



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08567

Date and time of decision: 10 August 2020 10:19:00
G Deal, 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 applicant claims to be a Sinhalese male from Jaffna in the north of Sri Lanka. [In] December 2012 the applicant, his wife (IAA20/8566) and his wife's two eldest daughters from her former marriage (IAA20/8569 and IAA20/8570) arrived by boat in Australia. On [date] the applicant and his wife had a [child] (IAA20/8568). On 30 June 2017 they lodged a combined application for a Safe Haven Enterprise Visa (visa application) with the Department of Immigration, now part of the Department of Home Affairs. The applicant's wife made claims for protection and the applicant applied as a member of the wife's family. The wife made some claims on behalf of the applicant.
2. On 10 July 2020 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted the applicant's mother was Tamil and his father Sinhalese, that the applicant was from the north of Sri Lanka, married his wife, a Tamil, in a Hindu ceremony in Sri Lanka in 2011 and travelled to Australia with his wife and her daughters in 2012 and lived with them in Australia and had a [child] with his wife in [year]. Overall, the delegate found the applicant did not meet the relevant definition of refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia had protection obligations.
3. The applicant's wife, [child] and step-daughters, with whom he made the visa application, are the subject of a separate decision record.¹

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. By email dated 27 July 2020 the applicant's migration agent provided the IAA with a concise submission raising pertinent points (IAA submission). In the IAA submission the migration agent states she does not seek to provide new information but to address some of the delegate's findings, and with the exception of the below, I agree the IAA submission contains no new information. The IAA submission makes reference to a submission it states was previously provided to the delegate on 29 May 2020 (Further Submission). It was not in the review material and when the IAA requested a copy from the Department the Department advised that no such submission was received by it. Upon request, the migration agent subsequently provided the IAA with persuasive evidence to show it had been emailed to the Department correctly on 29 May 2020. I accept that it was emailed to the Department. It was not before the delegate when he made his decision. The Further Submission contains new information however it clearly states it is being provided in respect of the applicant and her daughters' (not in respect of the applicant), moreover the content relates to the treatment of Tamils in particular, and I do not consider it relevant in relation to the applicant.

¹ The applicant's wife and daughters have a separate decision record because of a request to keep some claims confidential. The applicant does not know the confidential claims. He said he would not be making his own claims and has instead simply referred to his wife's statement of claims accompanying the visa application, and seeks protection on the basis of being a member of the same family unit. His wife also mentioned some claims concerning him.

Applicant's claims for protection

6. The applicant also relies on his membership of the same family unit as his wife, [child] and step-daughters and the applicant's wife raised some claims on his behalf at the primary stage.
7. Claims relevant to the applicant can be summarised as follows:
 - He is "majority Sinhalese" and from Jaffna in the north of Sri Lanka.
 - He married his wife in a Hindu ceremony in 2011.
 - He and his wife had a [child] in Australia in [year].
 - He is at risk from extremist groups as he is not Tamil and not a supporter of the government.
 - He left Sri Lanka illegally with his wife and her two daughters in 2012.

Refugee assessment

8. 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

9. 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.
10. Based on the evidence, including the consistency and the documentary evidence, I accept the applicant is a Sri Lankan national, from Jaffna in the north of Sri Lanka, is "majority Sinhalese" and a Buddhist, married his wife in a Hindu ceremony in 2011, left Sri Lanka illegally in 2012 with his wife and two step-daughters and had [another child] with his wife in Australia in [year]. I consider Sri Lanka the receiving country.

11. In the visa application the applicant's wife also briefly stated in her statement of claims that the applicant "...is at risk from extremist groups as he is not Tamil and not a supporter of the government". This was not subsequently elaborated on in the wife's visa interview, post interview submission or in submissions to the IAA, despite not being considered in the delegate's decision. I also note the wife subsequently clarified that the applicant had a Tamil mother but was "majority Sinhalese" and he also speaks both Tamil and Sinhala. The country information before me² indicates that after decades of fighting the Liberation Tigers of Tamil Eelam (LTTE) surrendered to the government in May 2009. There is no evidence before me to indicate the applicant has a profile of adverse interest to the Sri Lankan government or authorities or anyone else that he does not support the government. He is married to a Tamil woman and left Sri Lanka illegally in 2012 and I am willing to accept as plausible that he may be privately critical of the Sri Lanka government. DFAT also reports of terrorist bombings by Islamic extremists in Sri Lanka in 2019 but that the perpetrators had all reportedly been killed or apprehended and there have been no further attacks. While Muslims were targeted and subject to reprisals the country information does not indicate Sinhalese in particular were targeted by the extremists or the authorities. Tamil criminal gangs in the north are reported to pose a low threat of violence (meaning DFAT has insufficient evidence to conclude that there is a pattern of behaviour) to the local community. Ethnic Sinhalese and Buddhists comprise the majority of the population in Sri Lanka. While he travelled a lot for work the applicant has indicated he lived in Jaffna with his wife and her daughters before leaving Sri Lanka in 2012 and there is no credible evidence before me to suggest he was harmed during this period. In her statement of claims accompanying her visa application the applicant's wife said she feared her ex-husband would harm her husband, although in a post interview submission she said she wished to withdraw this claim and noted that as "majority Sinhalese" he would have protections. There is no credible evidence before me to indicate his wife, [or children] have an adverse profile of on-going interest (whether to the authorities or anyone else). I am not satisfied the applicant faces a real chance of harm on account of being a male with a Sinhalese father and Tamil mother from the north, his marriage or his views on the Sri Lankan government.
12. I accept the applicant left Sri Lanka illegally. While no claims in relation to the applicant's illegal departure were made, the delegate considered whether the applicant would suffer serious harm as a consequence and as such I will also consider this. The country information before me³ indicates that following arrival at the airport, returnees will be processed in a group by a number of government agencies and this process can take several hours. If returning on a temporary travel document, police will undertake further investigations in particular to ensure an individual does not have a criminal or terrorist background or an outstanding court order or arrest warrant. All returnees are subject to these standard procedures regardless of religion or ethnicity. DFAT understands detainees are not subject to mistreatment during airport processing. Those who departed illegally by boat may be found to have committed an offence under the *Immigrants and Emigrants Act 1949* (I&E Act). If arrested for illegal departure they will be photographed, fingerprinted, a statement will be taken they will be transported to the closest magistrate's court where the next steps will be determined. If a magistrate is not available, for example on a weekend or public holiday, DFAT understands they may be detained for up to two days at the airport. DFAT reports it is not aware of mistreatment of returnees during this process. Those charged must also appear in court when their case is being heard or they are summonsed as a witness in a case. The offence will be heard in the court closest to the occurrence of the offence which may involve legal and transportation costs. Cases are only heard when all members of a people smuggling venture have been located, which can result in long delays. Penalties can

² Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

³ DFAT, 'DFAT Country Information Report Sri Lanka', 3 November 2019, 20191104135244.

technically include imprisonment however it has been reported that no mere passenger has been given a custodial sentence and the fines are relatively low (starting at 3,000 rupees) and able to be paid in instalments. A fine will generally be issued and the person will be free to go immediately, if they plead guilty. If not pleading guilty they will likely be granted bail on the basis of personal surety or guarantee by a family member and will have to wait for a family member to pick them up. DFAT also notes that the cumulative costs for returnees associated with the court process can be high and there can be delays.

13. There is no credible evidence before me that suggests the applicant has a criminal or terrorist background or outstanding court orders or arrest warrants or is otherwise wanted by the authorities. The country information detailed above indicates all returnees are processed under the same standard procedures and that people are not harmed during this processing. Based on the country information above I accept the applicant may be detained at the airport for processing but I am not satisfied he faces a real chance of harm during standard processing procedures. I accept the applicant may be arrested under the I&E Act for his illegal departure, photographed, fingerprinted, have a statement taken and will be transported to the magistrate's court at the earliest available opportunity. I accept the applicant may possibly be briefly (two or so days) held at the airport if a magistrate is not immediately available, as part of the usual procedures for those charged for illegal departure. Based on his profile I am not satisfied there is a real chance he would be otherwise detained or harmed. If he pleads guilty after being issued with a fine he is likely to be free to leave immediately. Based on the applicant's circumstances, his ability to work and option to pay the fine in instalments I am not satisfied that this would threaten his capacity to subsist. If he does not plead guilty he would likely be granted bail on certain conditions, such as on personal surety or guarantee by a family member, and would be released on being collected by a family member. The evidence before me does not indicate one of his family members would be unable or unwilling to do this if required. While he may have to meet costs associated with the court process, in the circumstances I am not satisfied there is a real chance this would threaten his capacity to subsist or would otherwise amount to serious harm.
14. I accept the applicant, as a consequence of his illegal departure, may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this, but I do not accept these experiences amount to 'serious harm' in this case. Furthermore, I am not satisfied that the relevant laws and procedures dealing with those who depart Sri Lanka illegally are discriminatory, or intended to apply or are applied or enforced in a discriminatory manner.
15. I am not satisfied the applicant faces a real chance of persecution because of his illegal departure.
16. I am not satisfied the applicant has a well-founded fear of persecution whether because of his marriage, views of the Sri Lankan government or his illegal departure.

Refugee: conclusion

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

Complementary protection assessment

18. 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

19. 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.

20. 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.

21. For the reasons already discussed, I accept the applicant, as a consequence of his illegal departure, may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this. However I am not satisfied that these circumstances amount to 'significant harm' as defined for the purposes of s.36(2A). There is not a real risk the applicant would be arbitrarily deprived of his life or subject to the death penalty on his return or be subject to torture. Furthermore, the evidence before me does not support a conclusion that there is an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman in nature or to cause extreme humiliation.

22. As discussed above I have otherwise concluded that there was no 'real chance' the applicant would suffer harm on his return to Sri Lanka for the reasons claimed. 'Real chance' and 'real risk' involve the same standard. For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

Complementary protection: conclusion

23. 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 do not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

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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.