



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA16/01075

Date and time of decision: 3 April 2017 14:53:00

Michael 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 an 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 Hindu from the [Town 1] district in the Eastern Province of Sri Lanka. He departed Sri Lanka illegally in July 2012 and arrived on Christmas Island [in] August 2012. [In] August 2013, he lodged an invalid application for a protection visa. [In] November 2015, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] October 2016.
2. The applicant claims to fear harm on the basis of: being a former member of the Liberation Tigers of Tamil Eelam (LTTE) and the Sea Tigers; as a Tamil from the East; and for being a returned asylum seeker who fled Sri Lanka illegally.
3. The delegate accepted the applicant's claims of membership of the LTTE/Sea Tigers and of being detained by the Sri Lankan military and authorities. The delegate did not accept that the Sri Lankan authorities have an ongoing interest in the applicant and having regard to the current political situation in Sri Lanka found that the applicant does not face a real chance of serious harm or a real risk of significant harm. The delegate found that the applicant is not a person in respect of whom Australia has protection obligations.

Information before the IAA

4. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The Department of Foreign Affairs and Trade (DFAT) country information report that was before the delegate is dated 18 December 2015.¹ On 24 January 2017, DFAT released an updated version of the country information report.² This was not before the delegate at the time of the decision and is new information. I consider DFAT to be an authoritative source of country information and as its January 2017 report updates its December 2015 report (although the two are quite similar), I am satisfied that there are exceptional circumstances to justify considering the new information.
6. I have considered s.473DE which provides that the IAA must give the applicant particulars of any new information if that new information would be the reason, or part of the reason, for affirming the decision. However, this requirement does not apply to information that is not about the applicant specifically and is just about a class of persons of which the applicant is a member. From the 2017 report I have obtained new information regarding Sri Lankan citizens who are returning as returned asylum seekers and/or those who departed Sri Lanka illegally. This information is not specifically about the applicant and is just about a class of persons of which the applicant is, or looking forward should he return to Sri Lanka, will be, a member. I also note that the information relating to the treatment of returned asylum seekers in the 2017 report is substantially the same as the information that was in the 2015 report.
7. No information was received from the applicant.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

² DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105.

Applicant's claims for protection

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

- He is a Tamil Hindu from the [Town 1] district in the Eastern Province of Sri Lanka. He is married with one child. His wife and child reside with his parents and siblings in the family home in [Town 1].
- In 2003, at the age of [years], he was forcibly recruited into the Sea Tigers. He undertook military training in a Sea Tiger camp. After the Boxing Day tsunami in 2004, he was permitted to travel home to check on his family.
- His mother went to the United Nations High Commission for Refugees (UNHCR) and registered him as an underage abductee. He believed he was safe and did not go back but the LTTE came and took him away again. He was taken to a number of different camps for training.
- In November 2006, he was wounded in shelling and ran away. He was able to call his mother and she brought him home to [Town 1]. Two days later he was arrested by the military and taken to the [Town 2] Police Station. His mother went to the UNHCR and the UNHCR was able to get him released after 15 days. He and his [sibling] fled Sri Lanka and went to [Country 1].
- He stayed in [Country 1] until February 2010. He thought Sri Lanka was safe once the war was over and came back to [Town 1]. About 10 days later, the Criminal Investigation Division (CID) came and arrested him. He was detained in the [Town 1] Navy Camp for three months, during which he was interrogated and tortured many times.
- He was released in May 2010. The CID continued to visit him and question him about other people who may have been in the LTTE. He spent a lot of time at his [relative]'s house, which is 50 kilometres away.
- The CID kept visiting him and asking questions so in July 2012 he decided to escape to Australia.
- The authorities keep visiting his [sibling] and asking about him. In 2015, they forced his [sibling] to divulge the applicant's Skype address.
- He believes he will be shot and killed if he returns to Sri Lanka. He also fears former LTTE cadres who now work with the Sri Lankan government.

Refugee assessment

9. 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

10. 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.

11. The applicant claims to be a Hindu Tamil from the Eastern Province. The applicant provided evidence of his identity and on the basis of this evidence I accept that the applicant is a Hindu Tamil from this part of Sri Lanka.

Forced recruitment by the LTTE

12. The applicant did not raise any claims of recruitment by the LTTE until he made his SHEV application in 2015. At the interview with the delegate [in] January 2016 (the interview), the applicant's agent submitted that someone who was really involved with the LTTE would be fearful of disclosing this at first. The delegate questioned the applicant at some length about his claims and the applicant provided consistent and plausible answers. Having considered the country information³ relating to LTTE structure, forced recruitment and child soldiers that was before the delegate and taking into account the applicant's age at the time of these incidents, I am satisfied that the applicant is a credible witness and I do not draw any adverse inferences from the timing of his claims. His explanations and descriptions of events are consistent with the country information.

13. I accept the applicant's claims in relation to his forced recruitment into the LTTE, training, being injured and returning to the family home. I note that the applicant was aged [age range] during this period. I also accept the claims that he was detained by the military once he left the LTTE but as he was underage his mother was able to negotiate his release through the UNHCR. I take into account the documentary evidence supplied by the applicant and I accept that he and his [sibling] fled to [Country 1] and remained in refugee camps until they returned to Sri Lanka in February 2010.

14. The applicant has not claimed that he ever participated in any combat or other offensive operations. He has consistently claimed that he spent his time in training. He was injured in late 2006 but he claims, and I accept, that this occurred when the Sri Lankan military was shelling the area that the LTTE camp was located in.

15. The applicant has not claimed that he has been involved in any LTTE commemorations, support activities, separatist or anti-government activities at any time since he escaped from the LTTE.

³ In particular: Joanne Richards, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, 01 November 2014, CISA447F082828.

Detention by the CID

16. The applicant claims that about 10 days after he returned from [Country 1] in February 2010, the CID came and arrested him. He was taken to the CID compound inside the [Town 1] Navy Camp and was detained for about three months. He claims that he was interrogated and tortured on many occasions. He has not described, nor was he asked for details of, the claimed interrogations or torture.
17. I accept that as a known former LTTE member (albeit a forced child soldier), the applicant would have had a profile and/or been of interest to the military and security forces. His evidence and documents provided in his application confirm that he returned from [Country 1] on an official travel document issued by the Sri Lankan government, so I accept that the authorities would have been aware of his return.
18. According to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka,⁴ since the end of the armed conflict in 2009, former LTTE members and many others have been “demobilized” and gone through “rehabilitation” programs. Such programs were underway at the time that the applicant was detained and continued up to and beyond the date that the applicant left Sri Lanka for Australia. I am satisfied that the applicant was detained by the CID as claimed. The UNHCR guidelines document allegations of torture by police and military personnel against such detainees and I am prepared to accept that the applicant’s detention would have involved interrogation and mistreatment, possibly amounting to torture.⁵
19. While I accept that the applicant had an adverse security profile in 2010, the country information indicates that former combatants and higher level LTTE cadre were sent to rehabilitation camps for 12 months, while many detainees who were released without such rehabilitation were still subject to post-release monitoring, surveillance and regular reporting requirements.⁶ The applicant was released after 3 months, was not sent to a rehabilitation camp and was not subject to any monitoring, surveillance or reporting. He has claimed that the authorities continued to visit and question him after his release but told the delegate that they were asking him about other people he might have known. This is consistent with the UNHCR Guidelines, which note that many released detainees were put under pressure to become informants.⁷ Considering all of this evidence, I am satisfied that at the time the applicant was released from detention, he was no longer of interest to the authorities except as a possible informant in relation to other persons.
20. More recent information notes that as of May 2016, the last 132 ex-LTTE combatants were completing the rehabilitation program and it is expected that rehabilitation will then come to an end.⁸ The same information notes that while former combatants continue to report surveillance, harassment, arbitrary arrest, torture or mistreatment, the United Kingdom Upper Tribunal (UT) has found that post-rehabilitation monitoring alone did not, in its view, amount to persecution.

⁴ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, at p 11.

⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, at p 18.

⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, at p 11-12; United Kingdom Home Office (UKHO), "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17 at p 20.

⁷ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, at p 28.

⁸ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17 at p 8.

21. The applicant has claimed that the security forces have visited his [sibling] to ask about him and as recently as 2015, they forced his [sibling] to provide them with his Skype address. The applicant has not claimed that the authorities have tried to contact him since he has been in Australia or since they obtained this Skype address. Given I have found that the applicant is not of interest to the authorities except as a potential informant, I do not accept the claims that the authorities have been visiting his [sibling] or that they forcibly obtained the Skype address.
22. I have considered the applicant's submission at the interview that he will be identified as a suspected former child soldier due to the presence of [specified] injuries on his body. I have accepted the applicant's claims that he was identified as a child soldier and detained in 2010 and I take into account that the [specified] injuries were received before this detention. I am satisfied that the presence of these [injuries] will not identify him with any profile that the authorities have not already considered.
23. Although the applicant has claimed to fear harm from former LTTE cadres who are associated with the government, he has not expanded on this claim or provided any detail. I take into account country information that confirms there are breakaway LTTE groups who have sided with and acted in support of the government⁹; however, as the applicant has not advanced any specific claims against these groups (and there is no evidence of any interest by such groups or persons in the applicant since he fled the LTTE in 2006), I find that as he is not of interest to the authorities or government, he will not be of interest to, or face harm from, these groups.
24. I am satisfied that the applicant does not face a real chance of serious harm on the basis of being a forcibly abducted child soldier who trained with the LTTE.

Tamil from the East

25. I accept that as a Tamil the applicant has a subjective fear of arrest, detention, disappearance and mistreatment at the hands of the Sri Lankan authorities. The UNHCR Guidelines referred to earlier set out the types of LTTE links that may, in the UNHCR's opinion, give rise to a need for protection. These include:
 - 1) Persons who held senior positions with considerable authority in the LTTE civilian administration;
 - 2) Former LTTE combatants or "cadres";
 - 3) Former LTTE combatants or "cadres" who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, "computer branch" or media (newspaper and radio);
 - 4) Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
 - 5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; and
 - 6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.¹⁰

⁹ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17 at p 38-39.

¹⁰ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

26. I have found above that the applicant is no longer a person of interest to the authorities in relation to his LTTE involvement. The applicant has not claimed that any other member of his family was involved in the LTTE. Although this is not an exhaustive list, it does not list Tamils, Tamils from the East or Tamil Hindus as being a group or groups at risk generally.
27. According to the country information, there have been dramatic changes in Sri Lanka since the applicant departed in 2012. Most significantly, there were presidential and parliamentary elections in 2015 which saw the new President, Mathripala Sirisena, win a decisive victory. Sirisena has formed a coalition of parties as the United Front For Good Governance and holds a majority in the parliament. For the first time since 1983, a Tamil politician (the leader of the Tamil National Alliance (TNA)) has been named as the leader of the opposition. The opposition has pledged to support the government on all issues where it feels support is justified and the TNA backed President Sirisena during the presidential elections. The manifesto of the new government includes constitutional reform, limiting the powers of the executive, the removal of checkpoints and other restrictions as well as appointing civilian governors in the North and East provinces.¹¹

28. On 9 February 2016, the UNHCR said that:

*The element of fear has considerably diminished, at least in Colombo and the South. In the North and East, it has mutated but, sadly, still exists. Virtually everyone agrees there has been progress, although opinions differ markedly about the extent of that progress... One of the most important long-term achievements over the past year has been the restoration of the legitimacy and independence of Sri Lanka's Human Rights Commission. The appointment of new leadership of great integrity, through the proper constitutional process, offers a new start to revitalise this all-important national institution.*¹²

29. The Human Rights Watch (HRW) annual report for 2016 stated:

*The [new] government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms ... and took steps to restore the independence of the judiciary. In contrast to the combative approach of the [previous] government, it also initiated a new, more open dialogue with the international community, including human rights organizations.*¹³

30. The country information does indicate that there continue to be reports of arbitrary detention and harm perpetrated by the security forces in Sri Lanka, particularly of Tamils. The HRW report goes on to note that the government has not taken any significant measures to end the impunity of security force abuse and had not repealed the "draconian" Prevention of Terrorism Act (PTA). A US State Department report on Sri Lanka on 13 April 2016 found that there were human rights problems reported during 2015. The major ones included harassment of civil society activists, journalists, and persons viewed as sympathizers of the LTTE. There were also reports of arbitrary arrest and detention, torture, rape and other forms of sexual and gender-based violence committed by the authorities.¹⁴

¹¹ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, at p 14-15.

¹² UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, at p 15.

¹³ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, at p 16.

¹⁴ *ibid*

31. This is also supported by media reports provided by the applicant at the interview that allege human rights abuses are continuing. I have considered these reports and take into account that the victims had been accused of trying to start up the LTTE again, bringing the country into disrepute by talking about the war and atrocities or had been involved in recent protests and activities relating to Tamil rights.
32. In May 2016, the UK Home Office assessed that simply being a Tamil does not of itself give rise to a well-founded fear of persecution or serious harm in Sri Lanka. The UK Home Office also noted that a person being of Tamil ethnicity does not of itself warrant international protection. "Neither in general would a person who evidences past membership or connection to the LTTE **unless** they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport."¹⁵ (emphasis added).
33. There is no evidence before me and the applicant has not claimed that he has been involved in any separatist or anti-government activities, protests or criticism of the government since leaving the LTTE. He has not claimed that he would be a person of interest to the government for any reason other than his past LTTE involvement. I have found that he is not now of interest to the government or authorities because of his past LTTE involvement.
34. While some of the country information indicates that Tamils are facing difficulties in returning to and taking up their properties in the east, the applicant gave evidence at the interview that his family reside in the family home in [Town 1] and have never been dispossessed or forced to flee that property. I am satisfied that he will not face any difficulties in relation to his property.
35. I have also considered the applicant's religion. The country information and media reports cited above note that the major human rights issues reported in 2016 included harassment of civil society activists, journalists and persons linked to the LTTE or separatist activities but do not refer to issues relating to religion. None of the referred information assesses that Tamil Hindus face a real chance of serious harm on the basis of their religion. The applicant has not made specific claims or referred to any information that suggests Tamil Hindus face a real chance of serious harm. I am satisfied that the applicant does not face a real chance of serious harm on the basis of his being a Hindu.
36. Having considered this evidence including the country information cited above, I am satisfied that the applicant does not face a real chance of serious harm on the basis of being a Tamil, a Hindu or a Tamil from the East.

Illegal departure and returned asylum seeker

37. I am satisfied that the applicant departed Sri Lanka illegally. I accept that given the information before me, including the way he departed the country, there is a possibility he would be assessed by the Sri Lankan authorities as having sought asylum in Australia. DFAT has assessed the risk of torture or mistreatment for the majority of returning Tamils is low, including for those suspected of offences under the Immigrants and Emigrants Act (the I&E Act).¹⁶
38. On the basis of the evidence before me, I accept that as a person who departed Sri Lanka illegally, the applicant may be questioned on return as part of the airport screening process. The country information before me indicates that as a returning asylum seeker who departed illegally, the applicant may be subject to an interview, and contact made with the police in his

¹⁵ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, at p 9.

¹⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105, at p 29.

home area, his family and/or neighbours, and a check of criminal and court records.¹⁷ While I accept that he was detained for three months in 2010 and there may be records of this on the security files, I have also found that he was released and not subject to any further interest by the authorities, other than as a potential informant. There are no claims or evidence that he is subject to any extant criminal proceedings. I am satisfied that he will not be considered returnee of interest. The country information before me indicates that returned asylum seekers and those with an otherwise low profile are not generally at risk of harm on return to Sri Lanka.¹⁸ I am therefore satisfied that the applicant would not be at risk on return on the basis of any adverse security or criminal profile and I find that there is not a real chance he would be harmed or mistreated because he is a returning asylum seeker.

39. According to DFAT a Sri Lankan national who departs Sri Lanka other than via an official port will be in breach of the I&E Act and may be subject to penalties which can include imprisonment for up to five years and a fine of up to Rs.200000 (approximately AUD \$2000). In terms of the likelihood of a custodial sentence, DFAT advises that those who are not actively involved in a people smuggling venture are not given custodial sentences for departing Sri Lanka illegally. DFAT also assesses that ordinary passengers are generally viewed as victims.
40. Persons who departed in breach of the I&E Act may be arrested and charged. Such persons may be remanded in custody for a short period, while waiting to be brought before a magistrate. The period of remand would normally be twenty four hours, but may be longer if a person is returned just before a weekend. Where a person who departed illegally pleads guilty, they will be fined and discharged. In most cases, when a returnee pleads not guilty, they are immediately granted bail on personal surety, though they may be required to have a family member act as guarantor, in which case they may also need to wait until a family member comes to court to collect them. Illegal departees are rarely subject to bail conditions or general reporting conditions between hearings.¹⁹
41. As the applicant left Sri Lanka in breach of the I&E Act, I find that there is a real chance he would be charged and fined under that law. I have found that the applicant is not a person of current interest to the authorities. I have also taken into account that he previously left Sri Lanka illegally (in 2010) but was able to obtain permission to return and was not charged or detained because of this illegal departure. I am satisfied that he will not be treated differently to any other Tamil returnee.
42. If the applicant were to plead not guilty, I find it highly likely that he will be bailed on personal surety. There is no information before me that indicates that the applicant was anything other than an ordinary passenger on a boat and as noted above, ordinary passengers are generally viewed as victims. I am therefore satisfied there is not a real chance of the applicant being given a custodial sentence. I accept the applicant may be fined, which may be paid by instalment, and I do not accept this would cause him economic hardship, threaten his capacity to subsist or otherwise constitute serious harm. Accordingly, I find that any fine imposed, or the requirement for any bail, surety or guarantee, would not constitute serious harm.
43. Although I am satisfied the applicant would not be given any custodial sentence, the country information indicates there is also a possibility he may be detained for several days while awaiting an opportunity to appear before a magistrate. While I find that a period of detention of more than a few days is remote, I accept that such detention may occur in a Sri Lankan prison. I have considered whether such a period of detention would constitute serious harm.

¹⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105, at p 34.

¹⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105, at p 29.

¹⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105, at p 33-34.

Under Australian law, the question of whether a loss of liberty amounts to serious harm is a qualitative judgment, involving the assessment of matters of fact and degree. This includes an evaluation of the nature and gravity of that loss of liberty.²⁰ The country information before me indicates that any such detention would only continue until the applicant was given an opportunity to appear before a magistrate, and would likely be very brief.

44. I am not satisfied on the evidence before me that the applicant has any vulnerabilities or health concerns that preclude the possibility of a brief detention. In all the circumstances, I find that any questioning and detention the applicant may experience would be relatively brief and would not constitute serious harm as non-exhaustively defined in the Act.
45. In the alternative, I am also satisfied that the provisions and penalties of the I&E Act are laws of general application. The country information before me does not suggest the I&E Act is discriminatory on its terms, that the law is applied in a discriminatory manner or that it is selectively enforced. To the extent that the applicant may be fined, detained or questioned under the I&E Act, I am satisfied this would not constitute serious harm and would be the exercise of laws of general application that apply to all Sri Lankans equally.
46. Overall, I am not satisfied that the applicant will face a real chance of serious harm on the basis of: being a former member of the LTEE and the Sea Tigers; as a Tamil from the East; and for being a returned asylum seeker who fled Sri Lanka illegally.

Refugee: conclusion

47. 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

48. 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

49. 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 *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610.

50. I have found that the applicant does not face a real chance of serious harm on the basis of: being a former member of the LTTE and the Sea Tigers; and as a Tamil from the East. As 'real chance' and 'real risk' have been found to equate to the same threshold²¹ I find that the applicant does not face a real risk of significant harm for any of these reasons.
51. I accept that the applicant may be identified as a returned asylum seeker on return to Sri Lanka. However I am not satisfied that the applicant is of any adverse interest to the authorities. In light of this and in accordance with relevant country information, I am not satisfied the applicant faces a real risk of any harm for this reason for the purpose of s.36(2)(aa).
52. I have accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally and will likely be subject to prosecution on account of breaching the I&E Act. In relation to detention at the airport, the applicant may be questioned and detained there for up to 24 hours depending on the length of individual investigation and the availability of a magistrate. DFAT advises that the risk of harm for the majority of returnees, including those suspected of offences under the I&E Act is low and there is no indication before me that the applicant faces a real risk of significant harm during the investigation, questioning or while held in airport detention.
53. While I have found above that the applicant will not receive a custodial sentence, I have considered the conditions the applicant may face if he is held in a nearby prison while waiting to come before the magistrate. DFAT has assessed the risk of torture or mistreatment for people suspected of an offence under the I&E Act as low.²² There is no evidence that any prisoners subject to short periods of detention awaiting prosecution under the I&E Act have been subject to the death penalty or have been otherwise arbitrarily deprived of their life, nor that they have been tortured. There is also no indication that authorities or others, through any act or omission intentionally inflict pain or suffering such as to meet the definition of cruel or inhuman treatment or punishment, nor any intention to cause extreme humiliation. In light of this, I am not satisfied that the applicant would be subject to acts or omissions which would constitute significant harm, as defined under s.36(2A) and s. 5 of the Act during his time in detention or prison while awaiting his magistrates court hearing.
54. In summary, having regard to the circumstances and profile of the applicant, I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm on the basis of: being a former member of the LTEE and the Sea Tigers; as a Tamil from the East; and for being a returned asylum seeker who fled Sri Lanka illegally.

Complementary protection: conclusion

55. 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).

²¹ *MIAC v SZQRB* (2013) 210 FCR 505.

²² DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105 at p 29.

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...