



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/01744

Date and time of decision: 16 October 2017 17:15:00
Mark Oakman, 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 from the Northern Province, Sri Lanka. He arrived in Australia [in] October 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) [in] April 2016. [In] January 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. In accordance with s.473DC(1) of the Act I obtained new information in the form of country information from the most recent Department of Foreign Affairs and Trade (DFAT) country report¹ for Sri Lanka. This report is dated 24 January 2017 (DFAT 2017 report) and was not available at the date of the delegate's decision. The delegate relied on information contained in DFAT reports for Sri Lanka dated up to 18 December 2015 which the latest report has updated. Given that I consider DFAT an authoritative source of country information, the DFAT information relied on by the delegate is now more than 18 months old and the DFAT 2017 report is DFAT's most recent assessment regarding the situation in Sri Lanka and was prepared for the specific purpose of protection status determination, I am satisfied that there are exceptional circumstances to justify considering this new information.
4. On 3 February 2017 the IAA received submissions and further information from the applicant's representative. To the extent the submissions discuss evidence, including country information, which was before the delegate and respond to the delegate's decision based on that material, I consider this does not constitute new information. The further information consists of country information in the form of references to a number of articles. One of the articles is in Tamil and I can therefore attach no weight to it. There is a reference to an article on a Tamil website copied from an Indian website but I am unable to access the article as no copy of the actual article was provided and the only links provided are to the two websites generally. There is also an article concerning the abduction of a union leader in Kottawa dated 1 February 2017. As that article post-dates the delegate's decision and assists in providing some context to the DFAT 2017 report that I am considering as new information as discussed above, I am satisfied that the information was not and could not have been provided to the delegate and that there are exceptional circumstances to justify considering that new information.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant fears that if he were forced to return to Sri Lanka he would be subjected to harm including being apprehended by people in senior positions in the police or Sri Lankan Army (SLA) and then taken away and tortured as this has occurred to some people who have returned to Sri Lanka. Additionally, his situation would be worse because he left Sri Lanka illegally;

¹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

- He is afraid harm will be inflicted on him by the SLA or people associated with the government because of what previously happened to his father, uncle and brother. Before he left Sri Lanka he was also suspected of being involved with the Liberation Tigers of Tamil Eelam (LTTE); and
- He fears if he is forced to return to Sri Lanka he may be subject to serious harm and torture including beatings with hard objects, burnt with hot irons, cuts to legs and hands with large and small knives and blades. He has seen photographs of people tortured like this. He will be harmed because he left the country without permission and the government authorities previously suspected that he was involved in the LTTE and had acted against the government.

Factual findings

Receiving country

6. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from [District], Northern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

Problems in Sri Lanka

7. The applicant states that he was born in [an area], [in a district] in [year]. His family were displaced from their home between 1999 and 2007, then moved to another area where they rented before the authorities allowed them back to their home in 2009. He attended school from [year] to [year] and completed his [qualification]. His [family members] live in Sri Lanka. Neither he nor anyone in his family had any contact with the LTTE. He described the area he lived in [as] a neutral zone between the LTTE and the SLA during the war but there was a SLA camp nearby.
8. The applicant says that he was forced to leave Sri Lanka because of the war between the LTTE and the Sri Lankan government. Many families were affected by that war. Often his father and [brother] were taken away by the SLA. They were taken to SLA camps, questioned, beaten and released. When this happened the applicant and his mother were also taken but were left outside the SLA camp. He was not questioned or beaten at this time. At the time of the war Tamils were taken away upon suspicion of helping the LTTE and under suspicion for possessing weapons. His father and brother were taken away and questioned in 2010 and it often happened after the fighting in 2008. His father and brother would be questioned for three to four hours brother and sometimes kept overnight and he and his mother would wait for them if this happened. Whenever a new SLA officer came to the camp they would bring everyone in and question them about LTTE connections and their background. The last time this occurred was around the end of 2011.
9. The applicant states that his [(uncle)] was abducted in 2008 and never heard from again. He was taken away in a white van. He believes the SLA took his uncle. [In] October 2008 a complaint was made regarding his uncle's abduction to the Human Rights Commission of Sri Lanka (HRCSL). His family have heard nothing further about the complaint. The family doesn't know what happened to the uncle and he had no connection with the LTTE.

10. The applicant claims that when he went to school he had to travel past a SLA camp and when he returned home at night he would be questioned because he was under suspicion of being involved with the LTTE or acting against the government. This mainly occurred in 2009 and 2010 but also occurred in 2008 and 2011. It occurred less in 2012. During this time he was afraid he might be abducted by the SLA because people were taken by the SLA after dark in the evenings. He was afraid he could not leave the house in the evenings when it was dark because he might be taken by the SLA for questioning and feared he could be beaten and killed. He was never physically harmed when the SLA questioned him as he was [age] at the time. He was doing his [qualification] and classes went until 8pm or later and the SLA would always stop them and ask where they had been and what they were doing. It happened every day going home from school, it was routine as he passed by the SLA camp and he always said he was coming from school. If it was the same SLA officers who knew them they would be asked just those questions and be allowed to go but if it was a new SLA officer they may ask other questions. New officers would pretend to harm them, by repeatedly asking where they had been and asking if they were really telling the truth, but not actually harm them. He was never detained but was questioned many times.
11. The applicant claims that after he left Sri Lanka his [brother] was taken for questioning by senior people from the SLA about the whereabouts of the applicant as the Sri Lankan authorities had the details of the people in every household so they knew he was missing. Although they threatened to hold his brother until the applicant was produced, his brother told them he went to a different district to work and his brother was released after one day. A few days later the SLA men returned but his brother left before they arrived and hid in the jungle. His brother believed they had returned to abduct him. When the men couldn't find his brother they questioned and beat his father. His brother stayed at a relative's house in [a city] but returned four or five days later, when he was questioned by the SLA again. He was told to report to the SLA every week. His brother is still taken sometimes to the SLA camp for questioning, as the SLA camp sometimes organises gatherings and sometimes they come around and take people in for questioning.
12. The applicant provided various supporting documents including identity documents, letters from Members of Parliament, and letters to the police.
13. DFAT reports² that incidents of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east. The UN High Commissioner for Refugees (UNHCR) confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.³ DFAT assesses⁴ that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. Many Tamils, in the north and east in particular, reported being monitored, harassed, arrested and/or detained by security forces under the Rajapaksa government.⁵ According to a 2013 UNHCR survey, 87 per cent of Tamil who were displaced by the war and who had returned to their homes in the north and east had been registered by the SLA and 71 per cent had been visited by the Sri Lankan authorities for interviews.⁶

² Ibid 4.12.

³ UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp17 and 18.

⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 4.12 and 4.13.

⁵ Ibid 3.8.

⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, 3.37.

14. Based on his generally consistent evidence on the incidents, the supporting documents and the country information, I accept the applicant's claims as set out in his SHEV application and at the SHEV interview except as discussed below.
15. The applicant claimed for the first time towards the end of the SHEV interview that his brother was still sometimes taken for questioning to the SLA camp, in the context of the SLA holding gatherings and coming around to take people for questioning. In his SHEV application written statement the applicant only refers to his brother being questioned shortly after the applicant left Sri Lanka, his brother hiding for four or five days, his father was questioned and beaten in his brother's absence, his brother being questioned after he returned from hiding and then reporting on a weekly basis for an unspecified period of time. At an earlier point of the SHEV interview the applicant and delegate discussed his brother in some detail and the applicant made no mention of the SLA continuing to question this brother. I do not consider it credible that, if the SLA was continuing to question his brother he would not have referred to it in his written statement or earlier in the SHEV interview when specifically questioned about his brother. I reject the applicant's claim that the SLA still sometimes take his brother for questioning as a later embellishment in his evidence in order to boost his protection claims.

Failed Asylum Seeker

16. The applicant claims to have left Sri Lanka in September 2012 to travel to Australia as a passenger in a boat organised by a smuggler. He does not have a passport. I find that, if he were to return to Sri Lanka, he will be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities.

Refugee assessment

17. 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

18. 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.

Young Tamil male from the north, LTTE links and imputed political opinion

19. Country information indicates that Tamils were subject to longstanding, systematic discrimination in university education, government employment and other matters controlled by the government.⁷ However, there have been a number of significant changes since the election of the Sirisena government in 2015. The new government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms to restrict executive powers, and took steps to restore the independence of the judiciary. In contrast to the approach of the Rajapaksa government, it also initiated a new, more open dialogue with the international community, including human rights organisations.⁸
20. The Sirisena government implemented a number of confidence-building measures to address the long-standing grievances of the Tamil community including truth and accountability for events towards the end of the war.⁹ It is reported to have engaged more with the UN and prioritised reconciliation and human rights and established the Office of National Unity and Reconciliation with a focus on promoting social integration to build an inclusive society, securing language rights for all citizens, supporting a healing process within war-affected communities, and providing coordinated development planning for war-affected regions.¹⁰ The Tamil National Alliance leader, R Sampanthan, was appointed the leader of the opposition and is the first ethnic minority opposition leader since 1983.¹¹ The United Nations High Commissioner for Human Rights observed in February 2016 that one of the most important long-term achievements over the past year had been the restoration of the legitimacy and independence of HRCSL.¹²
21. The DFAT 2017 report assesses that Sri Lankans of all backgrounds generally have a low risk of experiencing official discrimination as there are no current laws or policies that discriminate on the basis of ethnicity including in relation to access to education, employment or access to housing. DFAT states that Tamil inclusion in the political dialogue in Sri Lanka has increased under the Sirisena government and Tamils have a substantial level of political influence.¹³
22. During the war, more Tamils were detained under emergency regulations and the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA) than any other ethnic group. This was primarily due to LTTE members and supporters being almost entirely Tamil, but DFAT notes that there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity. Since 2015 the Sirisena government has reviewed and released some PTA detainees, including Tamils, and DFAT assesses that there are currently fewer individuals detained under the PTA than during the war.¹⁴

⁷ US Department of State (USDOS), "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p33.

⁸ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, 6.1.4.

⁹ USDOS, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p34.

¹⁰ Ibid pp6, 27, 28 and 34.

¹¹ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, 5.1.5.

¹² Ibid 6.1.1

¹³ DFAT "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.4 and 3.6.

¹⁴ Ibid 3.8.

23. DFAT assesses¹⁵ that monitoring and harassment of Tamils has decreased significantly under the Sirisena government; the police are now responsible for civil affairs across Sri Lanka; although there is still a sizable military presence in the north and east, it is largely idle and generally restricted to their barracks; and members of the Tamil community have described a positive shift in the nature of interactions with the authorities and they feel able to question the motives of, or object to, monitoring or observation activities. DFAT assesses that some societal discrimination on the basis of ethnicity can occur but does not identify any such specific issues in relation to Tamils. DFAT notes that monolingual Tamil speakers can have difficulties communicating with the police, military and other government officials but assesses that these practical difficulties are as a result of a lack of qualified language teachers, the disruption of civilian life caused by the war and historical discriminatory language policies rather than official discrimination.¹⁶ The applicant does not claim he suffered any incidents of societal discrimination or harm while in Sri Lanka. The country information discussed above indicates the monitoring and harassment of Tamils in the north and east has significantly decreased, there have been significant positive developments for Tamils in the country's politics.
24. The UNHCR's 2012 Eligibility Guidelines for Sri Lanka¹⁷ note that a person's real or perceived links with the LTTE may give rise to a need for international refugee protection. However, originating from an area that was previously controlled by the LTTE does not in itself do so. Although the nature of these links can vary, this may include:
- Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
 - Former LTTE combatants or "cadres";
 - 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);
 - 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;
 - 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; or
 - Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
25. DFAT refers to the UNHCR's guidelines and notes¹⁸ that accurately identifying people according to those categories may be difficult and the UNHCR recognises that each case depends on its individual circumstances.¹⁹ DFAT also confirms²⁰ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated

¹⁵ Ibid 3.9.

¹⁶ Ibid 3.4 and 3.7.

¹⁷ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp26 and 27.

¹⁸ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.32 and 3.33.

¹⁹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p25.

²⁰ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29.

intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE.

26. DFAT assesses²¹ the number of incidents of extra-judicial killings, disappearances and kidnappings for ransom, including incidents of violence involving former LTTE members, as significantly reduced since the end of the war. There are credible reports of torture carried out by the security forces during the war and its immediate aftermath although DFAT states that Tamils faced a higher risk of torture during the war.²² DFAT is aware of reports of torture carried out by the police including from the UN Special Rapporteur and the HRCSL but assesses that torture in Sri Lanka, whether perpetrated by the military, intelligence or police forces, is not presently systemic or state sponsored and that the risk of torture from military and intelligence forces has decreased since the end of the war.²³ DFAT also assesses²⁴ that cases where the police are alleged to have tortured or mistreated an individual generally reflect low capacity, lack of training and due process in arrest and detention procedures, together with poor policing methods that focus on extracting confessions rather than conducting a thorough investigation. DFAT states that as few reports of torture are proved or disproved it is difficult to determine the prevalence of torture. However, it considers²⁵ that Sri Lankans face a low risk of mistreatment that can amount to torture, mostly perpetrated by the police, irrespective of their religion, ethnicity, geographical location or other identity; that the incidence of torture has reduced in recent years; and that the allegations of torture pertain to a relatively small number of cases compared to the total population.
27. The US Department of State (USDOS) 2016 report notes there were no substantiated reports in Sri Lanka of extra-judicial killings in 2015 but the use of force against civilians, though rare, remains a problem.²⁶ USDOS notes there are credible reports that the military and security forces have abducted, tortured, raped and sexually abused citizens and in the north and east security forces are responsible for detaining those accused of LTTE connections, with observers reporting that interrogations sometimes included mistreatment and torture.²⁷
28. The UK Home Office (UKHO) 2016 report discusses protection claims as based on a person's actual or perceived political opinion of support for or involvement in the LTTE or other Tamil separatist groups, including membership of, or participation with, such groups overseas. The report notes that in the UKHO view simply being a Tamil does not give rise to protection claims.²⁸ The UKHO notes there have been positive developments in Sri Lanka since President Sirisena became President in January 2015. White van abductions are now seldom reported, and the number of torture complaints has reduced, although new cases of Tamil victims continue to emerge, both of torture and occasional white van abductions.²⁹ The authorities continue to monitor people, particularly in the north and east and persons perceived to sympathise with the LTTE continue to be intimidated, harassed, arrested, detained and tortured.³⁰ UKHO notes that, despite improvements, there continue to be reports of

²¹ Ibid 4.1.

²² Ibid 4.12- 4.14.

²³ Ibid 4.15, 4.16 and 4.18.

²⁴ Ibid 4.19.

²⁵ Ibid 4.20.

²⁶ USDOS, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p2.

²⁷ Ibid pp7-9.

²⁸ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, 1.1.1 and 2.3.1.

²⁹ Ibid 2.3.6, 2.3.7, 6.6.2, 6.6.6, 6.6.7 and 6.6.11.

³⁰ Ibid 2.3.8.

abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE.³¹

29. I accept that the applicant was regularly questioned as he passed the SLA camp on his way home from school for a number of years between 2008 and 2012. I accept that his uncle was abducted in a white van incident in 2008, has not been seen since and the family lodged a complaint about the abduction with the HRCSL. I accept that the applicant's father and brother were taken by the SLA for questioning and beaten on a number of occasions from 2008 and that the last such incident occurred in approximately late 2011, and the applicant and his mother were also taken and waited outside the SLA camp for his brother and father to be released. I also accept that the applicant's brother was questioned by the SLA concerning the applicant's whereabouts, that his father was questioned and beaten when the SLA returned but couldn't find his brother, and that his brother was questioned after he returned home and was required to report weekly for a period to the SLA camp. I accept that he is Tamil and he and his family in areas that at times were controlled by the LTTE during the war.
30. Having regard to the UNHCR guidelines and the other information before me, I do not consider the applicant to be at risk of harm for reason of any real or perceived links to the LTTE, or any imputed political opinion, now or in the reasonably foreseeable future, for a number of reasons.
31. First, as the UNHCR Guidelines and UKHO 2016 report note, residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection, and the applicant and his family had no actual involvement with the LTTE. Secondly, although he was routinely questioned when passing the SLA camp on his way home from school from 2008 to 2012, the applicant was never arrested, charged, detained, or physically harmed by the Sri Lankan authorities. Thirdly, although the applicant's father and brother were questioned and beaten on a number of occasions from 2008 they were detained at most overnight, they were always eventually released and those incidents ceased in late 2011. Furthermore the applicant doesn't claim his father and brother were ever charged, arrested or imprisoned either as a result of those incidents up to 2011 or following the incidents between the SLA and his brother and father shortly after the applicant left Sri Lanka in September 2012. Although his uncle was abducted in 2008, the applicant doesn't claim that he or his family have ever been questioned by the Sri Lankan authorities about his uncle or suffered any adverse interest from the authorities or anyone else from making a complaint to the HRCSL.
32. Country information discussed above indicates that the monitoring and harassment of Tamils was routine under the Rajapaksa government. Additionally, given that the authorities ascertained the applicant was missing from home because of the household registration details, I am not satisfied that the SLA's enquiring after his whereabouts shortly after he left Sri Lanka was demonstrative of the authorities specifically targeting the applicant as opposed to a routine enquiry. Furthermore, given that the applicant doesn't claim the authorities subsequently made enquiries about his whereabouts after that first occasion, I am satisfied the later questioning and reporting requirement placed for a period on his brother and the questioning and mistreatment of his father was also part of the routine harassment and monitoring of Tamils at the time and arose from his brother's action in hiding from the authorities for a number of days rather than because of any particular interest in the applicant.
33. The applicant does not have a profile that country information suggests he is at risk of harm, now or in the foreseeable future, for any LTTE links or for any imputed political views. I do not

³¹ Ibid 2.3.10.

consider that the Sri Lankan authorities had any adverse interest in the applicant other than as part of the former Rajapaksa government's then general harassment and monitoring of Tamils, including Tamils who were displaced during the war, in the north and east around the time he left Sri Lanka, nor, given that the Sri Lankan the authorities have not made any further enquiries (except for one routine enquiry shortly after he left) about the applicant's whereabouts and that the harassment and monitoring of Tamils has significantly decreased under the Sirisena government, that he would be of any adverse interest to the Sri Lankan authorities if he returned.

34. The applicant's representative submitted, among other things, that abductions still occur, as shown by the article concerning the abduction of a union leader, that people have been abducted on their return to Sri Lanka, and that there are still tensions in the north and east and there is a chance the Sri Lankan government could declare emergency regulations and again require Tamils to register and search, arrest and torture young Tamil males. I am satisfied the submissions and country information referred to by the applicant are broadly consistent with the DFAT 2017 report which does not suggest that incidents of abduction do not occur, but overall assesses that such incidents have reduced, as well as assessing the general situation for Tamils in Sri Lanka as improved as discussed above. The UKHO 2016 report also suggests that while such incidents still occur they are not occurring to the same extent as they were and there has been an improvement since the change of government. I consider the references to what could occur, on the chance that emergency regulations were declared, to be speculative.
35. I am satisfied that the applicant will not face a real chance of persecution from the Sri Lankan authorities due to any links to the LTTE, for any imputed political opinion and/or as a young Tamil male from the north, if returned to Sri Lanka, now or in the reasonably foreseeable future.

Returning asylum seeker and illegal departure from Sri Lanka

36. I accept that, on his return to Sri Lanka, the applicant would be considered by the authorities to be a failed asylum seeker who departed Sri Lanka illegally.
37. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. In practice, penalties are applied on a discretionary basis and most cases result in a fine and not imprisonment.³²
38. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration, the State Intelligence Service and a unit of the Criminal Investigation Division (CID) based at the airport who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed en masse and processing can take several hours.³³
39. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting the authorities in their claimed home suburb or town. DFAT assesses that returnees are treated according to these

³² DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.17.

³³ Ibid 5.19.

standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.³⁴

40. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted and photographed. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. Should a Magistrate not be available before this time, for example, because of a weekend or public holiday, those charged may be held at a nearby prison.³⁵ DFAT rates³⁶ general prison conditions in Sri Lanka as not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions.
41. Fines, which can be paid by instalments, are issued to persons who departed Sri Lanka illegally. If a person pleads guilty, they will be fined and are then free to go. Generally, if pleading not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor.³⁷
42. I accept that the applicant will be identified as an asylum seeker on his return. DFAT assesses the risk of mistreatment or torture for the majority of returnees, including those suspected of offences under the IE Act, is low and continues to reduce.³⁸ Country information containing reports of some returnees being tortured was before the delegate.³⁹ DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with actual or perceived links to the LTTE may be at risk of harm when processed at the airport. However, as discussed above, the applicant was not of any adverse interest to the Sri Lankan authorities around the time of his departure from Sri Lanka except as part of the Rajapaksa government's routine harassment and monitoring of Tamils at the time and he does not have a profile that would make him of adverse interest to the authorities if he returned. Taking into account those findings and the country information I do not accept that the applicant will be at risk of adverse attention from the Sri Lankan authorities when scrutinised on arrival in Sri Lanka.
43. I am not satisfied that there is a real chance that the applicant would face harm on his return as a failed Tamil asylum seeker from Australia. I accept that the applicant, if returned to Sri Lanka, will face action under the IE Act. The country information confirms that the applicant is likely to be detained and questioned at the airport, possibly up to 24 hours, as part of a standard process, before being taken by the police to the nearest Magistrates Court.
44. Once before the Court, and if not dealt with on the spot if the applicant were pleading guilty, the applicant would ordinarily be released unconditionally or be bailed to return to Court at a

³⁴ Ibid 5.20.

³⁵ Ibid 5.21.

³⁶ Ibid 4.25.

³⁷ Ibid 5.22.

³⁸ Ibid 4.21 and 4.22.

³⁹ Including Tamils Against Genocide, "Returnees at Risk: Detention and Torture in Sri Lanka", 1 September 2012, CIS24826; Freedom from Torture (FFT), "Sri Lankan Tamils tortured on return from the UK", 13 September 2012, CIS24086; UKHO, "Sri Lanka - Bulletin: Treatment of Returns", 1 December 2012, CIS28615; Immigration and Refugee Board of Canada, "Treatment of Tamil returnees to Sri Lanka", 1 February 2013, CIS28614; "Another Tamil returnee arrested", Sri Lanka Mirror, 1 July 2015, CXBD6A0DE16698; "SL military continues to arrest Tamils from East returning from Middle-East", Tamil net, 31 May 2015, CXBD6A0DE7540; "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", Tamil net, 3 May 2015, CXBD6A0DE6027; "10 Tamils arriving in Lanka arrested", Sri Lanka Mirror, 4 March 2015, CXBD6A0DE6065; International Truth and Justice Project, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; and FFT, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881.

later date. If a Magistrate is not available at that time, for example due to the weekend or a public holiday, the applicant could be held in a nearby prison for a short time. Although the maximum penalty includes five years imprisonment, the country information indicates custodial sentences are not imposed on those who departed illegally and were merely passengers on a people smuggling boat but that fines are issued to act as a deterrent.

45. The applicant's evidence is that he was only a passenger on the boat. I find, based on the country information discussed above that the applicant may be detained and questioned at the airport for up to 24 hours, faces a fine for breaching the IE Act and, depending on the availability of a Magistrate at the time he is charged under that Act, or if a relative is required to guarantee any bail surety, may face a short period of being held in prison.
46. The High Court endorsed in *MIBP v WZAPN*,⁴⁰ the position taken in *SZTEQ v MIBP*,⁴¹ that whether a risk of loss of liberty constitutes serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.
47. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, or if a relative is required to guarantee any bail surety, I am satisfied the applicant would face only a brief period in detention. Even having regard to general poor prison conditions, I do not consider that a few days in detention would constitute the necessary level of threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.
48. Similarly, whether considered separately, in combination or cumulatively with a brief period of detention, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine under the IE Act, to constitute a threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm.
49. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.⁴² In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
50. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a failed Tamil asylum seeker who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
51. I accept he will face some non-discriminatory penalties because of his illegal departure from Sri Lanka. However, considering the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

⁴⁰ *MIBP v WZAP; WZARV v MIBP* [2015] HCA 22.

⁴¹ *SZTEQ v MIBP* [2015] FCAFC 39.

⁴² *Chen Shi Hai v MIMA* (2000) 201 CLR 293, at [20]; and *Applicant A v MIEA* (1997) 190 CLR 225, p233.

Refugee: conclusion

52. 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

53. 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

54. 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.

55. The applicant fears he will be tortured if he is returned to Sri Lanka. However, I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political opinion, as a young Tamil male from the north, as a returned Tamil failed asylum seeker from Australia or a combination of these. As 'real chance' and 'real risk' involve the same standard,⁴³ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.

56. As discussed above, the applicant faces possible action under the IE Act for his illegal departure and DFAT advises that, once a person is found to have departed illegally, the process at the airport is that they will be arrested by the police, have their fingerprints taken and be photographed. Returnees may be questioned for up to 24 hours during their processing and may be detained in prison for a brief period while waiting to appear before a Magistrate or for a relative to arrive if a bail guarantor is required. A fine may be imposed. DFAT has assessed the risk of torture or mistreatment of people suspected of an offence under the IE Act as low and that it continues to reduce.

57. The applicant may be subjected to questioning, arrest, fingerprinting and being photographed when processed at the airport, poor prison conditions during any brief detention, a bail surety and a fine under the IE Act. Country information indicates that the poor prison conditions are due to overcrowding, poor sanitation and lack of resources. I am not satisfied, on the evidence, that there is an intention to inflict pain or suffering, severe pain or suffering or extreme humiliation in any processing at the airport, brief detention, bail surety or fine imposed under the IE Act. These circumstances do not amount to the death penalty, an arbitrary deprivation of life or torture. I am not satisfied that the airport processing, any bail surety imposed, any

⁴³ *MIAC v SZQRB* (2013) 210 FCR 505.

fine imposed, and the poor prison conditions, to which the applicant may be briefly subjected, of themselves or in combination constitute significant harm as defined under s.36(2A) of the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any processing at the airport, from any brief period of detention, any bail surety or any fine imposed.

58. There is no suggestion in the evidence that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason as a returned Tamil failed asylum seeker, for any links to the LTTE, for any imputed political opinion, as a young Tamil male from the north or any combination of these. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.
59. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

Complementary protection: conclusion

60. 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.