



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07433

Date and time of decision: 25 November 2019 09:51:00
J Jennings, 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 Tamil from the Eastern Province, Sri Lanka. On 23 March 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 24 October 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. I have also obtained the Department of Foreign Affairs and Trade (DFAT), Country Report, Sri Lanka, dated 4 November 2019.¹ This report was published after the delegate's decision and the delegate relied on the then current 2018 DFAT report for Sri Lanka which the 2019 report has updated. It has been prepared specifically for the purpose of protection status determinations. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil from the Eastern Province in Sri Lanka.
 - During the civil war the applicant grew up in the family village of [Village 1], located in the government controlled Trincomalee District.
 - The applicant completed only [a number of] years of schooling and is not literate. Because of his limited education he has difficulty remembering dates.
 - From a young age he worked as a fisherman in Sri Lanka. Due to the security situation fishing was highly regulated and he required a pass from the navy to operate.
 - He supported the LTTE in the area by [undertaking a certain task]. His [Sibling 1] and [Sibling 2] also joined the LTTE.
 - On one occasion he returned from [an activity] with his father and they were intercepted by the navy. There had been a [an incident] in the village and he, his father and some other fishermen were questioned. The other fishermen questioned were taken to prison, one was released and the other was not.
 - Around 2005 the army arrested the applicant's father who was accused of [being] connected with the [incident]. The applicant believes his father was suspected of being involved in the village incident because his [Sibling 1] had joined the LTTE. His father was taken to court and imprisoned for [a number of] years. He was tortured while detained.
 - While his father was imprisoned the applicant was arrested and detained for [a number of] days. His wife contacted [Organisation 1] for assistance and the applicant was

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

released. He went into hiding after this incident. His father was tortured in prison in an attempt to find out where the applicant was hiding,

- After a period the applicant came out of hiding and with the support of [Organisation 1] contacted the authorities. He was required to report to the police to sign to show he had not left the country.
 - Around four months after coming out of hiding the applicant and a group of other fishermen were rounded up by the navy. They were beaten. [Organisation 1] were alerted and came to the fishermen's rescue. The applicant was taken to court and charged under the Prevention of Terrorism Act (PTA) for being a terrorist and released on a [bond] guaranteed by his wife. His name was placed on a list of people associated with the LTTE, meaning he could be interrogated or arrested at any time.
 - The applicant decided to leave Sri Lanka and a few days after his release he travelled to [Country 1] illegally by boat with his wife and child. The family stayed in [Country 1] as refugees from 2006 to 2008, but because they were poorly treated in [Country 1] they returned to their village in Sri Lanka.
 - The applicant's father was released from prison while the applicant was in [Country 1]. After his release he did not return to the village in the Eastern Province but moved to an LTTE controlled area.
 - After his return from [Country 1] the applicant was regularly harassed by the navy because his boat drifted into the wrong areas at night. He decided to leave the area and move into an LTTE controlled area in the north.
 - At the end of the civil war his [Sibling 2] who was connected with the LTTE disappeared; the family do not know [Sibling 2's] whereabouts. A [relative] also went missing. The applicant's parents and [Sibling 1] were taken into a camp at the end of the war and detained there for a period. His mother was hurt and sustained damages to her [limb] when leaving the LTTE controlled area; she had further complications from this injury and died around 2018.
 - The applicant decided to leave Sri Lanka and departed illegally by boat in October 2012.
 - The authorities frequently ask about the applicant's whereabouts. His father was beaten about eight months ago.
5. The applicant was gaoled in Australia for [a number of] months following an incident in which [an incident occurred with] another person. He has not raised any protection claims in relation to this matter and I consider it is not relevant to his protection claims.

Factual findings

6. The applicant has consistently claimed to be Tamil from the Eastern Province, Sri Lanka and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
7. I accept that he has had limited education and while it is stated at Question 29 of the SHEV application form that he reads and writes Tamil I accept his statement made at the SHEV interview that he is illiterate.
8. I accept that he grew up in a government controlled area and began work as a fisherman from a young age. I accept that fishing was highly regulated and that he needed a pass to operate.

9. The country information advises that the civil war was a time of tension in the Eastern Province and the authorities sought to strictly regulate the Tamil population and quash LTTE activities.² In this environment I accept that the applicant was aware of accounts of Tamils, including local fishermen, coming to harm in Sri Lanka.
10. I accept that the applicant travelled to [Country 1] illegally and resided there as a refugee from 2006 to 2008. I note that he returned to Sri Lanka using a "paper passport" and was provided financial assistance by [Organisation 2] on return to Sri Lanka.
11. The applicant has advanced claims of harassment by the authorities to him and his family and claims of being suspected of LTTE activity and that he and his father were arrested and detained as a result. I have taken into account the applicant's illiteracy, limited education and stated difficulty remembering dates but as discussed below I am concerned that he has provided substantially varying accounts of his experiences and that of some family members and that parts of his account conflicts with the country information reporting the situation in Sri Lanka at the time.
12. Of concern is that a number of claims were not declared in the Arrival Entry interview conducted on 30 December 2012 yet were advanced in his statement of claims made in 2017, and that additionally a number of claims were made in the SHEV interview which had not been previously advanced. At the SHEV interview the applicant was provided the opportunity to explain these omissions. In response he stated that he was very tense at the Arrival Entry interview as he had travelled for [many] days at sea without food and he did not know what he should tell. I accept that he arrived in Australia after a possibly difficult journey, but the Arrival Entry interview was conducted [numerous] weeks after his arrival and I am not satisfied this would have resulted in the significant variations in the information he provided at that interview to that later provided. Nor am I satisfied that his explanation "he did not know what to tell" accounts for the omission of information regarding his residence history, his missing [Sibling 2], and incidents of his arrest/detention noting that he was asked direct questions on these matters.
13. He also stated he did not disclose some claims earlier as he was concerned he may be returned to Sri Lanka. I accept he may have had concerns about being returned to Sri Lanka which may have resulted in him not declaring his or his siblings' claimed LTTE associations but I note that at that interview the applicant was willing to disclose that his father was taken into custody and beaten, yet did not declare the incidents where he claims he was arrested and detained. With regard to claims not declared in the SHEV application but later declared at the SHEV interview I take into account the caution in the statement of claims that it is only a summary of his claims for protection and not an exhaustive statement of what has happened. I also note his comment that he was willing to disclose some claims at the SHEV interview because he trusted the delegate. While I note the reasons the applicant has advanced for not disclosing some claims earlier I would still expect the applicant's claims to be plausible and consistent with the independent country information but there remain inconsistencies and implausibilities in his accounts which I am not persuaded are explained by his limited education and illiteracy or concerns he may be returned to Sri Lanka.

Father arrested and detained and familial LTTE links

² Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

14. The applicant has claimed his father was accused of being involved with an incident in the village and was imprisoned as a result. In the statement of claims he described the incident as [Incident 1], whereas at the SHEV interview he described the incident as [Incident 2].
15. There is also confusion in the applicant's account as to when this incident occurred and when his father was arrested. In the statement of claims he stated he was [Age Range 1] when he and his father were intercepted by the navy at the time the incident in the village occurred and that they were questioned about their activities. This would date the incident as having occurred around 1996/1997, and would be somewhat consistent with his account at the Arrival Entry interview that he was a child and at the SHEV interview that he was "small" when this incident and questioning occurred. Yet at another point in the SHEV interview he stated he could not recall the date but that he was [Age Range 2] when this incident occurred, dating the incident as occurring in 2001/2002. There is a significant difference in the applicant being a teenager of [Age Range 1] or a man of [Age Range 2], noting he was a married man by 2001, and it is difficult to accept he has given such conflicting accounts of this incident. I accept that he may not be able to recall the date, but I have significant concerns about his disparate account of his age at the time.
16. In addition to the variation in the dates in the applicant's account there is some variation in his account of when and how his father was detained. In his statement of claims he referred to them being stopped and questioned on return from a [trip] but that neither of them was detained at that time. Later in that statement he stated that his father was detained in relation to the village incident in 2005, indicating that the applicant's father was detained at a later time. Whereas in the SHEV interview he indicated that his father was arrested when the two were first intercepted after returning from [the trip].
17. It is his claim his father was imprisoned for [a number of] years and the applicant has consistently stated that his father was released from prison while he was in [Country 1], and he has also consistently stated he left for [Country 1] in 2006, which would be consistent with the claim his father was arrested and detained around 2005. In the event that the claimed [incident] occurred in the village in either 1996/1997 or 2001/2002 it is difficult to accept that his father was not arrested on suspicion of involvement in the incident until 2005, being, in the event of either date, some years after the incident. Furthermore it is difficult to reconcile the claim his father was suspected of involvement in the incident because the applicant's [Sibling 1] was an LTTE member. The applicant has consistently dated his [Sibling 1's] year of birth as [specified], indicating that [Sibling 1] would have been [Age 1] if the village incident occurred in 1986/1987 or [Age 2] if it occurred in 2001/2002. The applicant stated that his [Sibling 1] was around [Age 3] when [the sibling] joined the LTTE and considering this and that [Sibling 1] would have been at most [Age 2] at the time of the village incident it is difficult to accept that [the sibling] was an LTTE member at the time thereby casting suspicion on their father. I have considered reports of recruitment of child soldiers by the LTTE and the possibility that the applicant's [Sibling 1] was recruited while very young as a child soldier and possibly at [Age 2], but such recruitments attracted widespread criticism in the general populace and parents were generally distressed by their young children being forced into fighting roles.³ Had his [Sibling 1] been recruited at such a young age as a child soldier I consider that the applicant would have stated this to be the case when giving his account of [Sibling 1's] LTTE association, particularly as he stated that one reason he helped the LTTE was to avoid a family member being forcibly recruited by the LTTE.

³ Freedom House, "Freedom in the World Country Report Sri Lanka 2008", 2 July 2008, CX205329; Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

18. While evident, the confusion as to when the claimed incident and the imprisonment of the applicant's father occurred would not in itself damage the veracity of his claim, particularly giving weight to his problems remembering dates. But I am concerned about the significant implausibilities in his account as follows: variation in the description of the incident in the village, being either [Incident 1] or [Incident 2]; variation in the account his father was arrested, being either when he and the applicant were first intercepted by the navy or sometime later; variation in whether the applicant was "small" or a child when the interception/incident occurred or aged [Age Range 2]; the apparent lapse of time of some years from the time the incident in the village occurred to the time the applicant's father was arrested; and that his father was suspected of involvement in the incident because his [child] was an LTTE member, although [the child] was only a child at the time. I accept that an applicant's recount of an incident may vary to some degree in different accounts but his failure to provide accounts of this incident that are compatible with other accounts or information he has provided severely damages the credibility of his claims.
19. Overall I am not satisfied that the evidence points to the applicant's [Sibling 1] being an LTTE member around the time of the claimed incident in the village and that this cast suspicion on their father being involved in that incident. Even putting aside the late advance of the claim as to [Sibling 1's] LTTE membership I am concerned that the applicant's account of [Sibling 1's] role with the LTTE is very limited; he claims [Sibling 1] was a member for [a number of] years and noting that after the end of the war [Sibling 1] returned to live with the family I consider he would have had greater knowledge of [Sibling 1's] LTTE activities, if true. I do not accept that the applicant's [Sibling 1] was an LTTE member or associated with the LTTE.
20. Nor am I satisfied that the applicant's father was suspected of being involved in an incident and arrested, charged under the PTA and imprisoned. I have not accepted his [child] was a member of the LTTE and it is not apparent why the applicant's father would be suspected of terrorist activities and detained under the PTA. I accept that there was a degree of arbitrariness about arrests and mistreatment of Tamils during the civil war but my concerns about the variations in the applicant's recount of his father's experience and relevant events lead me to doubt the veracity of this claim. I do not accept the applicant's father was suspected of being involved with terrorist activity and imprisoned and mistreated.
21. The applicant has claimed that his [Sibling 2] [joined] the LTTE at the end of the war and has been missing since 2009. However, the applicant declared this [Sibling 2] to be residing in Sri Lanka in the SHEV application forms completed in 2017. While this may be a simple mistake I consider it significant that when asked specifically at the Arrival Entry interview to identify any family members who are missing he did not so identify this [Sibling 2], but stated [Sibling 2] was living in Sri Lanka. I take into account his stated reluctance to disclose earlier the claimed LTTE links of his siblings, and while this may have inhibited him from disclosing the claimed LTTE association I am concerned that he stated this [Sibling 2] was continuing to reside in Sri Lanka at the Arrival Entry interview and in the SHEV application. He was willing to declare that a [relative] had gone missing at the end of the war and I am not satisfied that if this [Sibling 2] has been missing since 2009 that he did not provide this information earlier and in fact provided information to the contrary. I also note that in the statement of claims he was willing to declare that his [Sibling 2] was suspected of being with the LTTE when he stated "my mother and [Sibling 2] also experienced harassment after I returned from [Country 1] in 2008. The army thought my [Sibling 2] ... was with the LTTE because [Sibling 2] was found in an LTTE controlled area". I am further concerned by the applicant's limited knowledge of the claimed activities with the LTTE of this [Sibling 2]. Even taking into account the applicant's concern of being returned to Sri Lanka and his limited education the late advance of this claim, when considered with the conflicting evidence he provided earlier that

this [Sibling 2] was continuing to reside in Sri Lanka and that he did not state this [Sibling 2] was missing when specifically asked at the Arrival Entry interview and that he was willing to declare a missing [relative] in his statement of claims, casts doubt on its veracity. I do not accept that the applicant's [Sibling 2] joined the LTTE, or had an association with the LTTE or [went] missing at the end of the civil war.

Family detained after the civil war and mother harmed

22. I accept that the applicant's family were living in LTTE controlled territory at the end of the war and were placed in a camp in Vavuniya for a period after the war. This is consistent with the country information regarding the situation for many Tamils living in conflict areas and LTTE areas at the end of the war.⁴ I find that his family members were displaced due to the civil war conflict and detained along with the many thousands of other internally displaced persons. However the family have since been released from detention and have been able to return to live openly in the community. I accept that his mother sustained injuries from mistreatment at this time and that these worsened resulting in, or contributing to, her death in 2018. I accept that his [relative] went missing in 2009, noting that many thousands of people were killed and not identified at the end of the war and that there is no evidence to the contrary before me.

Applicant's LTTE involvement, arrests, charge under the PTA and ongoing interest from the authorities

23. The applicant stated that he was concerned about disclosing some claims earlier for fear of being returned to Sri Lanka and while this may account for the applicant's failure to mention his claimed LTTE association I am not persuaded that this explains his failure to mention claims of mistreatment and detention from the authorities when asked about his experiences at the Arrival Entry interview. At that interview the applicant was asked if he had ever been arrested or detained and he stated no. When asked if the authorities impacted on his day-to-day life in Sri Lanka he stated yes and when asked to provide details stated that when he was small his father had been caught and beaten and that it was only his father who had been so harmed. While I accept that the applicant may have been reluctant to have mentioned the claimed LTTE involvement at this interview I am concerned that he did not declare the claimed arrests or detention. Even taking into account that he may have decided not to mention this for fear it may disclose the now claimed LTTE involvement I note that he was willing to declare his father's arrest and imprisonment although he has similarly since claimed this was linked to an LTTE association. Furthermore he did not mention at this interview the claims of harassment from the navy for fishing in areas he should not have been, which have no apparent link to the now claimed LTTE association. The applicant's failure to mention these matters casts serious doubt on the claim of detention made in the later statement of claims and on the subsequent SHEV interview claims that this attention was for reason of his LTTE association and on claims he came to the attention of the navy and was captured and beaten by them for fishing in the wrong areas.
24. I have considered the applicant's claim that he supported the LTTE from both the time before he travelled to [Country 1] and after and that he travelled to the LTTE held northern area around 2008/2009 in order to do so, indicating that he had a long association with the LTTE providing such support. It is the applicant's own evidence that he lived in the government-controlled Trincomalee District and that he cannot remember a time when it was not

⁴ Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

government-controlled. In the light of his evidence that the area was government-controlled and that the activities of fishermen were highly regulated by the navy it is difficult to understand how the applicant supported the LTTE by [undertaking a certain task]. The applicant stated that he had to obtain a licence in order to fish and that each day he had to take his pass to the authorities and register before taking his boat out to fish. This indicates the strict control the authorities maintained in the area and is supported by the country information reporting that the authorities controlled fishing and the use of boats in the area in order to prevent any LTTE activity in the area.⁵ This stringent security regime would have made providing any practical support to the LTTE very difficult, yet when asked at the SHEV interview to detail how he supported the LTTE the applicant's response was limited to stating he [undertook a certain activity]. When asked to provide further detail he added that sometimes this was [details deleted] and that the LTTE could not have operated without these provisions. There was no indication in the applicant's account as to how he managed to circumvent the strict security in place at the time in order to support the LTTE. Furthermore I note that the residence details provided by the applicant at the Arrival Entry interview and in the SHEV application did not include the now claimed residence in these LTTE controlled areas for a period from 2008/2009. The applicant was given the opportunity to explain this omission at the SHEV interview but I am not persuaded his response regarding his stress at the Arrival Entry interview and that he did not know what he should tell explains the omission and the applicant did not advance an explanation for the omission of this claimed residence in his SHEV application. The applicant has failed to satisfy me that he provided practical support to the LTTE. I do not accept this claim.

25. I am also concerned about implausibilities in the applicant's account that he was charged and detained under the PTA and released on the assurance of a bond in light of his account of later events. He left Sri Lanka illegally in 2006, yet on return in 2008 there is no indication that the bond was seized or claimed by the authorities. The applicant advised that he returned to Sri Lanka from [Country 1] using a "paper passport" and that he received financial assistance from the [Organisation 2] on return. The [Organisation 2] has operated repatriation programs assisting Sri Lankan refugees to return to the [country] Noting that the applicant returned with official documentation of some form, the "paper passport", and received money from the [Organisation 2] I am satisfied the applicant returned under such a program and that his return to the country would have been known to the Sri Lankan officials. It is the applicant's claim that prior to leaving for [Country 1] he had been charged under the PTA, which is a significant claim and indicates a serious concern by the authorities in the activities of the person so charged. I note his claim when he came out of hiding following the claimed earlier arrest he was required to sign regularly at the police station to show he had not left the country. In the light of this earlier claimed interest in him remaining in the country and his claim of later leaving Sri Lanka illegally after having been released from PTA detention under the provisions of bond I am surprised that there was no apparent action when he returned to Sri Lanka in 2008 to seize the bond payment or punish the applicant for leaving the country illegally. I am concerned that the applicant's account of having been detained under the PTA yet been able to return in 2008 and resume living in the family village of [Village 1] is implausible.
26. I also find implausible the applicant's response to questioning at the SHEV interview about the need to register his residence in Sri Lanka. When asked if he was registered in his home

⁵ Country of Origin Information Section (COIS), "Sri Lanka: Situation for Tamils in the East and the North", 2 October 2008, LKA9471CQ; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345; Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

village the applicant responded that he was not and that you could avoid such registration by hiding in the jungle. As noted the applicant returned to Sri Lanka in 2008 using documentation and supported by [Organisation 2] and as such I have found that his return would have been known to the authorities and that he would have been subject to the compulsory registration of residents in place at the time.⁶

27. Also noting the need for household registration and the strict security regime in place I do not accept that the applicant went into hiding around 2005 to avoid the authorities. It is his claim that the authorities were interested in him and tortured his father in prison to ascertain the applicant's whereabouts. Notwithstanding that I have not accepted that the applicant's father was in prison I consider this claim to be implausible as there seems little utility in torturing the applicant's father to ascertain the applicant's whereabouts noting it is claimed his father was in prison in [Location 1]. Yet there is no indication during the period of claimed hiding that the authorities questioned or harmed his wife or mother or siblings who continued to live openly in the community; if the applicant had been of interest to the authorities as he claims it was open to the authorities to pursue enquiries about his whereabouts with such family members. I do not accept that the applicant was of interest to the authorities and that he was in hiding for a period around 2005/2006. It follows that I do not accept he came out of hiding and with the assistance of [Organisation 1] approached the police and was then made to report regularly to the police to sign.
28. I also consider it significant the applicant returned to Sri Lanka in the latter part of 2008 which was the time of heightened civil war fighting. In the latter part of 2008 and in the early months of 2009 the government made significant advances into LTTE controlled areas, pushing the LTTE further into a decreasing area of control. The fighting in this period was intense and movement was severely restricted by the authorities; the authorities cut off the passage of supplies into LTTE territory and controlled entry.⁷ Yet the applicant claims that in this environment he moved into an LTTE controlled area in order to continue to support the LTTE. I place significant weight on the country information reporting the strict control of roads and other passage into LTTE areas and I am not satisfied that the applicant could so have travelled into an LTTE area at this time as claimed.
29. I accept that fishing was strictly controlled at this time, but I am not satisfied the applicant was captured and beaten by the navy for fishing in the wrong areas. At the Arrival Entry interview he was asked how the authorities in his area impacted on his day to day life yet he did not mention the incidents of capture and mistreatment from the navy which he stated in the statement of claims occurred "almost every time" he went out to fish. I am not satisfied he would not have mentioned this harassment at the Arrival Entry interview when asked direct and relevant questions about his experience if these incidents occurred as claimed.
30. I have not accepted that the applicant was involved with the LTTE and provided them support. I do not accept that he was arrested or detained by the authorities for this reason, and noting my concerns that he had not advance any claims of having been detained at the Arrival Entry interview I am not satisfied that he was so arrested or detained for this or other reasons. I do not accept that the applicant was of interest to the authorities or that he went into hiding to avoid them. I have already indicated my concerns about the variation in the

⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

⁷ Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358; Country of Origin Information Section (COIS), "Sri Lanka: Situation for Tamils in the East and the North", 2 October 2008, LKA9471CQ

accounts he provided as to when, or how old he was, the claimed incident of interception of himself and his father by the navy and I am not satisfied that this incident occurred. I do not accept that the applicant was detained under the PTA or of interest to the authorities, either at the time he travelled to [Country 1] or when he departed in 2012

31. I have not accepted the applicant was of interest to the authorities and I do not accept that the authorities have continued to make enquiries about the applicant or his whereabouts or that they beat his father around eight months ago.
32. I accept that the applicant departed Sri Lanka and illegally in October 2012.

Refugee assessment

33. 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

34. 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.
35. I have not accepted that the applicant was of interest to the authorities at the time he left Sri Lanka and I am not satisfied that he would be imputed with a profile of concern should he return. I note his concern he would experience harm in Sri Lanka for reason of his Tamil ethnicity and I note his concern of reports in the Tamil community of people being arrested and beaten by the authorities on return to Sri Lanka.
36. However, on the evidence before me I am not satisfied that the applicant’s ethnicity or retuning as a failed asylum seeker would bring him to adverse attention in Sri Lanka. While there are reports of Tamils returning to Sri Lanka coming to attention of the authorities⁸ the

⁸ Sri Lanka Mirror, “Another Tamil returnee arrested”, 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Freedom From Torture, ‘Sri Lanka –

indications are that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. While agencies dispute the extent to which progress has occurred in human rights in Sri Lanka the country information before me does not support that there is a real chance Tamils or young Tamil men coming to harm on that basis. The UK Home Office reported the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism, journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a "stop" list of those against whom there is an extant court order or arrest warrant.⁹ I am not satisfied that the applicant would be of concern or imputed with a profile that would attract adverse attention from the authorities or Tamil groups. I am not satisfied that the applicant would face any harm as a returning failed Tamil asylum seeker or for being a Tamil.

37. I accept that the applicant departed from Sri Lanka illegally as a passenger on a boat in 2006 when he travelled to [Country 1] and in 2012 when he came to Australia and I accept that because of his illegal departures he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT advises that at the earliest possibility after investigations are complete police transport persons charged under the I&E Act to the closest Magistrate's court. Persons can remain in police custody at the Criminal Investigation Department office at the airport for up to 24 hours after arrival and in cases where a magistrate is not available, such as a weekend or public holiday, may be detained at an airport holding cell for two days. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.¹⁰
38. The penalties under the I&E Act for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,633). DFAT advises the severity of the fine does not necessarily increase for those who have departed Sri Lanka illegally on more than one occasion. In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine and the Sri Lankan Attorney-General's Department advises no fare-paying passenger on a people smuggling venture has been given a custodial sentence. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis.¹¹
39. DFAT advises that the Attorney-General's Department has directed that passengers of people smuggling ventures be charged under the I&E Act and appear in court. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as

Update on torture since 2009', 6 May 2016, CIS38A8012881; Country of Origin Information Section (COIS), 'Situation Update: Sri Lanka Tamil Returnees', 5 September 2017, CRF00C22F109

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

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

¹¹ *ibid*

guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, and may include reporting to police at the returnee's expense.¹² Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The frequency of court appearance depends on the Magistrate and DFAT understands that most persons charged under the I&E Act appear in court every three to six months. Cases are only progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.¹³

40. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. Even having regard to general detention conditions, I do not consider that a brief period in detention would amount to serious harm for the applicant for the purposes of s.5J of the Act. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm.
41. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. That law is not discriminatory on its terms, and the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution, punishment or detention of the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

Refugee: conclusion

42. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka.
43. 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

44. 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

45. 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

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

¹³ *ibid*

- 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.
46. I accept that the applicant will be identified on return as a person who departed Sri Lanka illegally in 2006 and 2012 and that he will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I accept that the applicant may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources.¹⁴ I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with offences of leaving Sri Lanka illegally. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm.
47. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the “real risk” test for complementary protection is the same standard as the “real chance” test,¹⁵ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

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

Decision

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

¹⁴ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

¹⁵ *MIAC v SZQRB* (2013) 210 FCR 505

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.