



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08449

Date and time of decision: 1 July 2020 09:51:00
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 and a Hindu from the Northern Province of Sri Lanka. He departed Sri Lanka illegally on or around [September] 2012 and arrived [in Australia] [in] October 2012. On 22 August 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 26 May 2020, a delegate of the Minister for Immigration (the delegate) refused to grant the SHEV.
2. The applicant claimed to fear harm because of his support for the Liberation Tigers of Tamil Eelam (LTTE) and the Tamil National Alliance (TNA). He also feared harm because he departed Sri Lanka illegally.
3. The delegate accepted the applicant's claims as to identity and origin. The delegate did not accept that the applicant had supported the LTTE or the TNA, or that he had been threatened by unknown persons. The delegate considered country information as to the changed circumstances in Sri Lanka and the processes taken in respect to returned asylum-seekers who departed illegally, and was not satisfied that the applicant faced a real chance or real risk of relevant harm for any reason.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 19 June 2020, the applicant (through his migration agent) provided a submission, in the form of a statement, to the IAA. Parts of this statement refer to information and evidence that was before the delegate and make arguments in relation to the delegate's decision and I am satisfied that this is not new information.
6. The applicant states that he has no new claims from his original claims but "would like to clarify a few things". In his clarification he refers to the appointment of a new President (Gotabaya Rajapaksa) and Prime Minister (Mahinda Rajapaksa) and submits that he fears persecution because of the Rajapaksa's brothers' past history in Sri Lanka. This claim was not raised or considered in the delegate's decision and I am satisfied that the claim to fear persecution because of the change of government is new information. The applicant has not explained why he was unable to raise this claim or provide any information in support of it to the delegate before the delegate made the decision. He has not sought to provide any information to the IAA in support of this claim and it is little more than an assertion. I take into account that he has been assisted by a migration agent, who also assisted with the submission to the IAA, and I am satisfied that he has not been prevented from raising this claim or providing information in support of it. Having regard to all of the above, I am not satisfied as to the matters in s.473DD(b). Further, as the claim is no more than an unsupported assertion, I am not satisfied that there are exceptional circumstances to justify considering it. Taking all of the above into account, as well as my considerations in relation to the applicant's request for an interview (considered further below), I have also decided not to invite the applicant to provide further information or comment in relation to this issue.
7. The applicant refers to his support of the TNA and states that his wife's relatives all supported the TNA and this is why he did so. He has not previously referred to his wife's relatives being

TNA supporters and I am satisfied that this is new information. He has not explained why he was unable to provide this information before the delegate made the decision (other than his comments to suffer from forgetfulness). While the information appears on its face to be credible personal information, for the reasons I give below, I accept that the applicant was a low-level supporter of the TNA. The new information does not purport to show any higher level TNA involvement than that which the applicant has already claimed. I am not satisfied that it would have affected the consideration of his claims had it been known, or that there are exceptional circumstances to justify considering it.

8. The applicant refers to (but does not attach) three country information reports that are not in the review material. I am satisfied that these are new information. The applicant has provided hyperlinks to two of these reports and a reference to the third. This does not comply with the Practice Direction.¹ In any event, the reports all pre-date the delegate's decision and the applicant has not explained why they could not have been provided to the Minister before that decision was made. The reports appear to contain general information and not personal information within the meaning of s.473DD(b)(ii). I am not satisfied as to the matters in s.473DD(b). The reports are outdated (2018, 2016 and 2015) and two of them are reports from organisations that have published more recent reports which are in the review material. I am satisfied that the more recent reporting, combined with other recent information in the review material, provides a more reliable basis on which to assess the claims to fear harm now or in the reasonably foreseeable future. I am not satisfied that there are exceptional circumstances to justify considering this new information.
9. The applicant also asks the IAA for an interview, submitting that he was nervous and stressed during the interview with the interviewing officer (not the delegate) on 17 December 2019 (the interview); that the delegate overlooked his claims; and that he will provide any further information requested by the IAA. I have listened to the interview and note that the applicant was assisted by a Tamil interpreter and his migration agent. At the start of the interview he confirmed that he understood the interpreter and there is no indication during the interview that he was unable to present his claims and evidence. He did not refer at any time to being stressed or nervous, although after the natural justice break he did mention being on medication for "forgetfulness". The interviewing officer asked if the applicant had any evidence of this and the applicant produced an unsigned and undated handwritten note on what appears to be [a specified] letterhead. The note is written in the first person (eg, "the doctor thinks I have Post Traumatic Stress Disorder") and does not refer to any treatment or medication. The interviewing officer asked the agent to provide a letter or certificate from the doctor and the agent said they would do so. The interviewing officer asked if the applicant had put forward all of his claims and evidence and the applicant said that he had told what he could remember. The interviewing officer asked the agent if she had anything she wished to say and she said no. There were no post-interview submissions or further medical certificates provided, or any further contact from the applicant or the agent, in the five months between the interview and the decision.
10. I am satisfied that the applicant has had a real and meaningful opportunity to provide his claims and evidence. Neither he nor his agent raised any concerns during the interview or at any time after the interview. He has not identified any information he would give at an IAA interview that is not already before me, nor how any new information that might be provided would satisfy s.473DD. I have decided not to invite the applicant to provide any further information or comment, whether by way of an interview or otherwise.

¹ IAA Practice Direction for Applicants, Representatives and Authorised Recipients, 1 May 2020.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:

- He is a Tamil and a Hindu who was born in the Northern Province of Sri Lanka in [year].
- His parents were killed by a bomb when he was an infant. He was adopted by a woman but when she could no longer look after him he was sent to live with a family who owned a [business].
- He supported the LTTE, including working with the family that supported the LTTE. He delivered [goods] to the LTTE.
- He also supported the TNA and received death threats from unknown persons.
- He was detained at the end of the war and questioned about his involvement with the LTTE. He was released but was required to report back to the camp every month.
- He fled Sri Lanka while still subject to reporting requirements. His wife and family have been constantly harassed by the Criminal Investigation Division (CID) since his departure and have been forced to pay bribes.

Refugee assessment

12. 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

13. 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.

14. The applicant has made consistent claims as to his identity and origin. He has provided documentary evidence in support of these aspects of his claims. I accept his claims as to identity and origin and I find that he is a Tamil and a Hindu from the Northern Province of Sri Lanka and that Sri Lanka is the receiving country for the purposes of this review.

15. The applicant has made no claims to fear harm as a Hindu and has not made any submission in respect of the delegate's finding that he did not make such claims and that these did not arise on the material. The most recent report from the Australian Department of Foreign Affairs and Trade (DFAT)² assessed that while no laws or official policies discriminate on the basis of religion, adherents of religions other than Buddhism face a low risk of official discrimination from government authorities, which can affect their ability to practise their faith freely. However, most Tamils in Sri Lanka are Hindu and Hindus account for a majority of the population in the Northern Province, and practise their faith freely there and elsewhere in Sri Lanka. There have been some reported instances of Buddhist monks claiming Hindu archaeological sites in the North and East as Buddhist sites. A number of extremist Buddhist groups operate in Sri Lanka, having emerged in response to perceived threats to Sri Lanka's Buddhist identity posed by religious minorities. Extremists have engaged in acts of violence and hate speech against religious minorities, particularly Muslims; however the information does not indicate that extremist activities targeting Hindus in the North is routine, commonplace or systematic.
16. The applicant has not claimed to have faced any harm in the past because of his religion. Although I acknowledge that absence of past harm is not necessarily an indicator of the risk of future harm, given the large numbers of Hindus living in Sri Lanka and the country information I have cited above, I am not satisfied that the applicant faces a real chance of harm because of his religion.
17. The applicant claims that after his parents' deaths he was adopted. In his statement he said that in 1989, his adoptive mother found out that the applicant had distant relatives (the ["A"] family) who owned a [business]. His adoptive mother was no longer able to take care of him and so she sent him to live with the [A] family. The applicant states that later, in 2003, he found that he had a sister living in [named] village and he went to live with her. He states that his adoptive parents told him that his own parents were killed by the Sri Lankan Army (SLA) and that because of this, he supported the LTTE. He also stated that the [A] family were strong supporters of the LTTE.
18. At the interview he said that he was not related to the [A] family. He said that his adoptive mother knew this family and when she could no longer look after him he went to work with them. He said that he worked as [an Occupation 1] for about 13 years. The interviewing officer asked how the [A] family influenced the applicant's political views and he said that they supported the LTTE so he did too, but he did not know any details. The interviewing officer asked a number of follow up questions to explore the family's views and influence on the applicant. The applicant repeated his general claim that they supported Tamils and the LTTE and that he did too. He said he did not see the [A] family engaged in any political activity. When asked what their political views were, he said he did not know their views or problems but they are Tamils and support Tamils and so he did as well.
19. He claims that in 2007, he borrowed money and started his own [business]. He said that he delivered [goods], including to the LTTE in LTTE-controlled areas. At the interview he was asked how the LTTE contacted him to do these deliveries and he said that everyone in the village knew he delivered goods so the LTTE just asked him to deliver to them as well. He did this as needed, sometimes weekly. He does not claim that he was ever questioned or detained while doing this, but he was detained at the end of the civil conflict in 2009 and taken to a detention camp. He was detained for about one year and was interrogated to identify people in the LTTE.

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

He claims that he was mistreated during these interrogations. He said that when his family found him, they arranged with the village headman to pay some money and he was released, but he was told that he needed to report to the authorities every month. Sometimes the authorities demanded money from him when he reported.

20. I have considered the applicant's answers at the interview and note that when the interviewing officer asked for further details or explanations, the applicant essentially repeated his basic claims, even where these did not answer the specific questions asked. In some ways his evidence indicates repetition of a learned story rather than evidence of a lived experience, but his basic claims are consistent with country information before me referring to the experiences of Tamils in the Northern Province at this time. I accept that he operated [a] business and carried supplies from government areas into LTTE-controlled areas. I accept that he may have provided supplies to the LTTE itself. I also accept that at the end of the conflict he was detained by the Sri Lankan authorities.
21. He claims that he was detained for about one year, was mistreated and was interrogated in order to identify LTTE members. I consider this to be an important detail, as he has not claimed that he was accused of being a member of the LTTE himself. It is plausible, and I accept, that as [an Occupation 1] who visited LTTE areas he may have been suspected of having knowledge of LTTE members. However, if he was suspected of being a member of the LTTE or otherwise associated with it personally, I would have expected that he would be questioned about this type of involvement. Further, information in the review material indicates that persons who were suspected of LTTE involvement were likely to be screened out from the general population in the camps and sent to specific detention or rehabilitation camps, or charged and prosecuted.³ Although the applicant claims he was detained for 12 months and then released following payment of money, he was not ever charged, or sent to, or threatened with being sent to, a rehabilitation camp, following his release.
22. While I accept that he was subject to monthly reporting after his release, the information before me indicates that reporting requirements were applied to many released persons and were not, on their own, indicative that a person had an adverse security profile with the authorities. The applicant was never re-arrested or subjected to house or personal searches, or threatened with being charged, or taken to a rehabilitation camp. The level of interest shown in him during and after his detention is not that which the information suggests would be shown to suspected LTTE cadre or members. Rather, it is indicative that he was seen as someone who may know of LTTE members but was not of any other interest himself. I accept that he was detained, questioned and mistreated. I accept that he was subjected to monthly reporting. However, having regard to all of the above, I am not satisfied that he was suspected of membership of, or any other involvement or association with the LTTE other than having delivered goods into the LTTE areas.
23. I accept that the applicant departed Sri Lanka while subject to reporting requirements. I have considered the country information before me and note that as well as DFAT, there is other recent reporting dealing with persons who are, or who may become, of adverse interest to the

³ See for example: DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; United Kingdom Home Office (UKHO), "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, O66E7028826; International Truth and Justice Project (ITJP), "Joseph Camp", 16 March 2017, CISED50AD3592; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012, CIS29707.

Sri Lankan authorities.⁴ This includes former high-profile members or leaders of the LTTE and persons who have been involved in terrorist or criminal activities. DFAT reported that some Tamils with imputed LTTE links (including those who fought for the LTTE or were part of its civilian administration) continue to report police monitoring and harassment. Multiple sources in the North told DFAT that former LTTE members, including those considered low-profile, are monitored to guard against the LTTE's re-emergence, although monitoring today is less extensive and takes a more subtle form. The extent of monitoring depends on one's former seniority within the LTTE; ongoing involvement with politically-sensitive issues, including protests relating to disappeared persons; and links to the Tamil diaspora, particularly elements of the diaspora considered radical by the Sri Lankan Government. Former LTTE members that fit this profile are more likely to be monitored by the authorities. DFAT assessed that while they may be monitored, Tamils with links to the LTTE are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.

24. The other reporting before me, including that which I have cited above, is consistent with DFAT's observations that persons with particular profiles may be subject to adverse interest and treatment. I also note media reporting of persons with such profiles who have been subjected to adverse attention in the past.⁵ However, there is no reporting before me that indicates that returnees who departed Sri Lanka while subject to reporting requirements, but who were not real or imputed members of the LTTE, have been subjected to adverse attention or harm on return for having left Sri Lanka. If such adverse interest was commonly or routinely experienced, I would expect that it would be noted in at least some of the information before me.
25. I have found above that the applicant did not have an adverse security profile at the time of his release from detention and while he has since departed Sri Lanka while subject to reporting requirements, I am not satisfied that this would of itself give rise to an adverse security or criminal profile. I am not satisfied that the applicant's departure while on reporting requirements will lead to any imputation of membership or association with the LTTE. I am not satisfied that he will be subject to any further reporting requirements should he return to his home village.
26. Having regard to all of the above, I am not satisfied that there is a real chance the applicant will be imputed to be a member or high-level associate of the LTTE and face harm for that reason, now or in the reasonably foreseeable future. I am not satisfied that there is a real chance that the applicant will face harm arising from his past interactions with the LTTE and the Sri Lankan authorities.

⁴ Freedom from Torture, "Too little change: Ongoing torture in security operations in Sri Lanka", 22 February 2019, 20190227113604; United Nations Human Rights Council, "Promoting reconciliation, accountability and human rights in Sri Lanka", 8 February 2019, 20190311120409; United Nations Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism - Visit to Sri Lanka", 14 December 2018, 20190305165949.

⁵ "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 insurgency", 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; "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.

27. The applicant claims that he supported the TNA. At the interview he said that he went to meetings and put up posters. He did not provide any further evidence of the type of support he provided. He said that he “faced problems” and was threatened by an unknown person over the telephone, but apart from making this claim he provided no further detail or identified any other problems that he claimed to have faced. Even if I accept that he did attend meetings and put up posters, and was threatened on one occasion because of this, he has not claimed that anyone tried to follow up on this threat in any way. I am not satisfied that the applicant had any particular profile beyond being a low-level supporter of the TNA. He has not claimed to have been involved in any activities, organisations or social media activities in Australia which may impact on his real or imputed political involvement. He has not claimed that he needs, wants or intends to engage in any higher level political involvement should he return to Sri Lanka. Given his low-level involvement in the past I find that he will not engage in any higher level involvement should he return. I am not satisfied that he faces a real chance of harm for any real or imputed association with the TNA, or any other political involvement, now or in the reasonably foreseeable future.
28. I have found that the applicant is not of adverse interest for any real or imputed political opinion or membership of the LTTE. I do not accept that his wife or any other family members have been visited, questioned or subjected to bribes or any other interest by the Sri Lankan authorities, or any other group or persons, in relation to the applicant.
29. I accept that the applicant is a Tamil who lived in the Northern Province. I have found above that he was not of any interest to the Sri Lankan authorities or military for any reason when he departed Sri Lanka in 2012, and that he will not have any real or imputed LTTE profile should he return now. Information from DFAT and other sources before me does not indicate that Tamils who lived in former LTTE-controlled areas continue to face harm from the authorities for that reason.
30. In 2012, the United Nations High Commissioner for Refugees (UNHCR)⁶ reported that at the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the Northern and Eastern provinces of Sri Lanka. Therefore, all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives. UNHCR opined that originating from an area that was previously controlled by the LTTE did not in itself result in a need for international refugee protection.
31. In 2017, the United Kingdom Home Office (UKHO)⁷ opined that a person being of Tamil ethnicity would not in itself warrant international protection. Unlike in the past, returnees (including those who had a previous connection with the LTTE) were able to return to their communities without suffering ill-treatment. Civil society groups on the ground did not report recent issues of ill-treatment. The police interest, if any, was not in any previous involvement with the LTTE, but on whether the person had committed any criminal act. This was because many had left the country using forged identities and the police were therefore seeking to establish the true identity of the returning person and whether they were wanted for any criminal acts in addition to leaving the country with false documents.

⁶ UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 1 December 2012, CIS29707.

⁷ UKHO, “Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)”, 15 June 2017, OG6E7028826.

32. Similarly, the recent DFAT and United States⁸ information before me reported the improvements in Sri Lanka for Tamils since the end of the conflict and the change to a peacetime government in 2015. Although there are some reports that Tamils from the Northern and Eastern Provinces may continue to face a degree of discrimination or harassment, and do not have the same opportunities as Sinhalese Sri Lankans, DFAT assessed that Tamils face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing.
33. Having regard to all of the above, I am not satisfied that the applicant faces a real chance of harm as a Tamil or as a Tamil from a former LTTE-controlled area.
34. I accept that the applicant will be returning to Sri Lanka as a returned asylum-seeker. DFAT⁹ does not indicate that returned asylum-seekers, including Tamils (with no other profiles) are subjected to any harm by the Sri Lankan authorities. Between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the United States, Canada, the United Kingdom and other European countries. Most returnees were Tamil. Although individual experiences vary, many Tamil returnees chose to return to their places of origin because they have existing family links, or because of the relatively lower cost of living compared to the south of Sri Lanka. DFAT also reports that the Sri Lankan Government has consistently stated that refugees are welcome to return and, in August 2016, released a “National Policy on Durable Solutions for Conflict-Affected Displacement”. During a visit to Australia in February 2017, the then Prime Minister Wickremesinghe stated publicly that failed asylum-seekers from Australia would be welcomed back to Sri Lanka, although human rights groups greeted this statement with caution.
35. DFAT noted 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. I note that the applicant has not claimed that he is in debt to anyone as a result of his journey.
36. DFAT was aware of anecdotal evidence of regular visits and telephone calls by the CID to failed asylum-seekers in the North and reports that some visits and telephone calls have continued into 2019, but it understands that most returnees, including failed asylum-seekers, are not actively monitored on an ongoing basis. DFAT reported that it was unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT was not aware of returnees, including failed asylum-seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.
37. Other information I have cited above, which comes from various international government and non-government organisations, supports DFAT’s conclusions that returned asylum-seekers

⁸ United States Department of State (USDOS), “Country Reports on Human Rights Practices for 2018 - Sri Lanka”, 13 March 2019, 20190314103240.

⁹ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244.

who are not otherwise suspected of high-level LTTE affiliation, anti-government or pro-Tamil activities, are not generally of adverse interest to the authorities.

38. I accept that the applicant may face visits from the authorities and some social stigma should he return to Sri Lanka. I am not satisfied that such stigma, visits or contact, if they were to occur, are of themselves, or would lead to, harm, let alone serious harm. I am satisfied that the applicant does not have any adverse profile that may mark him out as different from any other Tamil returnees and asylum-seekers. 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 Tamil asylum-seeker. I also note that he has family in Sri Lanka and has not claimed that he will be unable to return to live with them, or that there is any reason he will be unable to work in Sri Lanka. I am not satisfied that he faces a real chance of harm for being a returned asylum-seeker.
39. I accept that the applicant departed Sri Lanka in contravention of the *Immigrants and Emigrants Act* (1949) (the I&E Act). According to DFAT¹⁰, the applicant will be processed in a group with other returnees and while it may be several hours before the applicant and the other returnees can leave, returnees are free to go to the bathroom and to talk to one another during this time. As part of this process, the authorities will look into the applicant's personal history and check information against immigration and intelligence databases, criminal and court records, in order to confirm identity and identify any possible terrorist or criminal backgrounds, or any other security concerns. The authorities may also contact police, family and neighbours in the applicant's former home area. I have found above that the applicant does not have any adverse profile with the Sri Lankan authorities for any reason, including for having departed while subject to reporting requirements, and I am not satisfied that he will be treated differently, or subjected to harm, during these processes.
40. Based on the DFAT reporting, I accept that the applicant may be charged and brought before the closest Magistrate's Court at the earliest opportunity, although DFAT noted that subject to magistrate availability, returnees may be held for up to two days in the airport holding cell awaiting this transfer. DFAT was not aware of mistreatment during this process, nor do I consider on the basis of any other information before me, that the applicant will be mistreated during this process.
41. Once in court, the magistrate will determine the next steps to be taken. I am not satisfied that the authorities will perceive the applicant as having been anything other than a mere passenger on his trip to Australia. According to DFAT, the Sri Lankan Attorney-General's Department has advised that no custodial sentences have ever been issued to such persons. I am not satisfied there is a real chance that the applicant would be imprisoned for any period. I consider, based on DFAT's reporting, that should the applicant plead guilty to departing illegally, he may be fined up to LKR 200,000 (approximately AUD 1,633), although well-placed sources have told DFAT this fine is usually between LKR 15,000 and LKR 20,000 (approximately AUD 122 and AUD 163).
42. If a not-guilty plea is entered the magistrate would usually grant bail on the basis of personal surety or guarantee by a family member and the returnee may need to wait for the guarantor to come to court. I am not satisfied there is any reason that the applicant would not be granted bail on personal surety should he elect to plead not guilty. DFAT noted that while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs

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

associated with court appearances (if relevant) over protracted lengths of time can be high and disruptive to the returnee's lifestyle. However, I am not satisfied on the evidence before me that the applicant could not pay a fine, even if by instalment, and manage arrangements for any necessary travel and court appearance/s (should they be required), and nor am I satisfied that he would otherwise face serious harm arising from financial hardship in the reasonably foreseeable future. I am not satisfied that any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with the court appearance/s would constitute serious harm to the applicant. I am not satisfied that the applicant faces a real chance of serious harm as a returned asylum-seeker, or as a returned asylum-seeker who departed Sri Lanka illegally, including departing while subject to reporting requirements.

43. Additionally, I am satisfied the arrest and judicial processes the applicant may face result from the lawful prosecution of a crime and there is no evidence before me that laws relating to illegal departure are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. I find that the process leading to arrest, charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to all Sri Lankans who depart illegally and/or are subject to bail conditions and does not amount to persecution for the purposes of ss.5H(1) and 5J(1) of the Act.
44. I am not satisfied that the applicant has any personal adverse profile or history that will lead to a real chance of serious harm in Sri Lanka. I accept that he is a Tamil male from the Northern Province and will be a returned asylum-seeker who departed Sri Lanka illegally. I am not satisfied that he has a well-founded fear of persecution for those reasons, singly or when considered together.

Refugee: conclusion

45. 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

46. 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

47. 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.

48. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
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 two days) and 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.
50. The applicant may experience some visits from the authorities as well as some social stigma from community members and 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, would involve the applicant 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.
51. I have found that the applicant does not face a real chance of harm for any other reason or reasons. As "real chance" and "real risk" equate to the same threshold,¹¹ and for the same reasons as given above, I am not satisfied that the applicant faces a real risk of significant harm for any other reason or reasons.

Complementary protection: conclusion

52. 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.

¹¹ *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.