



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA17/02032

Date and time of decision: 4 September 2017 11:18:00

Joanne Jennings, 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 born in Colombo, Sri Lanka. [In] August 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He fears he will be harmed by the paramilitary Karuna group over a property dispute and by the Sri Lankan authorities who have imputed him with a Liberation Tigers of Tamil Eelam (LTTE) profile.
2. [In] February 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA received a submission dated 17 March 2017 on behalf of the applicant. In part the submission addresses the delegate's decision and findings, refers to case law, and makes particular reference to the applicant's status as a failed asylum seeker who would be processed en masse on return to Sri Lanka, and to that extent, may be referred to as argument rather than new information. I have had regard to the sections of the submission that address the delegate's decision and findings. In the submission the applicant also seeks to introduce additional details and country information.
5. The submission refers to the applicant's experience in Nauru and provides details regarding the Refugee Status Determination process in place in Nauru and information and conjecture regarding the storage and transfer of information. The submission refers to an attachment from UNSW Australia which was not attached and not referred to the IAA. The information regarding the applicant's concern of a possible breach of privacy and release of information from Nauru was before the Minister; his then representative made a verbal submission to the delegate at the applicant's SHEV interview expressing the applicant's concern. However the detail now provided in the submission to the IAA regarding the processing arrangements and storage of information, the UNHCR criticism of the arrangements, and his fear that the fact that he was willing to endure hardship under trying conditions in Nauru would attract adverse attention, was not before the Minister. At the SHEV interview the delegate advised the applicant that he had the opportunity after the interview to forward to her any comments about his concerns in this regard. The post-interview submission [in] December 2016 did not address these concerns. I am satisfied that the applicant had an opportunity to put this information to the Minister. I am satisfied that in part this is credible personal information, in that the submission recounts the applicant's interviews with officials and his transfer to and from Nauru. However I am not satisfied that any exceptional circumstances exist that justify considering the new information.
6. The submission contends that information regarding the assessment of claims the applicant made in his application for protection in Nauru may be relevant when assessing his claims for protection in Australia and that the IAA "must request for this information". The IAA is a limited form of review and can only consider new information in exceptional circumstances.

Noting that the IAA is required to assess whether the applicant meets the criterion for a protection visa under s.36(2)(a) of the Act and the definition of a refugee under s.5H(1) of the Act I am not satisfied that exceptional circumstances exist that warrant the IAA getting new information regarding his application for protection in Nauru.

7. The submission refers to the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017¹ and notes that, although this was published prior to her decision, the delegate failed to have regard to the report. The submission states that the "IAA is directed under s499 to consider DFAT publications", however the IAA is not so directed. I have obtained new information from this report, specifically information regarding Sri Lankans who have departed Sri Lanka illegally and sought asylum while overseas (information not specifically about the applicant but about a class of persons of which the applicant is a member). The delegate relied on the 18 December 2015 DFAT report for Sri Lanka which the 24 January 2017 report has updated. I am satisfied that there are exceptional circumstances to justify considering this new information.
8. The submission refers to country information in the form of the Advanced Unedited Version of a report on Sri Lanka published by the Committee Against Torture (CAT) after the 30 November 2016, a Daily Mirror article and the ACCORD report extract citing Human Rights Watch 2015.
 - The CAT report pre-dates the delegate decision and there is no information before me to explain why this report could not have been made available to the Minister or that it contains credible personal information. I note that the representative forwarded the delegate a post-interview submission which included reference to a range of country information but that this report was not included. I note the comments that the delegate had access to the CAT report, "however chose to rely essentially on the December 2015 DFAT report". I have had regard to the delegate's decision and I note that in addition to the DFAT report she referred to a range of reports from other agencies such as Human Rights Watch and Tamils Against Genocide and the more recent Freedom From Torture and International Truth and Justice Project reports published in 2016² and she stated that she had regard to the country information forwarded in the post-interview submission. I note the comment that it would be "unreasonable should the IAA refuse to consider contents of the recent CAT report for reason of not providing this report to the delegate prior to the delegate's decision being made", however I am not satisfied that that any exceptional circumstances exist that justify the IAA considering the new information.
 - The Daily Mirror article³ was published on 15 March 2017 and post-dates the delegate's decision on that basis I am satisfied that it could not have been provided to the Minister. The article refers to a group of 25 asylum seekers returned to Sri Lanka from Australia. The content of the article relates to the en masse processing of returnees and is directly relevant to comments that have been advanced in the submission regarding fears of harm emanating from this process. Given the nature of the information and that it post-dates the delegate's decision I am satisfied there are exceptional circumstances that justify the IAA considering the new information.
 - The Human Rights Watch report was forwarded to the delegate in the post-interview submission and is not new information.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISEDB50AD105

² Although these reports are not footnoted they are cited in the decision

³ <http://www.dailymirror.lk/article/-SL-asylum-seekers-deported-from-Australia-125521.html>

Applicant's claims for protection

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

- The applicant is a Tamil born in Colombo, Sri Lanka. The applicant grew up mostly in Colombo although he also spent some time in [town 1] where the family has some property and connections.
- In February 2008 there was an LTTE suicide bomb blast in Colombo. The police detected the telephone number of one of the applicant's relatives on the telephone of a bomber. This relative was involved in buying and selling [products] and it is believed he did business with a person who was an LTTE member, although he was not aware of this at the time. This relative was arrested by the authorities in April 2008 and taken to their office for questioning. He was held for almost three years and after his release in 2011 he was required to report regularly to the police.
- The applicant had been working with this relative and learning about [the business] from him and the police arrested him in June 2008. He was held for three days and questioned about his relative and any LTTE links. His [relative 1] paid some money when he was released. After this the police came to the applicant's work two or three times and questioned his employer about the applicant and any links to the LTTE; they watched the applicant at his work and questioned him once.
- In 2010 the applicant was stopped on the street by a number of army soldiers and asked for his identity card number and was harassed and beaten by them. He was released when he showed them documents that proved his residence in Colombo.
- In 2011 the applicant went to stay for a period in [town 1]. One of his [relative 1's] owned a house in the district which the paramilitary Karuna group occupied during the war. The family made attempts to repossess the house and lodged a complaint about the occupation although no action was taken by the authorities. The applicant has provided a copy of an acknowledgment of a land dispute complaint. His [relative 1] was warned by letter not to return to the house. After this the applicant and his brother were at the house in [town 1] when armed members of the Karuna group came and threatened them. The applicant and his brother ran away. The applicant stayed with [another relative] for a few days before returning to Colombo; he did not return to work but undertook [a subject] course. He stayed in hiding in Colombo because the Karuna group are closely linked to the authorities. The applicant did not experience any problems with registration when moving residence.
- In June 2012 members of the Karuna group spoke to the applicant's father at a public event in [town 1] and threatened harm to the applicant if he returned to [town 1].
- The applicant fears he will be harmed because he is a young Tamil and he fears the authorities suspect he was involved with the LTTE. The applicant fears that the Karuna group are closely linked to the authorities and he is concerned his family's conflict with the authorities in [town 1] would increase the risk of harm he would face from the authorities who are already suspicious of him. He also fears harm from the Karuna group.
- The applicant fears harm and discrimination from the general Sri Lankan population as a Tamil and he cited examples of Buddhist temples being erected in Hindu areas and at his interview showed a video clip of a Buddhist monk abusing a Tamil official.
- The applicant is concerned that his details may have been provided to the Sri Lankan authorities and that they will be aware that he has claimed asylum in both Nauru and

Australia. His then representative advanced at the SHEV interview that it was not clear if the applicant was in detention in Australia when the applicant's details were disclosed in February 2014 by the Department of Immigration and Border Protection (DIBP) on their website or whether he was in Nauru. The representative noted that claim assistant providers flew to and from Nauru from Australia and someone could have obtained the applicant's confidential information which would put the applicant at risk.

Refugee assessment

10. 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

11. 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.
12. The applicant has consistently claimed to be a Tamil born in Colombo and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
13. The applicant's claim that his relative was arrested after an LTTE bomb blast because his telephone number was identified in the telephone records of one of the bombers is plausible. It is also plausible that his relative was detained for two to three years and required to report regularly after his release as the emergency powers and Prevention of Terrorism Act (PTA) in place at the time provided the authorities wide sweeping powers to arrest and detain suspects⁴.
14. I accept that in June 2008 the applicant was detained by police for three days and questioned about his relative and any LTTE links. However I note that the applicant was released without charge after questioning. I accept that his [relative 1] paid some money at the time of his

⁴ 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

release, but I find that if he was suspected of any LTTE linked activities he would not have been released, despite any payments made by his [relative 1]. I accept that the police came to his work and spoke to his boss about him on two or three occasions and watched and questioned him, however I note that he was not re-arrested, or questioned again, and that he was able to continue living and working openly in Colombo. I am not satisfied that he was of ongoing interest to the authorities as a result of his link to this relative.

15. I accept that in 2010 the applicant was stopped by a number of army soldiers and asked for his identity card number and was harassed and beaten by them. UNHCR advises that cordon and search operations, particularly affecting Tamils, were occasionally reported, especially in parts of the city with large Tamil populations and that a process for registration of Tamil youth was introduced⁵. I note that on this occasion the applicant was allowed to proceed on his way when he showed the soldiers documents that proved his residence in Colombo.
16. While I accept that the applicant may have found these incidents concerning, and that he moved to [town 1] as a result, I am not satisfied that the applicant was imputed with an LTTE profile as he fears. I place significant weight on the fact that the applicant was released without charge after being questioned in 2008 and allowed to continue on his way after demonstrating to the soldiers in 2010 that he was a resident of Colombo. I also note that the applicant was issued a passport in 2011, indicating that the authorities were not concerned at the possibility of the applicant leaving the country.
17. The applicant was questioned in 2008 and stopped for identity checking in 2010 in the context of the civil war and the immediate period following when the Tamil population was subject to scrutiny, monitoring, harassment and ongoing checks for links with the LTTE. However there has been a significant change in the passage of time since the end of the war and the election of the more conciliatory Sirisena government in 2015. Reporting in 2012 UNHCR noted that the number of security checkpoints in Colombo has been reduced. The Emergency Regulations that provided the security authorities broad powers to arrest and detain suspects have been lifted⁶. Although the PTA remains in force, and there remain credible reports of ongoing arrests and disappearances in Sri Lanka, I note the reports of improvement in the security situation that has resulted in a decrease in Tamils held in detention and led to greater political cooperation.
18. The US Department of State, reporting on events in 2015, noted the closure of the Omanthai military checkpoint, which previously divided government-held territory from former LTTE controlled territory; adopting the constitution's 19th amendment, which limits the powers of the presidency and begins a process of restoring the independence of government commissions; the government cosponsored a resolution on human rights at the UN Human Rights Council and welcomed visits by the UN special rapporteur on transitional justice, the UN Working Group on Enforced and Involuntary Disappearances, and the UN Office of the High Commissioner for Human Rights (OHCHR) Office of Legal Affairs team; the establishment of the Office of National Unity and Reconciliation to play a key role in reconciliation efforts and the Ministry of National Dialogue to further advance reconciliation. Other advances have been made in assisting families to access government benefits in the absence of death certificates and the government signed the International Convention for the Protection of All Persons from Enforced Disappearances. The government removed the ban on eight Tamil diaspora organizations and 267 individuals on the previous government's watch list⁷.

⁵ 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

⁶ Ibid

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

19. The US Department of State continued to report human rights abuses in 2015 and noted cases of harassment, arbitrary arrest, detention and torture of civil society activists, journalists, and LTTE sympathisers⁸. The UK Home Office noted in 2016 that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The UK Home Office reported the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism, journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a "stop" list of those against whom there is an extant court order or arrest warrant⁹. I am not satisfied that the applicant falls within one of these categories of persons.
20. I note the applicant's concerns about ongoing arrests and disappearances in Sri Lanka and I accept that there continue to be reports of arbitrary detention and harm perpetrated by the security forces in Sri Lanka, particularly of Tamils. The Human Rights Watch 2015 report "We Live In Constant Fear"¹⁰ reports on the lack of accountability for police abuse in Sri Lanka. Human Rights Watch documented a number of cases of police abuse, the use of torture to coerce confessions and unlawful deaths in police custody, some of which involved non-violent minor offences. The Freedom From Torture report¹¹ builds on the data and analysis provided in that organisation's 2015 report, "Tainted Peace: Torture in Sri Lanka since May 2009", which highlighted that the majority of the 148 people in that study had described an association with the LTTE. Similarly the International Truth and Justice Project report¹² noted that human rights violations by the security forces continue with impunity and Tamils with tenuous links to the LTTE or low-level cadres continue to be targeted, along with their families. However I have not accepted that the applicant was imputed with an LTTE profile at the time he left Sri Lanka and I am not satisfied that he would be perceived as such on return to Sri Lanka now.
21. I note the applicant's claim Buddhist temples are being built in Hindu areas and the reference to Sinhalese Buddhist abuse of Tamils. The Sri Lankan Constitution provides for religious freedom and all citizens have the right to practise their religion unhindered¹³. Country information¹⁴ supports that there have been tensions at times, mostly as a result of radical Buddhist groups harassing and violently attacking the minority religions. In assessing whether the applicant would be restricted in the future in practising his religion or harmed by Sinhalese Buddhists I have taken account of the improvements in the security situation. There is no indication that he was prevented from practising his religion in Sri Lanka, or that the erection of Buddhist temples resulted in any harm to him, nor is there any indication that his family still living in Sri Lanka have been restricted in their religious practice or harmed by Sinhalese Buddhists. I do not accept that the applicant's fear of persecution in Sri Lanka from Sinhalese Buddhists is well-founded.
22. In his written statement the applicant referred to his fear of being discriminated against by the Sri Lankan population in general; the applicant did not particularise his concerns. I note that the applicant was educated and has been in regular employment when not studying, and was able to move around Sri Lanka without restriction. I find that the level of societal discrimination

⁸ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

⁹ UK Home Office, "Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

¹⁰ Post-interview submission; Human Rights Watch 2015 report, "We Live In Constant Fear"

¹¹ Freedom From Torture, "Sri Lanka – Update on torture since 2009," 6 May 2016, CIS38A8012881

¹² International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

¹³ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

¹⁴ *ibid*

the applicant would face on return to Sri Lanka would not amount to serious harm or systematic and discriminatory conduct. There is no threat to the applicant's life or liberty, or physical harassment or ill treatment, or significant economic hardship, denial of access to basic services to capacity to earn a livelihood that threatens the applicant's capacity to subsist, or other form of harm that may be considered serious harm. I find that the applicant does not have a well-founded fear of serious harm on this basis.

23. I accept that the [town 1] house owned by the applicant's [relative 1] was occupied by the paramilitary Karuna group during the war, and it is plausible that members of the Karuna group threatened the applicant and his brother when they were in the house in 2011. It is also plausible that members of the Karuna group made comments to the applicant's father indicating they would harm the applicant if he returned to [town 1]. I note his claim to have been hiding in Colombo after this event as he was concerned the Karuna group had connections with the authorities; however I note that he remained living with [another relative] during this time and studied [subject], and had he been of adverse interest to the authorities the indications are that they had opportunities to locate him.
24. Country information indicates that land disputes remain a significant issue and that there is a continued displacement of people from their lands and homes as a result of persistent military occupation of the Northern and Eastern Provinces¹⁵. Resolving land disputes has been further complicated by secondary occupation by civilians; loss, destruction and damage to land documents; competing claims; landlessness; and un-regularized land claims¹⁶. I note that the [relative 1] who owns the property is now resident in [another country] and that she has abandoned her claim to the property which is currently vacant. Noting the improved security situation in general and the moves by the new government to control the past excesses of the military and the paramilitary groups that worked in conjunction with them, I am not satisfied the applicant would face harm from Karuna group now. Even if he was to pursue a claim on the house and others objected to his claim, noting the improved security situation I do not accept he would come to harm in the process. The country information demonstrates that recovery may be slow and difficult, and the applicant may not be successful, but I note he has lived with [a relative 1] in Colombo most of his life and with father in [town 1] and there is no indication he would be returning without somewhere to live.
25. The applicant's details were disclosed in the February 2014 data breach and I cannot discount that as a result the Sri Lankan authorities are aware that he has claimed protection in Australia. I also accept as possible that the authorities are aware the applicant claimed asylum in Nauru. The post-interview submission cites reports of Tamil asylum seekers returning to Sri Lanka being arrested on return. However, considering the evidence before me I am not satisfied that the applicant's status as a failed asylum seeker in both Nauru and Australia would bring him to adverse attention on return to Sri Lanka. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of LTTE links, but I do not accept the applicant has such a profile or would be perceived as such. DFAT has assessed that the risk of torture or mistreatment for the majority of returnees is low¹⁷ and I note that overall there have been relatively few such allegations in the context of the thousands of asylum seekers returned to Sri Lanka since 2009, including from Australia and other countries. I am not satisfied that there is a real chance the applicant would face any harm as a returning failed Tamil asylum seeker.

¹⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

¹⁶ *ibid*

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

26. I accept that the applicant departed Sri Lanka illegally and has claimed asylum. Penalties for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 2,000). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine¹⁸. For returnees travelling on temporary travel documents, such as the applicant would, an investigative process to confirm identity is conducted on arrival and may take several hours to complete.
27. As a returnee, I accept that the applicant may be questioned by police at the airport and charged under the Immigrants and Emigrants Act 1949 (I&E Act). As part of this process, most returnees will be fingerprinted and photographed, then transported to the nearest Magistrates Court at the first available opportunity. However, returnees may be required to remain in police custody at the Criminal Investigation Department Airport Office for up to 24 hours if a Magistrate is not available before this time, such as a weekend or public holiday, and may be held at a nearby prison¹⁹. The applicant may be detained in crowded and unsanitary conditions while on remand. The evidence before me is that this treatment arises from the application of Sri Lankan law and that the prison conditions in Sri Lanka are poor due to gross overcrowding and poor sanitary conditions.²⁰
28. Involuntary returnees are processed en masse on arrival and I accept that this may result in further delays. I have had regard to the media article submitted to the IAA reporting the return of a group of 25 people to Sri Lanka in March 2017, but I note that even considering the procedures involved, and that a returnee cannot leave until all members of the group have been processed, that DFAT have assessed that processing takes several hours. I find the assertion that should one returnee attract adverse attention that it is likely to expose members of the group to adverse attention and that “members of such a group could all be imputed with political opinion they did not hold due to one member of such a group being found to be a person of interest” to be unfounded and not supported by the country information before me. The International Truth and Justice Project²¹ is among agencies that have reported detention and torture of returnees who have had actual or perceived links to the LTTE, either immediately on return or after returning to their homes area. However I have not accepted that the applicant has been imputed with an LTTE profile in the past and I do not accept that he would be so in the event he returned to Sri Lanka in a group with a person who may be of interest. Furthermore, DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport²².
29. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis and payable by instalment if the returnee faces difficulty with payment.
30. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead 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. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, although DFAT understands that conditions are rarely applied, and a person will only

¹⁸ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105

¹⁹ *ibid*

²⁰ US Department of State, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, OGD95BE926320

²¹ International Truth & Justice Project Sri Lanka (ITJP), “Silenced: survivors of torture and sexual violence in 2015”, 7 January 2016, CIS38A801275

²² DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105

need to return to court when the case against them is being heard. DFAT assesses that ordinary passengers, such as the applicant, are generally viewed as victims²³.

31. The applicant was only a passenger on the boat. Based on country information I find that the applicant may be detained and questioned at the airport for up to 24 hours, be fined for breaching the I&E Act and, may face a period of time held in prison.
32. The High Court endorsed in *MIBP v WZAPN*²⁴, 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. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, 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 brief period in detention would constitute the necessary level of threat to his life or liberty, or to significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.
33. Similarly, 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, to constitute serious harm under s.5J(5) of the Act.
34. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E 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. 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 I&E 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.
35. I have not accepted that the applicant was, or would be, imputed with an LTTE profile. I considered whether, when taken together, the totality of the applicant's circumstances will lead to a real chance of him suffering harm from the authorities, the Karuna group or Sinhalese Buddhists, as a young Tamil man who departed Sri Lanka illegally and who has claimed asylum in Nauru and Australia and whose details were released in the data breach, together with the property dispute and his familial links to a person detained for two to three years as a suspected LTTE supporter, or for reason of the erection of Buddhist temples in Hindu areas. However, considering the country information before me, I am not satisfied that there is a real chance of the applicant being persecuted in Sri Lanka in the reasonably foreseeable future. I find that the applicant's fear of persecution is not well-founded.

Refugee: conclusion

36. 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

37. 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

²³ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

²⁴ *MIBP v WZAPN*; *WZARV v MIBP* (2015) 254 CLR 610

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

38. 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.

39. I accept that the applicant will be returning to Sri Lanka as a person of Tamil ethnicity and he has stated he fears discrimination on this basis. I am not satisfied on the evidence before me that any discrimination the applicant may face will involve deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. I am not satisfied the applicant would face a real risk of significant harm in Sri Lanka as a Tamil.

40. I have found that there is not a real chance that the applicant faces harm from the authorities, the Karuna group or Sinhalese Buddhists on the basis of being a young Tamil man with familial links to a person detained for two to three years as a suspected LTTE supporter, and who has claimed asylum in Nauru and Australia and whose details were released in the data breach, or for reason of the erection of Buddhist temples in Hindu areas or the property dispute. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test,²⁵ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

41. I accept that the applicant will be identified on return as a person who departed illegally and an asylum seeker and that there is a real risk that the applicant will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I am not satisfied that this treatment, either during the investigation process or while being held at the airport amounts to significant harm; or that the applicant would be exposed to significant harm during this process. Nor will the penalty be imposed on the applicant, or the remand conditions he would most likely face, amount to any form of significant harm. I find that custodial sentences have not been imposed on illegal returnees such as the applicant. I am not satisfied that there is a real risk that the applicant faces a custodial sentence. 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 conditions he may face during a short period in custody.

42. Furthermore, while I accept that the applicant may be subjected to poor prison conditions during any possible brief period of detention, country information confirms that this is due to overcrowding, poor sanitation and lack of resources and the evidence does not suggest that the applicant faces the death penalty or arbitrary deprivation of his life. The definition of "cruel

²⁵ *MIAC v SZQRB* (2013) 210 FCR 505

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 there is an intention to inflict pain or suffering or severe pain or suffering. Nor do I accept that there is an intention to cause extreme humiliation.

43. I am also not satisfied that questioning, or the imposition of a fine, or poor prison conditions together result in arbitrary deprivation of life, or amount to torture, severe pain or suffering, pain or suffering that is cruel or inhuman in nature or extreme humiliation. Accordingly, I am not satisfied the applicant will face a real risk of significant harm during any possible brief period in detention.

44. I accept there are reports of mistreatment of asylum seekers who have been returned to Sri Lanka; however DFAT reports that the risk of torture or mistreatment for the majority of returnees is low²⁶. I have found above the applicant is not a person of interest to the Sri Lankan authorities. I am therefore not satisfied that there is a real risk that the applicant would be subjected to mistreatment during any possible brief period in detention on return to Sri Lanka.

Complementary protection: conclusion

45. 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.

²⁶ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105

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.