



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01308

Date and time of decision: 22 June 2017 12:02:00
Rosie Mathlin, 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 who resided for most of his life in [Town 1], in the Eastern Province of Sri Lanka. He arrived in Australia, by boat, undocumented, [in] October 2012. [In] May 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. [In] November 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of the visa.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. In accordance with s.473DC(1) of the Act I have obtained new information, that being the most recent Department of Foreign Affairs and Trade (DFAT) Country Information Report for Sri Lanka,¹ which is dated 24 January 2017 and was therefore published after the date of the delegate's decision. The information is relevant because it relates to the situation of Sri Lankans, and specifically Tamils, who have departed Sri Lanka illegally and sought asylum; and also about the treatment of the Tamil population in areas of northern and eastern Sri Lanka formerly occupied by the LTTE by security forces, and the circumstances of that population under current political and security conditions. The information is therefore about classes of persons of which the applicant is a member. The delegate considered information in the 2015 DFAT Report for Sri Lanka², which provides a similar assessment to that in the later Report, but the 2017 report is DFAT's most recent assessment and contains the most up to date information. I am satisfied that there are exceptional circumstances to justify considering this new information: s.473DD(a).

Applicant's claims for protection

5. The applicant's claims are contained in the information referred to the IAA.
 - For three months before the September 2012 provincial council elections he worked for the Tamil National Alliance (TNA), for whom his wife's [relative] was a candidate. He put up posters, made speeches, canvassed house to house, and helped to organise meetings.
 - On two occasions in June 2012, men from other political parties came to his home and threatened him. They told him he would be killed if he did not stop working for the TNA.
 - After the second visit, which was [in] June 2012, the applicant stopped going home and slept at his workplace.
 - [In] September 2012 the men returned to his home and threatened the applicant's wife and children. The men were armed with guns and searched the house, questioning the applicant's wife and [child] as to his whereabouts.

¹Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

² DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

- The applicant's [relative] had been successful in the election and he tried to get the police to assist the applicant but they did not want to get involved. The applicant decided he had to leave Sri Lanka otherwise he would be killed.
- Since his departure, different groups of men have made inquiries about him at his home. This happened twice in December 2012, in April 2013 and in 2014. His wife is scared and now lives with her parents.
- The applicant fears that if he returns he will be abducted, tortured and killed by the Sri Lankan CID, the army (SLA), paramilitaries, and men involved in Sinhalese politics. He fears harm because of his work for the TNA, his Tamil ethnicity and because he was suspected of supporting the LTTE.
- Up until the SHEV interview the applicant stated that he was suspected of supporting the LTTE because he was a Tamil and because of where he resided, also because he spoke Sinhala and often used to stand up for Tamils who were being harassed by the security forces. At the SHEV interview the applicant claimed for the first time that his brother had been a member of the LTTE who had disappeared at the end of the war when he was last seen with Prabakharan.
- The applicant provided details of a number of incidents that occurred during the war and prior to 2006. In 1989 or 1990 he was detained by the army for 7 or 8 days with ten other Tamil men. They were made to kneel in one position throughout their detention, and were kicked and beaten. The applicant needed treatment for [a medical condition] after his release. In 1993 there was a massacre in his village in which the SLA shot and killed [Tamils], including [a number] of the applicant's [relatives]. After that the applicant and his family fled to a refugee camp in the [Town 1] district. In the camp boys were frequently taken by the army for questioning and beating. Some disappeared and were never seen again. The applicant's mother took him to Colombo to get him away from this.
- The applicant lived and worked in Colombo from 1993 until 1996. He was under suspicion as a Tamil and was often subjected to verbal harassment and threats from civilians and members of the security forces who accused him of supporting the LTTE. In 1996 he was out with two friends when one of them was abducted in a white van. Police and bystanders refused to do anything.
- In 1997 the applicant married and went to work in [Country 1] for several months. At the SHEV interview he said that he went to [Country 1] because he underwent torture because of his brother involvement with the LTTE. Initially the applicant said that he was tortured by the CID and army, and later he said that he was tortured by the Karuna Group following the split between the LTTE and Karuna. He then clarified that he was not tortured, but feared that he would be because they could not find his brother. He said that he returned to Sri Lanka when the situation stabilised. He had no difficulty entering or leaving via the airport.
- From 2009 until 2012 the applicant was employed as [an occupation] and [another occupation] in [Town 1].

Refugee assessment

6. 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.

Nationality and identity

7. There is no issue as to the applicant's identity or nationality. I accept that he is a Hindu Tamil originally from [a certain location] and most recently from [Town 1] in Eastern Province. Sri Lanka is the receiving country for the purposes of the Act.

Well-founded fear of persecution

8. 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.
9. The applicant has provided a detailed and reasonably consistent account, throughout the processing of his application, of the events which he claims caused him to leave Sri Lanka. Despite some minor discrepancies as to details, to which I give no weight having regard to the period of time since some of the events occurred, I consider that the applicant has given a truthful account of his circumstances, with one exception. The applicant stated for the first time at the SHEV interview that his [brother] had been [an official] in the LTTE and had been with Prabakharan at the end of the war; the applicant said that he has not been seen since. The applicant claims that he will fall under suspicion because of this, and that he will be investigated at the airport on return. I do not accept that the applicant's [brother] was in the LTTE or that he has been missing since the end of the war. The applicant did not claim at any time, until some way through the SHEV interview, that his brother had been with the LTTE. He denied at the entry interview, and initially at the SHEV interview, that any of his relatives were involved with political groups. He did not claim at the entry interview, in his SHEV application, or initially at the SHEV interview, that his brother was missing; in fact he stated that his [brothers] were living in [Town 1]. Asked by the delegate why he had not previously mentioned his brother's claimed involvement in the LTTE, he said that he was scared to do so. Even if I were to accept that the applicant was scared to mention his brother's involvement in the LTTE, this does not explain why on several occasions he stated that his brother was residing in [Town 1], when he could have stated that he was missing, or presumed dead, or that his whereabouts were unknown, if this were the truth. I do not accept that the applicant's being scared would have prevented him from providing an accurate response to questions asking his brother's whereabouts, if it were true that he is missing. Moreover, when the applicant was asked quite early in the SHEV interview whether his brothers had been involved in political groups he said "No. Not to a great extent", and went on to say that they had helped him with his TNA work,

but otherwise they never directly helped any political party. I do not accept that the applicant was too scared at that point in the interview to mention that his brother was involved with the LTTE, yet a short time later, for no apparent reason, he felt comfortable enough to “open his heart” as he said, and mention it. I also consider that the applicant gave shifting and evasive evidence when he initially stated that he had gone to [Country 1] because he underwent torture because of his brother LTTE links, but when pressed further he stated that in fact he had not been tortured, but feared that he might be. Given the lateness of the claim, for which I do not accept the applicant’s explanation, and his apparently shifting and inconsistent evidence about the matter, I do not accept that the applicant’s [brother] was involved with the LTTE and I do not accept that the applicant has ever faced problems for this reason; nor do I accept that he would in the future. The applicant does not claim that he or any other member of his family had any involvement with the LTTE.

Imputed support for LTTE

10. I accept that the applicant suffered the experiences he claims during the years of the civil war. I accept that he was detained and severely mistreated for more than a week in about 1990. I accept that [a number] of his relatives were killed in a massacre of Tamils in his village in 1993. I accept that during his residence in a refugee camp in 1993-4 he, along with other young men and boys in the camp, was regularly questioned and beaten about suspected LTTE involvement. I accept that he was harassed and threatened while living in Colombo and that he saw a friend abducted. All of these experiences are unfortunately typical of the treatment of Tamils during the civil war.³ However, I find that these events occurred in the context of war time security operations which targeted Tamils generally as suspected LTTE supporters. The applicant does not claim to have had any similar experiences since the war ended in 2009, and indeed, since he returned to Sri Lanka from [Country 1] in 2007. There is no information before me to suggest that the applicant was of any interest to the authorities after the war ended because of real or suspected links with the LTTE. He was able to obtain a passport and enter and exit Sri Lanka for [Country 1] without difficulty in 2007. (For reasons discussed below, I have not accepted that any visits to the applicant’s home after his departure from Sri Lanka were connected with suspected LTTE links).
11. Country information considered by the delegate indicates that during the war years, and subsequently, many young Tamil men were subject to harassment and more serious human rights abuses as the Sri Lankan government sought to identify anyone with past or present LTTE links. Country information indicates that the overall situation for Tamils in Sri Lanka has improved since the end of the civil conflict in 2009. Although military and security forces continue to have a significant presence in the north and east of Sri Lanka, DFAT advises that the monitoring and harassment of Tamils in these areas has decreased under the new Sirisena government and DFAT assesses that Tamil civilians who live in former LTTE areas in the north and east are at a low risk of being detained or prosecuted.⁴ The country information indicates that the Tamil population is now monitored for behaviour indicating support for the LTTE, a desire to revive it, or anti-government activity, On the basis of the applicant’s evidence about his own experiences, I am not satisfied that he has been subjected to monitoring activity of any kind since the end of the war in 2009. He does not claim to have been investigated in relation to LTTE connections, or to have been directly accused of LTTE involvement since the end of the war. The credible evidence indicates that, in fact, he has no such connections. In these

³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁴ DFAT, "DFAT Country Information Report - Sri Lanka", Department of Foreign Affairs and Trade, 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office "Country Information and Guidance Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17

circumstances, and given the changed security conditions in Sri Lanka, while I accept that Tamils who had, or are suspected of having past or current links with the LTTE may still face problems, I find that there is no real chance that the applicant would be subjected to harm now or in the reasonably foreseeable future as a person with suspected LTTE connections, including on account of his Tamil ethnicity and residence in areas formerly under LTTE control. Having regard to the independent information, and to the circumstances of the applicant, I am not satisfied that there is a real chance that he faces serious harm amounting to persecution on return to Sri Lanka because he would be imputed, for any reason arising on the credible evidence before me, to have links with the LTTE, or to hold views supportive of that organisation.

Campaigning for TNA

12. I accept that the applicant did low level electioneering for his wife's [relative], a TNA candidate in the 2012 provincial council elections. I accept that as a consequence of his work for the TNA he was threatened by members or supporters of rival political parties, and I accept that these groups came to his home on two occasions in June 2012, and again in September 2012, a few weeks after the election. These claims are consistent with country information considered by the delegate, which reports electoral fraud and voter intimidation in the 2012 provincial elections. However, there is no independent evidence to suggest that low level TNA supporters continue to be at real risk of serious harm many years after elections, and I note that it is now almost five years since those elections took place.
13. Country information considered by the delegate indicates that the political situation has changed considerably since the 2012 elections. Presidential and parliamentary elections were held in 2015 and were generally considered free and fair despite some fairly low level harassment of party workers and voting malpractice. The TNA currently has 16 members of parliament. The TNA leader is leader of the Opposition, and the TNA has a strong co-operative relationship with the government. Its main rival in the east, the TMVP, currently holds no political power, is no longer supported by the government, and no longer acts in a paramilitary capacity.⁵
14. Given the minor level of the applicant's past activity with the TNA; the length of time that has elapsed since the elections of 2012; and the fact that further elections have taken place since then resulting in a significant change to the political landscape, I consider that the applicant's election work with the TNA over a brief period of time in 2012 would not result in a real chance of serious harm if he returned to Sri Lanka now or in the reasonably foreseeable future. There is no independent evidence to suggest that low level TNA workers, as I am satisfied the applicant is, continue to be at real risk of serious harm many years after elections, even if they were harassed or threatened at the time. I accept that if the applicant were to continue to assist the TNA in future elections he may be subject to low level harassment, in the context of the documented, generally low level political violence that accompanies election campaigns in Sri Lanka, but I am not satisfied that this would rise to the level of serious harm amounting to persecution, particularly given the changed political climate as evidenced in the country information.

⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 at 2.2; 2.26; see also UK Home Office "Country Information and Guidance Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508

Post departure visits to home

15. The applicant's evidence about the claimed visits to his home after his departure - twice in December 2012, in April 2013 and again in 2014 - is somewhat vague, inconsistent and unsatisfactory.
16. In his written statement he said that soldiers came first, on 3 December 2012, and inquired as to his whereabouts. He said that later in December some men, but he is not sure if it was the same men, returned and surrounded the house at night. The applicant provided little detail about these visits at the SHEV interview, and it is not clear whether the circumstances he did describe there related to the claimed December visits, or the earlier ones in September, as the details he did provide were similar to those given in relation to the September visits.
17. In these circumstances I have some doubts about whether the visits in December 2012 actually took place, but in any event, it seems unlikely to me that any such visits would have been related to the September 2012 elections, three months after the event, and given the applicant's low level involvement. It is likely, in my view that these visits, if they occurred, were related to the applicant's unlawful departure.
18. In his written statement the applicant said that the CID came in April 2013 and asked whether he was in Australia and asked for his phone number. At the SHEV interview the applicant said that he did not know whether it was the CID who went to his home, as the men wore civilian clothes. He said that they asked for money but his wife did not give them any; they also asked for the applicant's phone number. Given the discrepancy between the written claims where the applicant specified that it was the CID, and the SHEV interview where he said that his wife did not know who the men were, I have some doubts as to whether the visit took place at all. Again, if it did, it may have been related to the circumstances of his departure. The applicant does not claim that there were any adverse consequences for his wife's refusal to pay the money they demanded.
19. In the written statement he said that in 2014 unknown men came to the home and asked his whereabouts. At the SHEV interview the applicant said that this visit occurred at the time of a certain religious festival, and that the men asked for money, which his wife gave them. His evidence suggested that it was routine for money to be solicited at this time from people who were overseas. In these circumstances, given the nature of the visit and the uncertainty about who the visitors were, I am not satisfied that this was anything other than some group soliciting money for the religious festival on the basis that the applicant was known to be overseas. I am not satisfied that it represents a threat of harm to the applicant or any adverse interest in him.
20. Overall, even accepting that at least some of the claimed visits in 2012 and 2013 took place, I am not satisfied that they indicate an ongoing intention on the part of the Sri Lankan security forces, paramilitaries or opposition political parties to harm the applicant, or that they indicate that the applicant faces a real chance of harm on return. I do not accept that any of the visits were connected with the applicant's work for the TNA in the September 2012 elections. Given that I do not accept his claim about his brother's involvement with the LTTE and there is no other connection with the LTTE, and given that the applicant does not claim to have been questioned, investigated or harassed in relation to LTTE involvement at any time after 2007, I do not accept that he would suddenly come under suspicion for these reasons at the end of 2012. There appears to be no other plausible explanation for this sudden interest in the applicant, and I consider it most likely, given the timing of the visits and the nature of the questions he claims his wife was asked, that they related to his departure in an illegal people

smuggling venture. If this is the case, I do not accept that the applicant is at risk of harm of any kind as a consequence, other than a possible prosecution for illegal departure under laws of general application, as discussed further below. As I have found that the 2014 visit had nothing to do with any security related matter, there has apparently been no official interest in the applicant since April 2013, four years ago. This further indicates, in my mind, that the visits do not indicate a level of interest in the applicant by any parties involved that reflects an intention to harm him, or that he faces a real chance of serious harm.

Discrimination on basis of Tamil ethnicity and Hindu religion

21. The applicant mentioned having faced discrimination as a Tamil, but when questioned about this by the delegate, he spoke about his wartime experiences in his village and the degree of suspicion with which the Tamil population was regarded, as well as the serious human rights abuses, detailed above, which were inflicted on the Tamil population because they were suspected of supporting the LTTE. As discussed above, I am satisfied that this occurred in the specific context of the civil war and I am satisfied that there is no real chance that it would continue in the future.
22. There is no credible evidence before me to suggest that the applicant has in the past experienced any other forms of discrimination on account of his Tamil ethnicity - for example, in relation to education, housing or employment - that would constitute serious harm (other than serious physical mistreatment and the other abuses related to wartime conditions, which is dealt with separately). The applicant is reasonably well educated, speaks Tamil and Sinhala, and has been consistently employed in responsible positions, not only in his home area but in Colombo and [Country 1]. He mentioned at the SHEV interview that he came from a wealthy family. The available information does not indicate that there is a real chance that this situation would change in the reasonably foreseeable future and I am not satisfied that the applicant would face discrimination amounting to serious harm on account of his Tamil ethnicity on return to Sri Lanka.
23. The delegate explored with the applicant whether he had faced discrimination as a Hindu and he said that he had not, but there were restrictions on Tamils' ability to celebrate festivals. It appears that he was speaking about the time when he resided in the predominantly Sinhalese area where he was born and originally lived, rather than [Town 1], where he was residing from 1994 onwards. He has not provided any further information which would suggest that he has faced significant restrictions on his right to practise his religion, or discrimination on religious grounds that would constitute serious harm. Based on the available information, I am not satisfied that the applicant would, in the reasonably foreseeable future suffer, significant restrictions on his ability to practise his Hindu faith, or religious discrimination amounting to serious harm.

Fear of harm as a failed Tamil asylum seeker who departed illegally

24. I accept that the applicant left Sri Lanka illegally. Country information indicates that on return he will undergo a routine investigation at the airport because of the circumstances of his departure, and he may be prosecuted under the *Immigrants and Emigrants Act 1949* (I&EAct).⁶ The applicant claims that he is at risk of harm under this process because he will be investigated in relation to his brother's claimed role with the LTTE.

⁶ DFAT "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 at [5.27] – [5.36]; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

25. I accept that because he departed Sri Lanka unlawfully in 2012 to come to Australia, where he unsuccessfully sought asylum, he will receive a degree of scrutiny at the airport on return as part of routine processing. However, I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the suspicion of the authorities during routine processing at the airport, or subsequently. As discussed above, I do not accept that the applicant's brother was involved with the LTTE, or that he has been missing since the end of the war. The applicant does not claim to have any other connection with the LTTE and I am satisfied that none would be imputed to him now, merely because of his Tamil ethnicity and his residence in a former LTTE controlled area. I am therefore satisfied that there is no real chance that he will face harm during, or as a consequence of the routine investigation that he may undergo at the airport on return. I find that the authorities will quickly establish that he had no relevant involvement with the LTTE during the conflict, has no current involvement with the LTTE, and is not of adverse interest for any reason. I do not consider that the fact that he campaigned for the TNA in 2012 would cause him to be at risk of harm on return.
26. Because he departed illegally the applicant may be arrested and charged under the I&E Act. DFAT advises that he might then remain in police custody at the CID Airport Office for up to 24 hours before being transported to the closest Magistrates Court at the first available opportunity. If a magistrate is not available he might be held on remand at a nearby prison, but DFAT advises that this would be for a few days at most.
27. When brought before a court, a person who pleads guilty will most likely be fined and discharged. While penalties can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees (SLR), DFAT advises that no returnee who was merely a passenger on a people smuggling venture has ever been given a custodial sentence for departing Sri Lanka illegally. Fines are imposed on a discretionary basis, are generally between 5 and 50 thousand SLR, and may be paid by instalment. As he was not involved in organising or facilitating people smuggling, I find that there is no real chance that the applicant will be given a custodial sentence. I am not satisfied, on the evidence before me, that the imposition of a fine would constitute serious harm.
28. Based on DFAT's advice I find that if the applicant were to plead not guilty, he would either be immediately granted bail on personal surety; or he might have to wait to be collected by a family member if required to have a family member act as guarantor. DFAT advises that if bail is granted there are rarely any conditions. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to police or police stations between hearings. In the absence of any information provided by the applicant to suggest that he would be unable to post bail, I am satisfied that he would be able to do so.
29. I accept that on return the applicant may be detained for a short period during investigation and while waiting to be taken before a court, and possibly while waiting for family members to post bail. Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, the High Court has confirmed that whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.⁷ I have considered whether a detention of several days would constitute serious harm given the particular circumstances of this applicant. While I accept that conditions in Sri Lankan prisons are poor due to a lack of resources, overcrowding and poor

⁷ *MIBP v WZAPN; WZARV v MIBP* [2015] 320 ALR 467; see also *SZTEQ v MIBP* (2015) 321 ALR 44 where the Full Federal Court held that that a threat to 'liberty' is not synonymous with the possibility of a person being held briefly on remand or detained for a short time for questioning.

sanitation,⁸ in my view, a brief period of detention, even taking the prison conditions into account, does not rise to the level of a threat to life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm for the purposes of the Act. I consider that even considered cumulatively, the totality of the treatment that the applicant is likely to experience on return, including being detained for up to 24 hours at the airport, then potentially being detained on remand for up to several days in overcrowded and unsanitary conditions, and having to pay a fine, does not amount to serious harm.

30. In any event, I find that the procedures under which the applicant as a returnee would be dealt with, and any penalties to which he may be subjected, will be applied on a non-discriminatory basis under a law of general application, and therefore do not constitute persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
31. While there are reports of failed Tamil asylum seekers or other Tamils returning to Sri Lanka being detained on arrival at the airport or after returning to their villages, and then being mistreated and subjected to torture particularly if they are detained for prolonged periods, the country information, considered as a whole, suggests that the key risk factor is whether a Tamil has certain actual or perceived links to the LTTE; merely being a Tamil, or a Tamil from the east, or being a failed asylum seeker is not enough to give rise to a real chance of harm on return.⁹ I do not accept that the applicant will be imputed with pro-LTTE or anti-government dissident beliefs by the authorities for any reason, including his Tamil ethnicity; his place of residence in a formerly LTTE controlled area; his family background; because he supported the TNA in the 2012 elections; or as a result of these personal characteristics considered cumulatively, and I find that the applicant does not face a real chance of persecution on returning to Sri Lanka.

Refugee: conclusion

32. 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

33. 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

34. Under s.36(2A), a person will suffer 'significant harm' if:

⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143.

⁹ DFAT "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 at [5.27] – [5.36]; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office "Country Information and Guidance Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17; UK Home Office, Bulletin: Sri Lanka: Treatment of Returnees, 1 December 2012, CIS28615; "Another Tamil returnee arrested", Sri Lankan 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; International Truth & Justice Project Sri Lanka (ITJP) "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881.

- 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.
35. As set out above, I have found that there is not a real chance that the applicant faces serious harm because of actual or imputed LTTE connections or activity or because of his support for the TNA. Based on the same information, and for the reasons set out above, I am also not satisfied that there is a real risk that he would face significant harm for these reasons, now or in the reasonably foreseeable future.
36. I am not satisfied that the applicant faces discrimination on return for reason of his ethnicity or because of his religion such as to amount to any form of significant harm.
37. As to his treatment under the criminal justice system as a person who departed illegally and/or a failed asylum seeker, as set out above I accept that he will be detained at the airport for questioning and security and character checks. He may be charged with an offence under the I&E Act because he departed Sri Lanka illegally. He may be remanded in custody for a short period either at the airport or at a prison, while waiting to be brought before a magistrate who will most likely quickly grant bail. For reasons discussed above, I do not accept that there are any particular aspects of the applicant's profile, including inability to post bail or pay a fine, that would result in his being detained for a longer period or subjected to more intensive interrogation in circumstances which might give rise to significant harm. I do not accept that the process outlined above amounts to significant harm; or that the applicant would be exposed to significant harm during this process. Nor does the penalty likely to be imposed on the applicant, or the remand conditions he would most likely face, amount to any form of significant harm. I find that, to date, a custodial sentence has never been imposed on illegal returnees such as the applicant and I am not satisfied that there is a real risk that this applicant faces a custodial sentence.
38. I am not satisfied that there is a real risk that the applicant will face torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, including as a result of poor conditions which I accept he may face during a short period in custody. The definition of "cruel or inhuman treatment or punishment" in s.5(1) of the Act requires that any pain or suffering be intentionally inflicted on a person. Similarly, "degrading treatment or punishment" is defined to mean an act or omission that causes and is intended to cause extreme humiliation. I am not satisfied that any pain or suffering caused to the applicant by overcrowding and poor and insanitary conditions in prison or on remand would be intentionally inflicted, as required. Nor do I accept that severe overcrowding and poor conditions are intended to cause extreme humiliation. There is no suggestion that the applicant faces the death penalty and I am not satisfied that he faces a real risk of being arbitrarily deprived of life as a consequence of poor conditions during a short period in custody.
39. For the reasons discussed above, I do not consider that the applicant faces significant harm for any of the reasons put forward, should he return to Sri Lanka. In so finding, I have considered his claims singly and cumulatively but am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to a receiving country, namely Sri Lanka, that there is a real risk he will suffer

significant harm. Accordingly, I find that the applicant does not satisfy the requirements of s.36(2)(aa) of the Act.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

...