



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02041

Date and time of decision: 6 September 2017 09:49:00
Natalie Becke, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Northern Province of Sri Lanka. [In] February 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). [In] February 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 22 March 2017 the IAA received a submission on behalf of the applicant ('the IAA submission'). The IAA submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate.
4. The IAA submission states that for the past 28 days the applicant's mother had been [participating] in a protest regarding enforced disappearances in Sri Lanka. The applicant argues that as the result of his mother's activism, the Sri Lankan authorities will impute him with anti-government sentiments and believe he has been politically active while overseas.
5. I accept this new information could not have been provided before the delegate's decision. I am also satisfied that the decision of the applicant's mother to engage in these activities, on its face, it represents a change in personal circumstances not within the control of the applicant. I am satisfied exceptional circumstances exist to justify considering this information.
6. The IAA submission contains a hyperlinked reference to an article on [a] website, dated [in] March 2017, which the applicant claims is evidence of the protest his mother has been involved with. Contrary to the IAA's 'Practice Direction', the article itself has not been provided or extracted with the IAA submission. The submission was prepared by the applicant's representative, a registered migration agent. Accordingly, I have decided to make the following decision without consideration of the information contained in the hyperlink.
7. I have obtained new information, specifically information on the treatment of Sri Lankans of Tamil ethnicity and citizens who have departed Sri Lanka illegally and sought asylum abroad from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017.¹ The delegate relied on the then current 18 December 2015 DFAT report for Sri Lanka and the 2017 report was only published after the delegate's decision. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - In [year] the applicant was born in Kilinochchi, Northern Province.

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

- Around 1996 the applicant's older brother, Brother L, joined the Liberation Tigers of Tamil Eelam (LTTE), attaining the rank of [rank]. Around 2003 Brother L was killed in combat.
- In 2007 the LTTE forcibly recruited the applicant's older brother, Brother A.
- Between October 2008 and May 2009 the applicant and his family were displaced due to the civil war.
- In February 2009 the applicant's father, who was not with the family at the time, was killed in a shelling attack.
- In May 2009 the applicant's younger brother, Brother G, was badly injured in a shelling attack and hospitalised.
- During this period the applicant also sustained injuries, from which he still bears physical scars.
- In May 2009 the applicant, his mother and sister were taken to a camp for Internally Displaced Persons (IDP) camp. The applicant saw Brother A, dressed military clothing, being detained by the authorities in a separate area.
- The applicant was permitted to exit the IDP camp to visit Brother G in hospital and stayed with him for two months.
- When the applicant tried to re-enter the IDP camp, the Sri Lankan Army (SLA) detained and questioned him for four hours about Brother A, and the circumstances of their father's death. The SLA then threatened to accuse the applicant of LTTE membership and send him to a rehabilitation camp, but his mother intervened.
- An SLA commander overheard the applicant expressing his concerns for Brother A during an interview with the United Nations High Commissioner for Refugees (UNHCR), and warned him not to make further enquiries about Brother A, or he would be harmed.
- In May 2010 the applicant and his family were released from the IDP camp and returned to their village in Kilinochchi. The applicant spoke to the Human Rights Commission (HRC) and the International Committee of the Red Cross (ICRC) to see if they could assist him find Brother A, but they were unable to.
- In July 2010 the applicant and his mother were ordered to attend [interviews] at the Criminal Investigation Department (CID) in Colombo. The CID questioned them about Brother A, the applicant's suspected LTTE links and his scars. The CID told them they must not tell the ICRC or the HRC that they had seen Brother A being taken away in the camp, and to retract any statements they may have made to these organisations previously. The CID threatened that if the applicant did not comply, they would arrest him for being with the LTTE.
- In 2011 the CID in Kilinochchi forced the applicant's [relative] to stand as a candidate for the Eelam People's Democratic Party (EPDP) in the local council elections, by threatening to arrest the applicant on LTTE charges. The applicant's [relative] won the election.
- The CID, who were working alongside the EPDP, used the applicant to pass messages to his [relative] during his term in office. The SLA also continued to monitor the applicant and his mother. Due to this situation the applicant was unable to live freely.
- In August 2012 the applicant departed Sri Lanka illegally by boat.

- The applicant fears the Sri Lankan authorities, or associated paramilitaries, will detain, interrogate, torture or kill him because: he is a young Tamil male from the North; he is suspected of LTTE links; he has familial LTTE links; he has scarring; he has provided information to humanitarian organisations; and in 2012 he departed Sri Lanka illegally and sought asylum in Australia.

Refugee assessment

9. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

10. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
11. The applicant has been consistent in stating his identity since his arrival in Australia. In support, the applicant has provided certified copies of his Sri Lankan national identity card and driver’s licence, and a copy of his birth certificate, with English translations. On the basis of the information before me I am satisfied the applicant’s identity is as claimed and that Sri Lanka is the receiving country for the purposes of this assessment.
12. The applicant was born in Kilinochchi, Northern Province, which under the control of the LTTE for significant periods during the Sri Lankan civil war (1983-2009). Historically many Tamils, particularly in the north and east of Sri Lanka reported being monitored, harassed, arrested and detained by security forces under the former Rajapaksa government.²
13. I accept that Brothers L and A were LTTE members. The applicant did not disclose his relationship with Brother L, or Brother L’s LTTE involvement, in his SHEV application and provided the delegate with a new statutory declaration at the SHEV interview regarding these matters. The applicant explained to the delegate that he had not previously advised the Department about Brother L because he had no evidence of their relationship; however his

² DFAT, “DFAT Country Information Report – Sri Lanka”, 18 December 2015, CISEC96CF14143

family had dug up some documents, which had been buried on military land and had only recently become accessible. The applicant's reasons for not providing Brother L's information earlier are somewhat unusual; however I am prepared to accept Brother L, who was [older] than the applicant, joined the LTTE in approximately 1996 and held the rank of [rank] until his death in the conflict in approximately 2003.

14. I accept in 2007 the LTTE forcibly recruited Brother A and that the applicant and his family did not have contact with him after this happened. I accept Brother A was a combatant, but that the applicant does not know what rank he held in the LTTE. I accept the applicant's evidence that his father was never involved in the LTTE, but that his separation from the rest of the family at the time of his death in February 2009, may have led the authorities to impute him with LTTE involvement.
15. I accept between October 2008 and May 2009 the applicant and his family were displaced due to the ongoing conflict, and that in May 2009 Brother G was badly injured and hospitalised. I accept during this period the applicant was also injured and has scars on his [body]. I accept in May 2009 the applicant, his mother and sister were taken to an IDP camp and that, as a young Tamil male, the applicant was questioned separately from his mother and sister upon arrival. I accept that at the IDP camp the applicant saw Brother A for the first time since 2007, dressed in military clothing, being taken away by the authorities.
16. Country information before the delegate indicates that civilians from LTTE-controlled areas who entered IDP camps were subjected to extensive interrogation upon arrival. Rigorous ongoing screening processes existed as well, with those who were suspected of being LTTE supporters, or members, being detained in separate camps to the general IDP population before being sent for rehabilitation. In the aftermath of the 25 year civil war the authorities also continued to regard Tamil males with suspicion, given their possible LTTE links.
17. I note the applicant has not claimed to have been harmed when he was questioned separately to his mother and sister upon arrival at the IDP camp, and I consider that he would not have been authorised to leave the camp for two months to stay with Brother G in hospital if he was of any ongoing interest to the Sri Lankan authorities at that time. I accept that upon the applicant's return to the camp the SLA detained him in a van and questioned him for four hours about Brother A, and the circumstances regarding his father's death. I accept the SLA accused the applicant of LTTE membership and threatened to send him to a rehabilitation camp, but his mother intervened. However, I consider that if the SLA had genuine reasons to believe the applicant had been with the LTTE, then his mother's intervention would not have prevented the authorities sending him to a rehabilitation camp.
18. I accept the applicant's claim that during an interview with the UNHCR at the IDP camp, an SLA commander overheard him talking about Brother A and warned him not to mention the matter again or he would be harmed. I consider the applicant's release from the IDP camp in May 2010, along with his mother and sister, indicates however that he was not a person of interest to the Sri Lankan authorities at that time.
19. I accept that after the family returned to their home village in Kilinochchi, the applicant and his mother sought the assistance of the HRC and ICRC to locate Brother A, and that these organisations made enquiries with the Sri Lankan authorities on their behalf, but were unsuccessful. Although the applicant has not specified that when making his enquiries he raised that he had last seen Brother A in the SLA's custody, I am prepared to accept he may have. In the applicant's written SHEV statement he claims that the CID then summoned him and his mother to Colombo; however his evidence to the delegate during the SHEV interview

suggests he and his mother went to Colombo of their own accord in order to obtain more information about Brother A.

20. Country information indicates that in the months following the end of the civil war in the north, thousands of missing person enquiries were lodged with the UNHCR, the ICRC and the International Organisation for Migration (IOM), as well as with the Sri Lankan authorities. The Commissioner General for Rehabilitation also established a system for civilians to search family members who may have been sent for rehabilitation. However, due to the large numbers of IDPs, and the government's reluctance to set up a more comprehensive tracing system, there was a general lack of information on those who were missing, presumed dead.³ On the evidence before me I consider the ICRC and HRC in Kilinochchi would have been pursuing lines of enquiry with the Sri Lankan authorities on many cases similar to Brother A's. I do not consider it plausible that as a result of the applicant's enquiries to the ICRC and HRC in Kilinochchi, the CID would then summon them to Colombo on [separate] occasions in order to pressure them into applying for a death certificate for Brother A as claimed.
21. On the evidence I find the applicant and his mother, having not had any success in Kilinochchi, went to Colombo of their own accord on [number] occasions to further their enquiries. I accept the CID in Colombo may have told the applicant and his mother to apply for Brother A's death certificate, asked the applicant about the scars on his [body], and insinuated he had LTTE involvement. The applicant has claimed that the CID warned him and his mother that if they didn't retract their statements with the ICRC and HRC, then they would arrest him on fabricated LTTE charges. There is no evidence before me that the applicant ever retracted his statements. Given the applicant was never detained or charged with any offence, and returned to Kilinochchi without incident, I am satisfied these threats were for the purpose of intimidation only. On the evidence, I am satisfied the CID in Colombo did not believe the applicant had any LTTE involvement.
22. In the applicant's written SHEV statement he claimed that in the lead up to the 2011 elections, a Kilinochchi-based CID officer, Mr K, coerced the applicant's [relative] into standing as an EPDP candidate, by threatening to detain the applicant on LTTE charges. I found the applicant's oral evidence regarding this to be vague and unconvincing and I have concerns regarding the credibility of this claim, given he did not raise it prior to his 2016 SHEV application.
23. The delegate asked the applicant why he did not mention his [relative]'s political involvement during his arrival interview, and the applicant responded that he was still physically stressed as the result of the boat journey from Sri Lanka, and concerned about his family, so was unable to give full answers. The applicant's first arrival interview was held [in] September 2012, ten days after his arrival in Australia, and I accept that he may not have been able to express himself fully, for the reasons he has claimed. I note however that in this interview the applicant still provided some detail about Brother A, the applicant's enquiry to the HRC and the applicant's subsequent interactions with the CID.
24. [In] January 2013 the applicant had a second arrival interview, in which he was given the opportunity to further explain his reasons for leaving Sri Lanka. During this interview the applicant provided detailed information about his family composition, and listed his [relative] as his emergency contact in Sri Lanka. The applicant also expanded on his other claims for protection, but did not refer to his [relative]'s political activities.

³ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

25. Given four months had elapsed between the applicant's arrival in Australia, and his second arrival interview, I am satisfied he had had sufficient opportunity to physically recover from the boat journey. I consider that if there was a link between the political activities of the applicant's [relative] and the applicant's reasons for coming to Australia, then he would have raised this at his second arrival interview.
26. During the SHEV interview, held [in] August 2016, the delegate asked the applicant if he could obtain evidence that his [relative] stood as an EPDP candidate in the 2011 local council elections. The applicant responded that he could, and the delegate gave him seven days to do so, and also indicated that he would be able to extend this period if the applicant required more time. [In] September 2016 the delegate received a post-SHEV interview written submission from the applicant's representative, which noted that the applicant was in the process of obtaining translations "of documents recently received from Sri Lanka". However at the time of the delegate's decision [in] February 2017, some five months later, no such documents had been received from the applicant or his representative.
27. I am prepared to accept the applicant's [relative] was an EPDP candidate in the 2011 elections, and held a seat on the local council until 2015. However I consider the claim that a CID officer called Mr K threatened to arrest the applicant on LTTE charges to force his [relative], who was popular in the local community, into this position, to be far-fetched and unsubstantiated. I do not accept this occurred. The applicant's evidence that the CID forced him to pass messages to his [relative] after his election, because the CID could not be seen to do it themselves, was also vague and unconvincing and I do not accept it occurred.
28. During the SHEV interview the applicant told the delegate that during the period his [relative] was part of the local council he did everything the authorities asked of him. The EPDP is now a pro-Sri Lankan government political party, belonging to the United People's Freedom Alliance led by President Sirisena. I am not satisfied the Sri Lankan authorities would impute the applicant to hold any sort of anti-Sri Lankan government political opinion because his [relative] was an EPDP politician.
29. The applicant also claimed his [relative] used to be the head of [an] Association, but has now lost the respect of the local community and is excluded from their activities because of his association with the EPDP and CID. I do not accept the applicant's claim that the community would do the same to him if he returned to Sri Lanka, because of the perception he assisted the CID gain access to his [relative]. There is no credible evidence before me that that the applicant would be imputed with an anti-Tamil political opinion because of his relationship to his [relative]. Overall I am not satisfied there is any link between the political activities of the applicant's [relative] and the applicant's own situation.
30. The applicant has provided an English translation of a letter, dated [in] June 2011, which appears to have been written by his mother to their local government official. The letter states that Brother A has been missing since May 2009 and requests the official to confirm if they have any information about his whereabouts. The applicant has not provided any evidence as to what official response, if any, his mother received.
31. During the SHEV interview the delegate asked the applicant what interactions he had with the authorities after 2010, and he responded that a few times the CID came to his house and asked him to go to their office. The applicant stated on one occasion he was questioned for almost three hours and told not to make further enquiries about Brother A. The applicant also stated the CID told him again to get a death certificate for Brother A, spoke of forcing his [relative] to

stand for election and warned the applicant they could frame him for LTTE involvement because of his scars.

32. I consider the applicant's evidence in this regard to be somewhat unconvincing. The applicant has claimed to have approached the UNHCR, ICRC and HRC in 2010, and that these organisations advised they had no information on Brother A. Given the volume of enquiries regarding missing persons at the time, I do not consider the applicant's enquiries to these organisations to have been particularly contentious; even taking into account Brother A had last been sighted in the custody of the SLA. The applicant has not claimed to have approached these organisations again after his initial enquiry.
33. I have accepted the CID in Colombo told the applicant to apply for Brother A's death certificate, and threatened to arrest him on LTTE charges if he did not retract his enquiries; but he did not do so. Accordingly, despite my concerns, I am prepared to accept that in 2011 and 2012 the Kilinochchi CID approached the applicant a few times, as he has claimed, again told him to apply for Brother A's death certificate, made references to his scars and insinuated he had LTTE involvement. I accept on one of these few occasions the applicant may have been questioned for three hours as he has claimed. For the reasons discussed above I do not accept they pressured the applicant's [relative] to run for office.
34. Three years elapsed between Brother A's disappearance in May 2009 and the applicant's departure from Sri Lanka in August 2012, during which time the applicant was working as a [occupation]. I consider that if the applicant was of adverse interest because of any suspected LTTE involvement; because he had raised Brother A's disappearance with the UNHCR, HRC and ICRC, and did not withdraw his enquiries; or because of the letter his mother wrote in 2011, then the authorities had sufficient time to take action against him. Despite the threats from the authorities, no action was forthcoming and I consider these threats to be empty. On the evidence, I consider the applicant has exaggerated the extent of the authorities' interest in him.
35. The applicant's evidence regarding the CID's visits to his family after his departure from Sri Lanka lacked detail, however I am prepared to accept they did so once in 2012 and once in 2013. The applicant has not claimed there were any adverse consequences for his family, and four years have now passed since the authorities showed any interest in the applicant.
36. I have had regard to a letter from the Australian Red Cross International Tracing Services, dated [in] February 2014, which references Brother A's details. I accept that the applicant attempted to obtain further information about Brother A from the Red Cross in Australia. The letter notes that as per a recent phone conversation between the Red Cross case worker and the applicant, the enquiry has now been closed. The evidence before me does not support a finding that the Sri Lankan authorities would be aware of the applicant's enquiry, or the applicant faces harm in Sri Lanka for this reason.
37. The applicant has claimed that the SLA were also monitoring him and his mother prior to his departure and that he cannot return to his home area because it is still under military control. The applicant has not provided any further information about the SLA monitoring, and country information before me indicates the situation for Tamils has improved substantially since the applicant was last in Sri Lanka. The Sirisena government has replaced the military governor of the Northern Province with a civilian administration as a confidence-building measure to address the grievances of the Tamil community.⁴ The requirement for Tamil residents of the

⁴ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

former LTTE strongholds of Jaffna and Kilinochchi to register with the military ceased in 2011 (prior to the applicant's departure from Sri Lanka), and monitoring of individual citizens in the north and east of the country, while still occurring, has reduced. Furthermore, there are no restrictions on freedom of movement throughout the entire country, and significant military checkpoints in the north have been dismantled.

38. The 2012 UNHCR Guidelines issued around the time of the applicant's departure from Sri Lanka did not specify individuals of Tamil race as requiring protection for that reason alone. Furthermore, in the UNHCR's opinion, individuals originating from an area where the LTTE were previously active, such as the applicant, did not require protection solely on that basis unless there were additional, relevant factors which may have given rise to a profile of risk.⁵ More recently, in 2016 the UK Home Office assessed that: "A person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidences past membership or connection to the LTTE unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport."⁶
39. In terms of real or perceived links to the LTTE, I note the UNHCR identified at that time, amongst other risk profiles, those with familial links to the LTTE as potentially in need of protection.⁷ While the Sri Lankan authorities were aware that Brother A had been with the LTTE, and suspected the applicant's father of the same, the applicant himself was never detained for more than a few hours, charged or harmed in relation to these family links. As noted above, the applicant did not raise Brother L's existence, or his senior role within the LTTE, until the day of the SHEV interview. The applicant has not claimed that there have been any adverse consequences for the applicant and his family for any reason related to Brother L's LTTE membership.
40. I have accepted the applicant has scars on his [body] after being injured in a shelling incident while displaced during the final stages of the civil war. However I note that neither the 2015 DFAT report, nor the current DFAT report, make any reference to people with scarring being more likely to be the subject of attention from the Sri Lankan authorities.⁸
41. The 2012 UNHCR Guidelines also identified persons seeking justice for human rights violations, and their family members, as potentially in need of protection.⁹ The country information cited above indicates that the chaos and mass displacement of civilians during the final stages of the civil war in the North, resulted in thousands of enquiries being lodged regarding missing persons, including those who had been involved with the LTTE. While I accept the applicant saw Brother A being led away by the SLA at the IDP camp in May 2009, and that he may have included this detail when making his enquiries, the authorities did not take any action against him prior to his departure from Sri Lanka in August 2012.
42. Approximately, five years have now passed since the publication of the UNHCR Guidelines and the country information before me indicates the situation in the north of Sri Lanka has

⁵ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁶ UK Home Office, "Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17

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

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

continued to improve. In 2013 the 'Commission of Enquiry to Investigate into Complaints Regarding Missing Persons' (COI), set up by the former Rajapaksa government, received more than 15,000 enquiries from the Northern and Eastern Provinces. However the COI failed to win the trust of the Tamil community, due the intimidation of witnesses, the focus on LTTE culpability, and the flawed interpretation of testimony; amongst other matters.

43. In October 2015 the Sirisena government, recognising the lack of progress which had been made, replaced the COI with an Office of Missing Persons, signed the 'International Convention for the Protection of All Persons from Enforced Disappearance', and criminalised enforced disappearances. In 2016 the UN Working Group on Enforced or Involuntary Disappearances, observed the Sri Lankan government's increasing openness and cooperation with international partners to seek justice for the missing and their families.¹⁰
44. The applicant's evidence is that his mother was equally involved in trying to locate Brother A and that the CID interviewed them together while in Colombo. I have also had regard to the letter the applicant's mother wrote to the government official in their village and the new information before the IAA that in early 2017 she engaged in [protest] regarding missing persons. I note the applicant's mother continues to live in Kilinochchi and I am not satisfied that she has an adverse profile with the authorities, or is being monitored by them, because of her efforts to locate Brother A, or her protest activity. On the evidence before me, including the improved country information, I do not accept the authorities would impute the applicant with anti-government sentiments, assume he has been politically active in Australia, or monitor him upon return because of his mother, or for any other reason.
45. I am not satisfied the Sri Lankan authorities will impute the applicant to have a pro-LTTE political opinion because of his status as a young Tamil male, his origins, his brothers' actual LTTE involvement, his father's imputed LTTE involvement, his mother's activities or his scarring. Based on the applicant's personal circumstances, and the greatly improved country information, I am not satisfied the Sri Lankan authorities have an adverse interest in him because of his or his mother's previous interactions with them, or with humanitarian organisations (in both Sri Lanka and Australia), regarding Brother A. Nor am I satisfied the applicant's [relative]'s EPDP association or political activities have resulted in a profile of any sort for the applicant. Overall I find the applicant does not face a real chance of harm for any of these reasons, should he return to Sri Lanka.

Returning Asylum Seeker from Australia – Illegal Departure

46. I accept the applicant departed Sri Lanka illegally in August 2012 and sought asylum in Australia.
47. I note DFAT assesses the risk of mistreatment for the majority of returning asylum seekers to be low and there is no country information before me to support a finding that the applicant will be imputed with an anti-Sri Lankan government political opinion simply because he has sought asylum in Australia, a western country, as he has claimed.¹¹ Overall I am not satisfied that the applicant faces a real chance of harm on account of him having sought asylum in Australia.
48. The applicant departed Sri Lanka without a passport and, as noted in the delegate's decision, persons who depart Sri Lanka illegally ('illegal departees') can be penalised under the Immigrants and Emigrants Act (I& E Act) upon return. Country information before the delegate

¹⁰ UK Home Office, "Sri Lanka: Tamil separatism Version 2.0", 19 May 2016, OGD7C848D17

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

indicates that persons who have departed Sri Lanka illegally may face penalties that can include imprisonment and fines although in practice, penalties are applied to such persons on a discretionary basis and can be paid by instalment, with the accused then free to go.¹²

49. Illegal departees who are charged under the I&E Act can remain in police custody at the airport for a short period after arrival, and should a magistrate not be available before this time – for example, because of a weekend or public holiday – may be held at a nearby prison. Whether such a loss of liberty, such that that the applicant may face under the I&E Act processing, would constitute serious harm is a qualitative judgment, involving the assessment of matters of fact and degree; as well as an evaluation of the nature and gravity of that loss of liberty.¹³
50. With reference to the applicant’s particular circumstances, there is no credible evidence before me the applicant has an adverse profile with the Sri Lankan authorities or that he was anything other than an ordinary illegal departee from Sri Lanka. Accordingly, while I accept there is a real chance the applicant will be questioned, fined, and held briefly as part of the re-entry process, I do not accept he would face greater scrutiny or penalty upon return than other illegal departees. On the evidence before me I am not satisfied that any routine questioning at the airport upon return, which all illegal departees undergo, amounts to serious harm.
51. I am also not satisfied that the payment of a fine, or being held in detention for a period of up to 24 hours at the airport, or possibly a nearby prison for a brief period, cumulatively amounts to serious harm. I accept the applicant may experience poor conditions if imprisoned for this brief period as the result of ageing prison infrastructure, overcrowding and shortage of sanitary and other basic facilities.¹⁴ However I am not satisfied that such conditions of themselves constitute serious harm as defined by the Act.
52. If the applicant pleads not guilty, he will be released on his own personal surety. I note in some cases a family member is required to collect illegal departees who are released, or to act as a guarantor if personal surety is not granted.¹⁵ There is no evidence before me to suggest a member of the applicant’s family would not be available to go to Colombo, or act as guarantor, if this is indeed required.
53. I am not satisfied on the evidence that even if he pleads not guilty, he will be detained any longer than a brief period.
54. Furthermore, the country information before the delegate indicates the I&E Act applies to all Sri Lankan citizens, and is not discriminatory on its face or in its application. A generally applicable law will not ordinarily constitute persecution because the application of the law does not amount to discrimination.¹⁶ As such I find the treatment the applicant will face as a consequence of the application of the I&E Act is not persecution within the meaning of s.5J(4) of the Act.

Refugee: conclusion

55. 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).

¹² Ibid.

¹³ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610

¹⁴ US Department of State, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, OGD95BE926320

¹⁵ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105

¹⁶ *Chen Shi Hai v MIMA* (2001) CLR 293

Complementary protection assessment

56. 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

57. 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.

58. I accept the applicant's family has both real and imputed links to the LTTE. I accept that the Sri Lankan authorities were aware that the applicant and his mother had made enquiries regarding Brother A, and had threatened them in the past. I accept the applicant has scars on his [body] as a result of the civil war. I accept the applicant's [relative] was a local council member for the EPDP until 2015 and that his mother has engaged in protest activity. However I not accepted that the applicant, as an asylum seeker, and a young Tamil male from a former LTTE-active area in the North with these experiences and physical scars, would face a real chance of harm in relation to these reasons upon return. For the same reasons I also find there is not a real risk he will suffer significant harm.

59. I have accepted the applicant would be returning to Sri Lanka as an asylum seeker who left the country by boat, and will be subject to a process under the I&E Act. Country information cited above indicates if he pleads guilty he will be fined, which he can pay by instalment. If he pleads not guilty he will be granted bail immediately on the basis of personal surety, or with a family member acting as a guarantor, pending a hearing. I accept that in any of these scenarios he may be held in detention for a short period. On the evidence before me I am satisfied the applicant, who was an ordinary passenger on a people smuggling venture, does not face a real risk of a custodial sentence.

60. DFAT has reported that detainees are not subject to mistreatment during processing at the airport. The applicant may be required to spend approximately 24 hours in police custody at the airport, or possibly a nearby jail, to resolve his offences under the I&E Act. Country information indicates that Sri Lankan prison conditions do not meet international standards due to old infrastructure, gross overcrowding, and a shortage of sanitary and other basic facilities.¹⁷ I am not satisfied this, or the imposition of a fine, would amount to the arbitrary deprivation of life, the death penalty or torture. I am also not satisfied there is an intention to

¹⁷ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

inflict pain or suffering, severe pain or suffering, whether physical or mental, or cause extreme humiliation. I find there is not real risk of significant harm on this basis.

61. While I accept the applicant will be required to pay a fine, I am not satisfied the imposition of a fine amounts to significant harm. I find the fine and/or the potential of being held in detention for a short period and/or any other treatment he is liable to receive under the I&E Act, when considered together, does not amount to the death penalty, arbitrary deprivation of life, torture, pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation. I am not satisfied payment of the fine amounts to significant harm as defined under ss.36(2A) and 5 of the Act.
62. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.

Complementary protection: conclusion

63. 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.