unable to provide further information to the delegate to support his claims.

8. Turning to the individual reports, there are two media reports referring to government or military figures - one dated 27 April 2019 noting that former wartime defence chief Gotabaya Rajapaksa has announced an intention to stand as president in elections; the other dated 20 August 2019 noting the appointment of a former general as the new Army Chief. The applicant submits that given the history and accusations levelled against these men, he is fearful of what may happen to him if such men are in high power positions. Mr Rajapaksa is quoted as saying that the government should not have dismantled the intelligence networks in Sri Lanka. The context of this is in relation to Islamic extremism, although he also makes some criticism of the focus on national reconciliation. However, there have been no elections and the future role of Mr Rajapaksa in any government is at this time speculative. The report on the appointment of the general notes that the general has faced allegations (which he has denied) of human rights abuses during the closing stages of the war. The article does not indicate that the focus of the Sri Lankan military has shifted, or that its treatment of Tamils in post-conflict Sri Lanka has deteriorated since this appointment, or that there are any indications that such may occur in the reasonably foreseeable future. Apart from these two media reports, there is no other information presented that considers or forecasts the prevailing or expected situation in Sri Lanka with respect to these two individuals. I am not satisfied that these reports are anything more than media speculation. Having regard to all of the above I am not satisfied that there are exceptional circumstances to justify considering either report.
9. The next report is dated 17 January 2019 and refers to leaked video footage of Sri Lankan prison inmates being beaten by prison officers. The article indicates that the incident occurred during the constitutional crisis of November 2018, at a time when there were prisoner protests in Sri Lanka. The article does not identify the prisoners or the reasons they were imprisoned. I take into account the temporal link to prisoner protests during the constitutional crisis and the lack of any detail as to who the prisoners were. The article does not indicate that such violence or mistreatment has been, or is being, reported by persons being held in short term detention at the airport during processing there. There is no other information before me that refers to current ongoing or targeted violence against persons held in short term airport detention. For the reasons given below, while I accept that the applicant may be held in short term detention at the airport during his return processing, I am not satisfied that the applicant has any profile that will see him imprisoned or detained for any other reason. Having regard to all of the above, I am not satisfied that there are exceptional circumstances to justify considering this report.
10. The final reports comprise two media reports and an audio file of an interview with an academic, all commenting on the removal of a Sri Lankan family from Australia and referring to the situation facing Tamils who are linked to the LTTE. There are also two reports referring to the torture of Tamils in Sri Lanka. These are dated 20 and 24 February 2019 respectively. Parts of the media reports about the family relate directly to that family's profiles and circumstances and are not said to be related to the applicant or his circumstances, other than being Tamils with claimed LTTE connections. Parts of the media articles refer to various reports by organisations such as the International Truth and Justice Project and Freedom From Torture. These organisational reports all pre-date the delegate's decision and information that was before the delegate. The information before the delegate included analyses from a range of government and non-government sources. I do not consider that the media articles or audio file contain more updated or authoritative analyses of the

situation in Sri Lanka. Having regard to all of the above, I am not satisfied that there are exceptional circumstances to justify considering any of this new information.

11. The submission asserts that the applicant's claims were not fully considered and that the applicant was not provided an opportunity to comment on concerns held by the delegate. It asks the IAA to invite the applicant for a fresh interview to clarify all concerns. I have considered the information already before me and take into account that the applicant has received legal assistance and has provided a submission to the IAA. I have considered the opportunities that the applicant has had to provide his claims and evidence and to comment on matters in issue in this review, as well as the statutory scheme governing fast track applications. I am satisfied that the applicant has had a real and meaningful opportunity to raise his claims and provide evidence and comments. I consider that an interview is not warranted in the particular circumstances of this case and I have also decided not to exercise my discretion under s.473DC to otherwise obtain further information or comment from the applicant.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows:
 - He is a Tamil who was born in Jaffna, in the Northern Province of Sri Lanka. Two of his brothers ([A] and [B]) were members of the LTTE.
 - In 2003, he opened a [business] in Jaffna, helped by [B]'s connections. Some of his customers were members of the LTTE. His [business] came to the attention of the Criminal Investigation Division (CID) because of this.
 - In 2005, he was with a distant relative, celebrating the LTTE leader's birthday. The authorities burst in and killed the relative and the applicant ran away and went into hiding, eventually going to the Vanni region.
 - In 2007 or 2008, [A] was killed fighting for the LTTE. [A] is considered to be a war hero. In 2009, the applicant's brother-in-law was killed while fighting at sea for the LTTE.
 - In March 2009, the applicant's father, sister and sister-in-law were killed in bombing in [Town].
 - Between April and November 2009, the applicant was in a refugee camp. When he was released he was told that he had to report to the authorities. He did this until November 2012.
 - After the war, [B], was imprisoned for three years. [B] was a commander in the LTTE Sea Tigers. After his release, [B] was told to report to the CID but he left Sri Lanka and now lives in [Country 2].
 - After [B] fled, the CID began visiting the applicant and questioning him about the LTTE and [B]'s whereabouts. The CID physically mistreated the applicant.
 - He was also harassed because he was accused of lighting candles at a memorial ceremony.
 - In 2013, the applicant left Sri Lanka. In 2014, the authorities visited his wife and his sister looking for him. His wife and sister said that he was in Australia.
 - In March 2017, the CID visited his wife again and said they knew he had returned from Australia. His wife said he had not returned and the CID threatened her.

- While he has been in Australia he has participated in different events including Martyr's Day, which could be considered as anti-government.
- If he returns he will be interrogated and tortured because of his imputed LTTE connections.

Refugee assessment

13. 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

14. 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.
15. The applicant claims to be a Tamil Hindu from Jaffna in the Northern Province of Sri Lanka. He was assisted by a Tamil interpreter when he attended the interview and has also provided documents in support of his identity. I accept that he is a Tamil Hindu from this part of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.
16. The review material includes a letter from the Northern Provincial Council dated 6 April 2017, provided by the applicant, which states that the applicant's family supported the Tamil National Alliance (TNA) during the elections. The applicant did not claim in his SHEV application or at the interview that he feared any harm arising from any real or imputed support of the TNA, or any political opinion other than the imputed LTTE profile. His submission to the IAA asserts that his statement of claim was not a full account of his experiences and that if the claim relating to the TNA was of concern to the delegate it should have been raised during the interview. The applicant has consistently referred to his imputed association with the LTTE but has not at any time referred to him or his family having any involvement with the TNA, or to fear harm for that reason. Towards the end of the interview the delegate asked the applicant a number of times if he had anything else that he wished to say and he did not refer to any other fears should he return to Sri Lanka. Section 5AAA of the Act stipulates that it is the applicant's responsibility to specify all particulars of his or her

claim and to provide sufficient evidence to establish the claim and that the Minister does not have any responsibility or obligation to establish, or assist in establishing, an applicant's claims. While not every fact will necessarily be included in a SHEV application, the applicant in this case was assisted by a migration service (and interpreter) to make his application, his accompanying statement included a reasonable amount of detail, and in those circumstances I would expect that there would be some mention of the TNA issue if it was of relevance to his claims. I would also expect it would be mentioned at the interview. I am not satisfied that the applicant has any connections with the TNA or that he faces a real chance of harm for any reason connected with the TNA.

17. The delegate considered the Easter 2019 bombings in Sri Lanka and whether these would impact on the applicant. I have considered the information before me¹ and take into account that the bombings were perpetrated by Islamic extremists and targeted Christians and foreigners. While a state of emergency was declared and there were some reported revenge attacks targeting Muslims, there is no information before me to indicate that Tamils, including former LTTE or suspected LTTE members, have been targeted by the authorities, or subjected to any increased surveillance, harassment or other adverse interest following these attacks. There is no information before me to indicate that Tamils or Tamil Hindus are being, or are likely to be, targeted by Islamic extremists now or in the reasonably foreseeable future. I am not satisfied on the evidence before me that the applicant faces any more than a remote chance of harm arising from the Easter 2019 attacks or their effects.
18. The applicant said that he was not involved with the LTTE in any role himself but said that he comes from what he called a "movement family". He said that he had two brothers who were members of the LTTE. One brother, [A], was working as an intelligence officer when he was killed in Jaffna in around 2008. [A] is considered to be a war hero. The other brother, [B], was a member of the Sea Tigers and was imprisoned for three years at the end of the war. The review material includes a letter from a Justice of the Peace in Jaffna, dated 2017. The author claims to know the applicant very well and lists the dates of death of members of the applicant's family. [A]VT's date of death is given as 2003. At the interview, the delegate asked about this difference and the applicant said that the date in the letter is wrong, because [A] was killed in 2007 or 2008. There is no other information before me about [A] or the date or circumstances of his death but the other information provided by the applicant is generally consistent with his claims. I accept that [A] was a member of the LTTE and that he was killed during the conflict.
19. The applicant claims that he used [B]'s LTTE connections to obtain permission to set up and operate a [business] in Jaffna in 2005. He said that he did not receive any financial or other assistance from the LTTE. He described the [business] as a place where people could [do something] and said that his mother also sold [produce] there. He said that many of his customers were LTTE members and because of this, his [business] attracted the attention of the CID. He said that the CID did not ever come into the [business] but used to watch it.

¹ "Five things to know a week after the Sri Lanka bombings", Nikkei Asian Review, 28 April 2019, 20190429105125; "What We Know and Don't Know About the Sri Lanka Attacks", New York Times, The, 22 April 2019, 20190423102213; "Sri Lanka bombings: All the latest updates", Aljazeera, 30 April 2019, 20190501142357; "Sri Lanka on high alert over Ramadan terror threat", Straits Times, 1 May 2019, 20190501134734; "Sri Lanka lifts social media ban imposed after Easter attacks", Aljazeera, 30 April 2019, 20190501145953; "The lessons from the Sri Lanka bombings", Australian Financial Review, 26 April 2019, 20190426143206; ""Mawanella was the start": Sri Lankan town reels from bombing links", The Guardian, 26 April 2019, 20190429172536; "In divided Sri Lanka, a perfect storm for Islamist terror to swoop", Sydney Morning Herald, The, 27 April 2019, 20190429102358; "The suicide bombs in Sri Lanka might have been prevented", Economist, The, 27 April 2019, 20190426144009.

20. The applicant has provided a Human Rights complaint, dated 7 April 2017 and filed by his wife in Sri Lanka. His wife states that the Eelam People's Democratic Party (EPDP) told the applicant to report to the office for questioning about his [business]. This appears to relate to a period between 2003 and 2006. The applicant himself has never claimed that he was personally approached by the EPDP, or that he was ever called for questioning by the authorities, any other group or persons in relation to his [business]. The applicant submits that the delegate did not raise this discrepancy with him so that he could clarify it. I consider that this is not a matter of clarification. The applicant has given reasonably detailed information about his past history and his fears. He has not at any time raised any claim to have been questioned in relation to his [business], by the authorities or by anyone else. I do not accept that he was told to report to the EPDP as stated in his wife's complaint. I note that the applicant did refer to the EPDP during the interview, in the context of being informed on by members of such groups. I have considered that claim further below.
21. The applicant said that later in 2005 he went to the house of a distant relative and friend ([C]) to celebrate the LTTE leader's birthday. He told the delegate that during the celebration the applicant and [C] went to another house. Some men burst into the house and shot [C] dead. The applicant did not claim that the men said anything or identified who they were or where they were from. He did not claim that they were wearing uniforms or were otherwise identifiable. However, he believes the men were from the CID. He said that immediately after the shooting he fled from the house and went into hiding in various places before going to the Vanni and asking his family to close his [business]. He said that shortly after this event, the CID went to his sister's home looking for him but she said that she did not know where he was.
22. The applicant has provided a death certificate that states that a person named [C] died on 26 November 2005 as a result of a gunshot wound to the chest. The death is recorded as "murder". He also provided a letter from the Northern Provincial Council referring to his general LTTE profile but which also states that he came to the attention of the authorities because of his attendance at the birthday celebrations.
23. The applicant's claims are generally plausible and I accept that [B] was a member of the LTTE, that the applicant operated a [business] that was frequented by LTTE members, and that the CID may have had an interest in the [business] and some low-level interest in the applicant as a result. I accept that [C] was killed and that the applicant fled the scene of the killing, although there is no evidence before me other than the applicant's assertion that the CID was behind the shooting. The applicant has not claimed that he himself was subjected to interrogation, questioning, detention or harassment (beyond some claimed surveillance of his [business]) prior to the shooting of [C]. Even if I accept that the CID was responsible for the shooting, and while it is possible that the applicant was recognised and that the CID came looking for him once at his sister's house, there is no evidence before me that the CID continued looking for him after that one visit, made enquiries about where he might have gone or approached other relatives or friends. Further, he was not identified by the authorities and questioned about his [business], former customers, the birthday celebration or the shooting incident during the six months he was in the refugee camp, or at any time during his later interactions with the authorities. Even if I accept that the CID enquired after him on one occasion in 2005 following the shooting, I am not satisfied that the CID has continued looking for him or displayed any ongoing interest in him arising from these incidents. Having regard to all of the above, while I accept that the claimed incidents happened in 2005, I am not satisfied that the applicant was of any ongoing adverse interest himself arising from the operation of the [business], his attendance at the birthday celebration, or the shooting of [C].

24. The applicant claims that his brother-in-law was killed fighting for the Sea Tigers in January 2009, and that his father, sister and sister-in-law were killed during the final stages of the conflict in March 2009. Information before me indicates that up to 40,000 people were killed in the final stages of the war, including combatants and civilians.² I accept that the applicant's family members were killed. I also accept that his brother-in-law was killed while fighting with the LTTE.
25. In April 2009, the applicant and his remaining family entered a refugee camp and remained there until November 2009. This is consistent with information³ that large numbers of civilians were detained on reaching government-controlled areas and subjected to screening procedures. The applicant said that while he was in the camp he was asked if he was a member of the LTTE and he said no. He was not arrested, interrogated, taken to any other camps or rehabilitation camps during this time. He has not claimed that he was questioned about his brothers or his brother-in-law. He said that after his release he was required to report to the CID office and continued to do so until November 2012. He has not claimed that he was arrested, charged over any association (including family) or involvement with the LTTE, or threatened with being sent to a rehabilitation centre, during any of these reporting sessions.
26. The applicant said that his brother [B] was arrested and imprisoned for three years at the end of the war. [B] was released by the courts in 2012 but after his release, he was told to report to the CID office in Colombo. [B] did not report and fled Sri Lanka, without telling his family. The applicant claims that after [B] left, the CID began to visit the applicant to question him about [B] and the LTTE. He was accused of helping [B] to escape and was physically mistreated and harmed, including being threatened with being shot. These incidents took place about three times per week between November 2012 and March 2013 until eventually he could not take being harassed anymore and he fled to [Country 1] and then to Australia. He said that in 2014, the authorities visited his sister looking for him and she said that he was in Australia. The authorities went to his wife's house two or three weeks later and she told them the same thing.
27. The applicant has provided a copy of what he claims is [B]'s [Country 2] identity card and I accept that [B] has left Sri Lanka. As I accept that [B] was a member of the LTTE, it is plausible that before he left Sri Lanka [B] was arrested, subject to court proceedings and directed to attend further questioning on his release. The applicant claims that [B] was a high ranking commander in the Sea Tigers, although there is no other evidence of this, nor any evidence of the matters in court other than the assertion that a court ordered his release. Nevertheless, I accept that the authorities had a suspicion of [B] and that this interest continued after [B]'s release. I also accept that [B] fled Sri Lanka and that the applicant was then questioned about [B]'s disappearance. The information before me corroborates that the Sri Lankan authorities used physical ill-treatment during such questioning and I accept that the applicant was subjected to ill-treatment and threats as he has claimed.
28. At the interview the applicant also claimed that just before he left Sri Lanka, there was a memorial ceremony in Jaffna at which people lit candles for dead LTTE soldiers. It is not clear

² "Sri Lanka – LKA38935 – Vanni area – 2008-2009 - Security – Current Situation – Treatment of LTTE members and suspects – Spouses of LTTE members and suspects – Women – Exiting Colombo – Security Checks – Failed Asylum Seekers", 8 July 2011, CR154B690759.

³ "Sri Lanka – LKA38935 – Vanni area – 2008-2009 - Security – Current Situation – Treatment of LTTE members and suspects – Spouses of LTTE members and suspects – Women – Exiting Colombo – Security Checks – Failed Asylum Seekers", 8 July 2011, CR154B690759.

whether the applicant lit candles himself or was merely present at the ceremony, but he claims that the authorities came and took him to the camp to ask him about this ceremony. It is plausible that if the authorities were questioning the applicant about [B] and the LTTE, they would also ask about such ceremonies. I accept that he was questioned about this event.

29. I accept that in 2012-2013 the applicant was of some (low-level) interest to the authorities. It is plausible that if he failed to report, the authorities would make enquiries about him and I also accept that shortly after the applicant left Sri Lanka himself, the authorities came to his house to ask about his whereabouts. I accept that at the time he left Sri Lanka, the applicant had a profile with the authorities as a family member of former LTTE combatants, one of whom had fled Sri Lanka. However, I must consider whether the applicant faces a real chance of harm now or in the reasonably foreseeable future should he return to Sri Lanka.
30. Since the applicant left Sri Lanka, there have been significant changes in the political and security landscape. The Australian Department of Foreign Affairs and Trade (DFAT)⁴ reports that a new government was elected in 2015 and this government is focussed on post-conflict reconciliation, transitional justice, and governance and economic reform. It has prioritised human rights and reconciliation and has made significant progress, including: replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict back to its former owners; releasing some individuals detained under the Prevention of Terrorism Act (PTA) and committing to reform the PTA; and engaging constructively with the United Nations. The security situation in Sri Lanka has greatly improved and has seen greater freedom of movement and a reduction in the military's involvement in civilian life. Although a sizeable military presence remains in the North, most are confined to so-called High Security Zones and smaller surrounding camps. Checkpoints and movement restrictions have been removed, and the monitoring and harassment of Tamils in day-to-day life has decreased significantly. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities, although the Sri Lankan authorities are said to remain sensitive to the re-emergence of the LTTE and Tamil separatism.
31. In 2012, the United Nations High Commissioner for Refugees (UNHCR)⁵ stated that in its opinion, persons with certain links to the LTTE might, in certain circumstances, require international refugee protections. These links were said to include persons with family links to former LTTE combatants. More recently, a 2017 United Kingdom Home Office (UKHO) report⁶ concludes that in UKHO's opinion, the focus of the Sri Lankan government has changed and the present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state. Former LTTE members most at risk of adverse interest or harm on return are those who are perceived to have a significant role in relation to post-conflict Tamil separatism, or to have committed serious terrorist or criminal acts, or to have supplied weapons or explosives. I note that the applicant's brother, [B], was ordered released by the Sri Lankan courts and there is nothing in the material before me to indicate that [B] is subject to any outstanding criminal or terrorist charges, or that he has been involved in separatist activities since he left Sri Lanka.

⁴ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

⁵ NO LONGER VALID AS AT 18 MAY 2017 - UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka, UN High Commissioner for Refugees, 21 December 2012, UNB0183EA8

⁶ United Kingdom Home Office (UKHO), "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

32. Other reports in the review material⁷ (some of which are now somewhat dated) do refer to reports of continuing human rights violations, torture, detention and disappearances. In general terms however, most of these reports refer to persons who had more significant LTTE or other profiles than the applicant. They do not indicate that Tamils or young Tamil males from the North continue to be systematically targeted by the authorities. Similarly, media reporting of Tamils being arrested when returning to Colombo airport⁸ indicates that most of these had profiles of actual former membership or status with the LTTE.
33. The applicant claims that the authorities came looking for him again in March 2017. He has provided documents from Sri Lanka comprising a complaint to the Human Rights Commission of Sri Lanka made by his wife, who states that the authorities asked about the applicant, demanded his surrender and threatened to destroy the family. There is also a statement from an attorney that purports to corroborate the wife's claims, although this document states that the applicant was attached to and supported the LTTE, which he himself has never claimed. The information before me, including the changed circumstances in Sri Lanka, does not indicate why the authorities would suddenly have an interest in the applicant more than three years after he had departed, why they would believe he had returned to Sri Lanka and why they would come to demand his surrender. While it is possible that the CID visited the house for other reasons and assaulted or threatened his wife, I do not accept the claims made by his wife that the CID was there to enquire after the applicant and demand his surrender. I am not satisfied that this incident indicates that the applicant has an adverse profile with, or is otherwise of interest to, the authorities in Sri Lanka.
34. The applicant claims to have attended Martyrs' Day and other commemorations in Australia. In the opinion of UKHO,⁹ attendance at demonstrations in the diaspora alone is not sufficient to create a real risk or a reasonable degree of likelihood that a person will attract adverse attention on return to Sri Lanka. UKHO states that, in its opinion, decision makers must consider each case on its facts and consider whether any diaspora activities in which the person has engaged are, or are likely to be, perceived as a "significant role" such as to make them of ongoing interest to the Sri Lankan authorities and/or that their activities will be, or will be perceived as being, a threat to the integrity of the state. Other information before me¹⁰ indicates that while such events attracted adverse attention in the past, commemoration and other activities have recently been allowed in Sri Lanka and do not, of themselves, attract adverse attention from the authorities. The most recent DFAT report does not refer to persons who attended such activities overseas, and who have no other adverse profile such as LTTE membership or Tamil separatist activities, being of any adverse interest to the authorities in Sri Lanka on return.

⁷ United States Department of State (USDOS), "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333; Landinfo, "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286; "Sri Lanka police hope to complete investigations on former LTTE women sea tiger leader soon", Colombo Page, 7 March 2015, CXBD6A0DE2613; "Sri Lankan PM vows to safeguard national security, dismisses fear of rebel insurgence", Xinhua (net) also News.cn also China View, 7 August 2015, CXBD6A0DE11589; "Sri Lankan army heightens security", The Hindu, 25 March 2014, CX323619; "Civil activities and freedoms curbed, five years after Sri Lanka's civil war", Radio Australia (ABC), 25 June 2014, CX1B9ECAB6048.

⁸ "TID arrests another Tamil man on return from abroad – VIDEO", Ceylon News, 19 May 2016, CX6A26A6E4702; "Another Tamil returnee arrested", Sri Lanka Mirror, 1 July 2015, CXBD6A0DE16698; "SL military continues to arrest Tamils from East returning from Middle-East", Tamil net, 31 May 2015, CXBD6A0DE7540; "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", Tamil net, 3 May 2015, CXBD6A0DE6027; "10 Tamils arriving in Lanka arrested", Sri Lanka Mirror, 4 March 2015, CXBD6A0DE6065.

⁹ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826

¹⁰ "Jaffna fears remembering Tamil war dead", British Broadcasting Corporation (BBC), 27 November 2015, CXBD6A0DE16516; "Good Governance allows the Martyrs Day – 'Maveerar Naal' celebrations on the sly?", Asian Tribune, 26 November 2017, CXC90406618275.

35. I am not satisfied that the applicant has any profile as a member or imputed member of the LTTE. While the applicant has a profile as a family member of former LTTE combatants and may have been of some personal low level interest more than 15 years ago because of his [business], I am not satisfied on the evidence before me that he would be imputed as having any role, let alone a significant role, in Tamil separatism, LTTE resurgence or anti-government activities, or that his association with [B] (or any other relative) would lead to such an imputation.
36. At the interview the applicant referred to groups such as EPDP, who go around pointing out people who were associated with the LTTE. I take into account that the applicant was subjected to reporting for questioning up until the time that he left Sri Lanka, but he was never arrested or charged with being himself a member of the LTTE. To the extent that the authorities were interested in him at that time, this was a consequence of his brother [B] having fled Sri Lanka. The applicant himself had, and has now, no personal profile that I consider would give rise to any imputation that he is now involved in LTTE resurgence or Tamil separatism, or that would lead to any group or person identifying him as such. I am not satisfied on the evidence before me that the applicant will be identified to the authorities by any group or person, or that he will have any adverse profile or be of any interest to the authorities now, even if his attendance at commemoration events in Australia was, or became, known.
37. The applicant claims to fear harm because he departed Sri Lanka against the orders of the CID. While I accept that he was probably told not to leave Sri Lanka, I am not satisfied that he had a profile such that the authorities would continue to have any interest in him now, six years later, even though he departed while being required to report for questioning.
38. Having regard to all of the above, I am not satisfied that the applicant faces a real chance of harm for any reason arising from his past interactions with the authorities, any real or imputed association (including family association) with the LTTE or the TNA, as a Tamil or a young Tamil male from the North, or from his attendance at any commemoration events.
39. The applicant did not claim to fear harm as a returned asylum-seeker who departed Sri Lanka illegally but the delegate considered whether he faced harm for this reason. Neither of the DFAT reports¹¹ in the review material indicates that returned asylum-seekers with no other profiles are subjected to any harm by the Sri Lankan authorities. During 2008-2017, over 2,400 asylum-seekers were returned to Sri Lanka from Australia, in addition to many more from other countries. The majority of these were Tamil. The Sri Lankan prime minister stated in 2017 that failed asylum-seekers from Australia would be welcomed back, although some human rights groups greeted this with scepticism.
40. DFAT notes that most returnees incurred significant expenses or debt to undertake their outward journey and were apprehensive about finding suitable employment opportunities and reliable housing on return. Some received reintegration assistance in the form of financial support and transport assistance on their return to Sri Lanka. DFAT assessed that any reintegration issues experienced by returnees were not based on their failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. 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. According to a 2015 survey, 49 per cent of refugee returnees in the North had received a visit at their homes for a purpose other than

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

registration, with almost half of those visits from the police. Refugees and failed asylum seekers reported social stigma from their communities upon return and in some communities, people resent the financial support provided to refugee returnees. DFAT assesses that returnees may face some societal discrimination upon return to their communities, which could also affect their ability to secure housing and employment. DFAT further assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities.

41. Other information that I have cited above, which comes from various international governments and non-government organisations, as well as media reports, support DFAT's conclusions that returned asylum-seekers who are not otherwise suspected of LTTE affiliation, anti-government or pro-Tamil activities are not generally of adverse interest to the authorities.
42. I accept that the applicant will return to the North and may face visits from the authorities and some social stigma. I am not satisfied that such stigma, visits or contact, if they were to occur, are of themselves, or would lead to, any harm, let alone serious harm. The applicant does not have any adverse profile that may mark him out as different from any other Tamil returnee and asylum-seeker. In more general terms, the applicant has family in the North and he not claimed that he will be unable to re-engage with them. The information before me does not indicate that the applicant will be prevented from obtaining, or be unable to obtain, employment, education or access to services because he is a returned asylum-seeker. Having regard to all of the above, I am not satisfied that the applicant faces a real chance of serious harm as a returned asylum-seeker.
43. I accept that the applicant departed Sri Lanka in contravention of the *Immigrants and Emigrants Act (1949)* (the I&E Act). According to DFAT¹², such persons are very likely to be questioned at the airport, subjected to enquiries and charged with an offence under the I&E Act. DFAT reports that passengers on a people smuggling venture (such as the applicant) are fined and are not subject to a custodial sentence. It is possible that as part of this process, returnees may be held for several days at the airport if a magistrate is unavailable, but the country information does not indicate that they are subject to mistreatment at the airport. It also indicates that all returnees are treated the same regardless of their background. If a returnee pleads guilty to the charge, they are fined (which may be paid by instalment) and are free to go. If they plead not guilty they are granted bail immediately on the basis of a personal surety or a guarantee by a family member. There may be ongoing costs associated with court visits.
44. The applicant has not claimed one way or the other as to how he would plead; however, I accept that he will more than likely be subject to questioning, possible short-term detention at the airport and a fine. I have found above that the applicant does not have any adverse profile for any reason and I am not satisfied that he would be treated any differently to any other returnees with no adverse profiles at the airport or subsequently. Furthermore, I do not accept that the processes and penalties described above rise to a level that may constitute serious harm as contemplated by ss.5J(4)(b) and (5) of the Act. In any event, the I&E Act provisions that deal with the breach of departure laws are not discriminatory on their face, nor do they disclose any discriminatory intent, nor are they implemented in a discriminatory manner. As such, they do not constitute persecution as contemplated by s.5J(4)(c).

¹² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

45. Having regard to all of the above, I am not satisfied that the applicant faces a real chance of persecution for any reason should he return to Sri Lanka.

Refugee: conclusion

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

Complementary protection assessment

47. 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

48. 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.
49. I accept that having departed Sri Lanka illegally, the applicant may be charged for committing an offence under the I&E Act. I accept that he may be questioned, held in an airport holding cell for a period (which may be up to 2 days) and that he may have to pay costs associated with penalties or court proceedings. I am not satisfied that these processes, or the penalties imposed, amount to significant harm, in that they do not involve being arbitrarily deprived of life, subjected to the death penalty or tortured. Nor would they involve pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or severe pain or suffering, or be intended to cause extreme humiliation, or otherwise amount to significant harm as defined in the Act, even when considered together. I also accept that the applicant may experience some visits from the authorities as well as some social stigma from community members and that he may face some difficulties while re-establishing himself in Sri Lanka. I am not satisfied that any visits, monitoring or stigma he may face, together with any difficulties he may experience re-establishing himself, amount to significant harm as defined.
50. I have found above that the applicant does not otherwise face a real chance of any harm. As 'real chance' and 'real risk' equate to the same threshold¹³, and for the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary consequence of the applicant's removal to Sri Lanka, he will face a real risk of significant harm.

¹³ *MIAC v SZQRB* (2013) 210 FCR 505.

Complementary protection: conclusion

51. 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.