



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02496

Date and time of decision: 6 November 2017 10:06:00
Michael Brereton, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu from [District 1] in the Northern Province of Sri Lanka. He departed Sri Lanka illegally [in] September 2012 and arrived [in Australia in] October 2012. [In] November 2016, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] April 2017.
2. The applicant claims to fear harm: because of a real or imputed association with the Liberation Tigers of Tamil Eelam (LTTE); as a Tamil male from a former LTTE-controlled area; and for being a returned asylum-seeker who fled Sri Lanka illegally.
3. The delegate did not accept that the applicant has an LTTE profile. Having considered information including the changed and improving circumstances in Sri Lanka, as well as the applicant's lack of profile, the delegate found that the applicant is not a person in respect of whom Australia has protection obligations.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant made a submission to the IAA on 9 May 2017. This submission consists of a statement by the applicant and six documents. Parts of the statement refer to and deal with claims, evidence and issues that were before the delegate as well as aspects of the delegate's decision.
6. The applicant seeks to provide further evidence in relation to the shooting of [his relative, Relative 1]. None of this evidence was before the delegate. I have listened to the audio recording of the interview with the delegate [in] April 2017 (the interview) and I note that the applicant was questioned extensively about the shooting incident and that he did not refer to the facts that he now asserts in this statement. He was also given a number of opportunities to add to or amend his claims, as well as being asked on a number of occasions if he had anything further that he wished to say. He was asked if he had put forward all of his claims and he said that he had done so. He did not provide any additional information in the week between the interview and the decision. He has not explained to the IAA why he did not raise this evidence at the interview. The evidence itself is quite different to some of the evidence he has previously given and in particular I note that he claims for the first time that he was with [Relative 1] on the day of the shooting, witnessed people searching for [Relative 1] and was at [Relative 1]'s house after the shooting. I do not consider it plausible that the applicant would not have raised such detailed and significant evidence during the course of the interview. I also take into account that the evidence he has previously provided in relation to the shooting has been inconsistent (this is discussed further below). Having regard to all of the above, the applicant has not satisfied me as to the matters in s.473DD(b) and further, I am not satisfied that there are exceptional circumstances to justify considering this new information.
7. The applicant makes what appears to be a new claim that he will be denied the capacity to earn a livelihood and that his capacity to subsist will be threatened. This claim was not before the delegate. The applicant has not explained why he did not raise this claim in his application

or at the interview. He has not provided any evidence beyond the claim itself that he will suffer any harm. Having regard to this and to the reasons I have given above, the applicant has not satisfied me as to the matters in s.473DD(b) and further, I am not satisfied that there are exceptional circumstances to justify considering this new information.

8. The applicant refers to a media report in his statement and attaches a further four media articles. None of these articles were before the delegate. All of the articles are general information. Four of them pre-date the decision and the applicant has not explained why they were not provided to the delegate. The applicant has not satisfied me as to the matters in s.473DD(b) and further, I am not satisfied that there are exceptional circumstances to justify considering this new information.
9. The remaining report is not dated and it contains general information about the Sri Lankan military taking land and the building of Buddhist temples. The applicant has not made any claims in relation to these issues. The applicant has not satisfied me as to the matters in s.473DD(b) and further, I am not satisfied that there are exceptional circumstances to justify considering this new information.
10. The applicant provided the IAA with a further [media report] and I am satisfied that it could not have been provided to the delegate before the decision. The report refers to [details of report removed]. He claims that it shows that his village is still under the control of the security forces and that civilians are being targeted. He states that he [will be subject to similar treatment] on his return.
11. According to the report, the [details of report removed]. I do not consider that this indicates that the applicant's village is under military or security control, that civilians are being targeted or that [details of report removed]. The applicant has not satisfied me as to the matters in s.473DD(b) and further, I am not satisfied that there are exceptional circumstances to justify considering this new information.
12. The applicant asks the IAA for an interview. Section 473DB of the Act provides that subject to Part 7AA, the IAA must review decisions on the papers without interviewing the applicant. Section 473DC also provides that the IAA does not have a duty to get, request or accept any new information, whether the IAA is requested to do so by an applicant or in any other circumstances. The IAA may only consider new information in limited circumstances. Furthermore, there is no statutory entitlement to a hearing. I take into account that the applicant told the delegate that he had put forward all of claims and he has not indicated that there are any matters that he was unable to previously raise. Having regard to these factors I have decided not to invite the applicant for an interview.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:
 - He is a Tamil Hindu who was born [in a district in] the Eastern Province of Sri Lanka. He lived with his family in this area until about 1991.
 - In 1988, his [brother] was [killed]. The applicant believes this was done by the Sri Lankan Army (SLA). In 1990, his mother was killed in a mass killing by the SLA.
 - He moved to [District 1] with his family in 1991 and remained there until 1996. He got married in 1995.

- He and his wife moved to [another district] in 1996 and remained there until 2008. The applicant worked in [a workplace in Town 1] that was under the control of the LTTE. [Relative 1] also worked there. Neither the applicant nor [Relative 1] were members of or otherwise associated with the LTTE.
 - In August 2008, he and his wife and daughter were displaced to various [areas]. When the conflict ended in 2009, the family was taken to an Internally Displaced Persons' camp (IDP camp) near [location]. The SLA told the people that anyone who was involved with the LTTE had to report to the office but the applicant did not do so.
 - He and his family were released in November 2009 and returned to [District 1]. He bought [a vehicle] and used it for [jobs]. Sometimes [Relative 1] helped him.
 - In his statement he claims that in 2012, he was at [Relative 1]'s house in [District 1]. As he left, he heard gunshots and later found out that [Relative 1] had been killed. He believes the SLA killed [Relative 1] because he was a Tamil.
 - At the interview with the delegate [in] April 2017 (the interview), he said that the incident occurred [in] 2010. He said that he was told that the Criminal Investigation Division (CID) came to [Relative 1]'s house and asked for [Relative 1], then came back later that night and shot him dead. The CID and SLA had been following the applicant as well and he believes that the incident is connected to his own case.
 - In [2012], the applicant was told to report to the SLA camp. He was on his way there when men came and took him from the road. They took him to the camp, [and] began to beat him. He was questioned about the LTTE and suffered severe [beatings]. He was kept for [a number of] days and then released.
 - After his release he went to the hospital. He was hospitalised for [a number of] days and underwent [examinations]. SLA men in plain clothes were there watching him.
 - The SLA kept ordering him to report to the camp and he went there [a number of] times. The SLA also followed him on the street and asked him questions. On the last occasion, in [2012], the SLA slapped him and [attacked him]. After this incident he decided to flee Sri Lanka.
 - The SLA and CID have continued to visit his home looking for him. His wife was ordered to report to the SLA camp but did not do so. She had to sell the [vehicle] and paid the SLA [a bribe].
14. At the interview, the applicant said that his [siblings] live in [Town 2]. He said that from time to time they had been asked if they were involved in the LTTE. The delegate asked if the CID had looked for the applicant in [Town 2] and he said no. Later in the interview when the delegate asked if the applicant could live in [Town 2], he said that the CID has been visiting his [siblings] and asking about him. At the conclusion of the interview the applicant also said that he had lost his education because of Sinhalese atrocities.

Refugee assessment

15. 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

16. 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.

17. The applicant claims to be a Tamil Hindu who was born in [Town 2] but has lived mainly in the Northern Province of Sri Lanka. His wife and children continue to reside in the [District 1]. He has provided documentary evidence of his identity and residence. On the basis of the evidence before me, I accept that the applicant is a Tamil Hindu who has resided in the East and North of Sri Lanka, and that Sri Lanka is his receiving country for the purposes of this review.

18. The applicant's key claim to fear harm from the Sri Lankan authorities is said to arise from his employment in [a workplace in Town 1] during the period 1996 to 2008. The applicant told the delegate that this [workplace] was one of [a number] in the area and that all of these [workplaces] were controlled by the LTTE. He said that he was one of [many] workers (including [Relative 1]) who worked for a [manager]. The applicant said that he, [Relative 1] and the [manager] were not members of the LTTE, but their wages were paid by the LTTE. He claims that the [workplace] was frequented by civilian and LTTE personnel but has not claimed that any of these were senior LTTE commanders or high profile cadre. The delegate asked the applicant if anything had happened to the other workers from this [workplace]. The applicant said that he thought two were dead but he did not know anything else.

19. The Australian Department of Foreign Affairs and Trade (DFAT) notes that at its peak in 2004, the LTTE had a large armed force as well as an extensive administrative structure. The majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course.¹ I take into account the applicant's evidence that there were many [such workplaces] operating in this area and that neither his manager nor any of his colleagues were, to his knowledge, members of the LTTE. I note that while the applicant claims to have been asked about [customers] of this [workplace] he has not been asked about the manager or any of his co-workers apart from [Relative 1].

20. Although the applicant claims that informants may have given his name to the authorities as a LTTE member, he told the delegate that after the end of the conflict he and his family resided in an IDP camp. I accept his claim that he did not identify himself as a LTTE associate while he was in this camp but he later told the delegate that he had been questioned at the IDP camp

¹ Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, at p15.

about [Relative 1] and the [workplace] where they worked. He has not claimed that he was mistreated, detained or separated and he and his family remained together until they were released from the IDP camp in November 2009.

21. I do not consider it is plausible that if the authorities had any suspicion whatsoever in relation to the applicant and his work at the [workplace], he would have been questioned and then released without further action, or that he would have been released from the IDP camp. I also take into account that he was not subject to any detention and questioning between November 2009 and February 2012. He claims that in 2012 he was detained and questioned about his work in the [workplace] on at least two occasions. Both times he was released without charge and he was not told that he had been identified for rehabilitation.
22. Having regard to all of the evidence and information above, it is plausible and I accept, that as the applicant worked in a [workplace] that was in a LTTE area and was frequented by LTTE members, he may have come to the attention of the authorities. I am satisfied that any interest that the authorities had in the applicant at that time was in relation to whether he could identify former LTTE members. I am not satisfied that the authorities suspected that the applicant was himself a member of the LTTE or that he had then, or would now have, any adverse security profile because of his employment in the [workplace].
23. The applicant has claimed that the SLA killed his mother and his brother. He told the delegate that his mother was killed in a large scale massacre of civilians and that his brother was shot [dead]. The applicant has not explained why he believes it was the SLA who killed his brother and has not claimed that he or any other member of his family has ever been asked any questions about his brother. I accept the applicant's claims in relation to his family members' deaths but I am satisfied that he has not been, and will not now be imputed with any adverse security profile because of these deaths.
24. The applicant has provided conflicting evidence in relation to the death of [Relative 1]. In his statement of claim he says that [Relative 1] was killed in 2012, just before the applicant's arrest by the SLA. He claims that he was visiting [Relative 1]'s house and just after he left, he heard gunshots. He later found out that [Relative 1] had been killed and he thought it was because [Relative 1] was a Tamil. At the interview however, he provided a death certificate that states [Relative 1] was killed [in] 2010. The applicant told the delegate that [Relative 1] was at home on his computer when the CID knocked at the door. [Relative 1]'s wife told the CID that he was not at home but later the CID got into the house and shot [Relative 1]. The applicant said that it was connected to his case because [Relative 1] had worked with him at the [workplace] in [Town 1] and had then helped him with [other] jobs in [District 1]. He said that he had been asked questions about [Relative 1] and that people had been following him in 2010. This was the first time that he claimed any interest by the authorities before 2012. He also claimed for the first time that he was questioned at different times between [2010] and [2012] and that the authorities were following him at this time.
25. While I accept the medical report that [Relative 1] was shot dead in [2010], I consider the applicant's claims that the incident was related to him and to the [workplace] in [Town 1] to be implausible. Although he claims that the authorities killed [Relative 1], the authorities made no attempt to arrest, detain or harm the applicant at this time, despite his claims that they were following him and asking him questions about [Relative 1]. He has not claimed that [Relative 1] had any profile other than having worked in the same [workplace] as the applicant and it is implausible that if the authorities killed him because of that profile, they did not take any action against the applicant. The authorities did not visit the applicant's home in 2010 and he was not arrested and detained until [2012]. I am not satisfied that the death of [Relative 1]

was linked to the applicant or that the applicant was questioned about his [Relative 1] between [2010] and [2012]. I am not satisfied that he was then, or would now be, imputed with any adverse security profile because of his association with [Relative 1].

26. The applicant claims that he was ordered to report to the SLA camp [on various dates in] 2012. He claims that in [2012], he was detained for [a number of] days, questioned, severely beaten and suffered injuries. The applicant claims that he was hospitalised as a result of this mistreatment and has provided a medical report from the [hospital] that confirms the applicant was admitted on [a date in] 2012 and treated for injuries that he claimed were occasioned by an assault by the armed forces.
27. I accept that the applicant was taken to the SLA camp, detained and beaten. I also accept that he was admitted to hospital for treatment following this incident. I take into account however that he was released without charge and was not subject to any reporting requirements. I also take into account his evidence to the delegate that other people were taken to the camp and mistreated at this time. I am satisfied that the applicant was detained and questioned as part of a general operation and that he was released because he was not a person of adverse security interest.
28. At the interview, the applicant claimed that after he was released, he was followed by the SLA. They watched him in the hospital and on the streets. He knew that it was the SLA because they were strangers in the area and their movements indicated that they were trying to arrest him. The delegate asked if these strangers arrested or detained him and he said that they told him to report to the SLA camp again. This was [later in] 2012. In his statement he claims that when he went there, the SLA men were [waiting for him]. They slapped him and [assaulted him], telling him that he had to tell them about his LTTE contacts but he said that he did not have any LTTE contacts. At the interview, he said that the SLA wanted his [vehicle] and that the men took the [vehicle] and returned it after [a number of] days but did not replace the fuel.
29. As I have found that the applicant did not have an adverse security profile when he was released [earlier in] 2012, I consider it is implausible and I do not accept that he was being followed or that plain clothes SLA or police were attempting to arrest him. I accept that he was called to the SLA camp [later in] 2012 and that he was slapped and threatened, and was asked about the LTTE again. However that the main reason behind this summons appears to have been to take the [vehicle]. The applicant was not charged or further detained and the [vehicle] was returned, albeit without fuel, after [a number of] days. I am not satisfied that this incident was related to any adverse security profile.
30. The applicant claims that since he fled Sri Lanka, the SLA and CID has been visiting his wife and asking about his whereabouts. He said that his wife was ordered to go to the SLA camp but she did not do so. He said that she had to sell the [vehicle] and give the SLA [a bribe]. I consider it is implausible that the authorities would suddenly start visiting his home given that he has not claimed any visits before he left Sri Lanka. I also take into account that he initially said that the authorities had never asked his family in [Town 2] about him but when the delegate asked if he could live there he said that the authorities were visiting his family there as well. I do not accept the claims that the authorities have been seeking him in either location. Further, as I have found that he is not of interest to the authorities, I do not accept the claims that his wife was ordered to report to the SLA camp or that she has had to pay a bribe to the SLA because of this.

31. At the end of the interview, the applicant said that he had lost his education because of Sri Lankan atrocities. I note however that at the start of the interview, the delegate asked the applicant if he had suffered any problems during his education and he said that he had not. He said that the problems only started after 1987, which was [a number of] years after the applicant had left school. He has not provided any other evidence or information in relation to this claim. I do not accept this claim.
32. Having regards to all of the evidence and information above I am satisfied that the applicant does not have an adverse security profile in relation to any real or imputed association with the LTTE, or any familial association (including [Relative 1]).
33. The applicant is a Tamil male from the North and a Hindu. I accept that as a Tamil and a young Tamil male who has lived in the East and the North, the applicant has experienced harassment, violence and serious mistreatment in the past. I take into account that some of this has been related to his ethnicity. I also take into account country information that indicates that the situation in Sri Lanka has improved significantly since the applicant left in 2012.
34. DFAT assesses that the situation in the North and the East has improved significantly since the end of the war and monitoring, harassment and detention of Tamils under the emergency regulations has decreased. Further improvements have followed the January 2015 presidential election and the parliamentary elections on 17 August 2015, at which the Tamil National Alliance (TNA) won 16 seats and the TNA leader Rajavarthiam Sampanthan was appointed Opposition Leader.²
35. The Sirisena Government has prioritised human rights and reconciliation and has made significant progress, including: replacing military governors in the Northern and Eastern Provinces with civilians; releasing some individuals detained under the PTA and committing to reform the PTA; and engaging constructively with the United Nations. The Government also established an Office of National Unity and Reconciliation (ONUR) to develop a national policy on reconciliation. Symbolic changes have also contributed to a more positive outlook for reconciliation. The 2015 Independence Day ceremony was attended by TNA leaders for the first time since 1972 and President Sirisena delivered a trilingual Declaration for Peace in Sinhala, Tamil and English, paying respect to all victims who had lost their lives during the civil conflict (a significant step toward acknowledging losses on both sides). At the 2016 Independence Day ceremony the national anthem was sung in Tamil, as well as Sinhala. The government has also changed the name of the day commemorating the end of the conflict (held in May) from 'Victory Day' to 'War Heroes Remembrance Day' and for the first time gave official approval for memorial events to take place in the North and East.³
36. In September 2015, the report of the UN's Office of the High Commissioner for Human Rights investigation into Sri Lanka (OISL) found that grave violations, including possible war crimes and crimes against humanity, were likely committed by both sides during the civil conflict. In response, the Sri Lankan Government co-sponsored a resolution in the UN Human Rights Council which, while recognising the progress Sri Lanka had made on reconciliation, committed Sri Lanka to implementing a range of transitional justice mechanisms and reconciliation projects. Further, on 18 December 2015, the Sri Lankan Cabinet approved the formation of the Secretariat for Coordinating Reconciliation Mechanisms within the Prime Minister's Office to oversee mechanisms for advancing truth, justice and reconciliation in Sri Lanka; an Office on Missing Persons; an Office for Reparations; a Truth, Justice, Reconciliation and Non-Recurrence

² DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, at pp 7, 10, 12.

³ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, at p 8.

Commission; and a Judicial Mechanism with a Special Counsel. DFAT assesses that if implemented effectively these mechanisms will provide a platform to achieve genuine reconciliation.⁴

37. The general security situation in the North and East has improved dramatically, although military and security forces maintain a significant presence in the Northern Province. In September 2016, DFAT observed a low-level, visible military presence in the north, with most of the military confined to the Security Forces Cantonment on Jaffna Peninsula (also known as 'High Security Zones') or the smaller surrounding military camps. Military checkpoints on major roads leading to the North and East were removed in 2015 and there are no restrictions on travelling to the North and East.⁵
38. DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. The Sri Lankan police are now responsible for civil affairs across Sri Lanka and while a sizeable (and largely idle) military presence remains in the North and East, armed forces personnel are generally restricted to their barracks. While some cases of monitoring continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities.⁶
39. The DFAT information and assessments are supported by other reports in the material before me. USDOS, reporting on events in 2015, noted that the elections were the most peaceful and efficiently conducted elections in the country's recent history. It also reported the closure of the Omanthai military checkpoint, which previously divided government-held territory from former LTTE-controlled territory. It also recognised the Sri Lankan government adopting the constitution's 19th amendment, which limits the powers of the presidency and begins a process of restoring the independence of government commissions; co-sponsoring a resolution on human rights at the UN Human Rights Council; welcoming 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; and establishing the Office of National Unity and Reconciliation 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 signing of the International Convention for the Protection of All Persons from Enforced Disappearances. The government also removed the ban on eight Tamil diaspora organizations and 267 individuals on the previous government's watch list.⁷
40. USDOS 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 sympathisers; however as noted above, overall the reports of harm relate to people with LTTE connections or who are otherwise Tamil separatist activists. The same report notes that President Sirisena swore in a Tamil as the first Tamil chief justice of the Supreme Court in two decades.

⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105, at pp 8-9.

⁵ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105, at p 10.

⁶ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105, at p 12.

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

41. Also in 2016, the United Kingdom Home Office (UKHO) reported that the new government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state. Its focus is on preventing (a) the resurgence of the LTTE or any similar organisations and (b) the revival of the civil war within Sri Lanka. Referring to UK Upper Tribunal case law in 2013 and 2014, the UKHO noted that that Tribunal had identified four categories of persons at risk of persecution or serious harm. These were:
- Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the Diaspora and/or a renewal of hostilities within Sri Lanka.;
 - Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government;
 - Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes; and
 - A person whose name appears on a computerised "stop" list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a "stop" list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.
42. The UKHO assessed that in its opinion, a person being of Tamil ethnicity would not in itself warrant international protection. Neither would being 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. As noted above, the 'stop' list comprises those against whom there is an extant court order or arrest warrant.⁸ I have found above that the applicant does not have an adverse security profile and I am satisfied that he will not appear on a stop list.
43. The UKHO document cited above has considered the general situation of Tamils in Sri Lanka and it refers to and extracts from a range of sources, including Human Rights Watch, Amnesty International, Freedom House and media reporting. These sources all report continuing allegations of monitoring, harassment, arbitrary arrest, disappearance, violence and other types of persecution; however, the reports generally refer to former LTTE fighters, activists, journalists, persons who are critical of the government and those who have other adverse profiles. I have found above that the applicant does not have an adverse security profile and he has not claimed any involvement in activities in Sri Lanka or Australia that could lead him to being imputed with an anti-government or other adverse profile.
44. I have also consider other information in the material before me that notes occasional reports of abductions, continued human rights violations and the use of torture by security forces.⁹
45. I am satisfied that the situation for Tamils in Sri Lanka has significantly improved and continues to do so. The material before me does not indicate that the situation is becoming worse for

⁸ United Kingdom Home Office (UKHO), "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17 at pp 5-6, 9-10.

⁹ "Tamils continue to live in fear in post-war Sri Lanka", India Today, 28 July 2015, CXBD6A0DE10907; Freedom From Torture "Sri Lanka – Update on torture since 2009", 6 May 2016 CIS38A8012881; International Truth & Justice Project (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275.

Tamils in any area of Sri Lanka. I am satisfied that the new government is taking steps to address past discrimination and violence, and that Tamils do not face a real chance of harm on the basis of ethnicity. I am further satisfied on the material before me that Tamil males do not face a real chance of harm on the basis of age, ethnicity and geographic origin and/or location.

46. The applicant has not claimed to have suffered any harm in the past because he is a Hindu. There is no evidence in the material before me that he has, or intends to engage in any acts of conversion or proselytization. DFAT has assessed that most members of religious groups in Sri Lanka are able to practice their faith freely, although the risk of harm increases if they engage in conversion or proselytization.
47. Having regard to all of the claims evidence and findings above, I am not satisfied that the applicant faces a real chance of harm from the Sri Lanka authorities on the basis of: any real or imputed association with the LTTE; his association with [Relative 1]; arising from previous incidents with the Sri Lankan authorities; or for being a Tamil, a young Tamil male from the North and East or a Hindu.

Returned asylum-seeker who departed illegally

48. The DFAT country report notes that over 1,500 asylum-seekers were returned from Australia to Sri Lanka between 2008 and 2015, in addition to many more that have been returned from other countries. Some returnees receive assistance, including financial support and transport assistance. Overall, DFAT assesses that any reintegration issues are not based on a failure to obtain asylum, but rather the employment and accommodation difficulties that returnees may face. DFAT also assesses that the risk of torture or mistreatment for the majority of returning asylum-seekers is low, including for those suspected of offences under Sri Lankan immigration law.¹⁰ There is nothing in this report or in any of the other information in the material before me that indicates that returning asylum-seekers face any harm or discrimination on the basis of having sought asylum overseas.
49. According to DFAT, a Sri Lankan national who departs Sri Lanka other than via an official port will be in breach of the *Immigration and Emigration Act* (the I&E Act) and may be subject to penalties which can include imprisonment and a fine. I accept that given the way the applicant departed Sri Lanka, he may come to the attention of the authorities as an illegal departee. DFAT advises that those who are not actively involved in a people smuggling venture are not given custodial sentences for departing Sri Lanka illegally. DFAT also assesses that ordinary passengers are generally viewed as victims on return.
50. I accept that the applicant may be questioned on return as part of the airport screening process. The country information before me indicates that this could involve an interview, contact with the police in his home area, his family and/or neighbours. The country information before me indicates that returned asylum seekers and those with no adverse profile are not generally at risk of harm on return to Sri Lanka.¹¹ I have found that the applicant does not have an adverse security profile.
51. I have taken into account other information in the material before me that reports arrests and detentions of returning Tamils at Colombo airport. This includes recent reporting from Freedom From Torture, and the International Truth and Justice Project, as well as older reports from Human Rights Watch and Tamils Against Genocide. The cases reported by these organisations generally involved persons suspected of particular LTTE links or an involvement

¹⁰ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, at pp 29, 35.

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105, at p 29.

in separatist or pro-Tamil activities, such as fundraising or protests.¹² I have also taken into account media reporting in the material before me that refers to the arrest of Tamil returnees and note that this also involves persons alleged to have been former LTTE members or to have particular profiles.¹³

52. Having regard to all of the above I am satisfied that the applicant will not be treated differently from other returning asylum-seekers who have no adverse security profile. I am satisfied that there is not a real chance that he would be subjected to harm because he is a returning asylum seeker.
53. Persons who departed in breach of the I&E Act may be arrested and charged. A person who departed illegally may, on return, be remanded in custody for a short period (24 hours) while waiting to be brought before a magistrate, but this period may be longer if a person is returned just before a weekend. Where a person pleads guilty, they will be fined and discharged. In most cases, when a returnee pleads not guilty, they are immediately granted bail on personal surety, though they may be required to have a family member act as guarantor, in which case they may also need to wait until a family member comes to court to collect them. DFAT reports that bail conditions are rarely imposed on illegal departees and there is no general requirement on such persons to report to police or police stations between hearings.¹⁴
54. The information before me does not indicate that the applicant was involved in organising or facilitating people smuggling, and as noted above, ordinary passengers are generally viewed as victims. The information does not indicate that repeat departees are more likely to be given custodial sentences. I am therefore satisfied that there is a real chance that the applicant will receive a fine and not a custodial sentence. Based on the country information before me, any fine may be paid by instalment and I do not accept this would cause him economic hardship or otherwise threaten his capacity to subsist. I find that any fine imposed, or the requirement for any bail, surety or guarantee, would not constitute serious harm.
55. Country information indicates there is also a possibility he may be detained for several days while awaiting an opportunity to appear before a magistrate. Under Australian law, the question of whether a loss of liberty amounts to serious harm is a qualitative judgment, involving the assessment of matters of fact and degree. This includes an evaluation of the nature and gravity of that loss of liberty.¹⁵ The country information before me indicates that any such detention would only continue until the applicant was given an opportunity to appear before a magistrate, and would likely be very brief. Although I accept that the applicant has suffered injuries during his questioning in 2012, I am not satisfied on the evidence before me that the applicant has any vulnerabilities or health concerns. I find that in this case, any questioning and detention that the applicant may experience would be relatively brief and would not constitute serious harm as non-exhaustively defined in the Act. I also find that any

¹² Tamils Against Genocide, "Returnees at Risk: Detention and Torture in Sri Lanka", 1 September 2012, CIS24826; Freedom from Torture, "Sri Lankan Tamils tortured on return from the UK", 1 September 2012, CIS24086; Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; Human Rights Watch (HRW), "United Kingdom Halt deportation flight to Sri Lanka", 15 September 2012, CX311600; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275.

¹³ Another Tamil returnee arrested", Sri Lankan Mirror, 1 July 2015, CXBD6A0DE16698; "SL military continues to arrest Tamils from East returning from Middle-East", Tamil net, 31 May 2015, CXBD6A0DE7540; "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", Tamil net, 3 May 2015, CXBD6A0DE6027; "10 Tamils arriving in Lanka arrested", Sri Lanka Mirror, 4 March 2015, CXBD6A0DE6065; "TID arrests another Tamil man on return from abroad – VIDEO", *Ceylon News*, 19 May 2016, CX6A26A6E4702.

¹⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105, at p 33-34.

¹⁵ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610.

monitoring or reporting requirements that may be imposed on the applicant because of his previous breach of bail would not be conduct such as to constitute serious harm.

56. I am also satisfied that the provisions and penalties of the I&E Act are laws of general application. The country information before me does not suggest the I&E Act is discriminatory on its terms, that the law is applied in a discriminatory manner or that it is selectively enforced. To the extent that the applicant may be fined, detained or questioned under the I&E Act, I am satisfied this would not constitute serious harm and would be the exercise of laws of general application that apply to all Sri Lankans equally.
57. Having regard to all of the evidence, information and my findings above, I am not satisfied that the applicant faces a real chance of harm because of: any real or imputed association with the LTTE; his association with [Relative 1]; previous incidents with the Sri Lankan authorities; being a Tamil, a young Tamil male from the North and East or a Hindu; or being a returned asylum-seeker. I am not satisfied that the applicant faces a real chance of serious harm for having departed Sri Lanka illegally.
58. As I have found that the applicant does not have an adverse security profile with the authorities and that he does not face a real chance of serious harm arising from his other claims, I am also satisfied that the applicant's cumulative circumstances do not give rise to a real chance of serious harm.

Refugee: conclusion

59. 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

60. 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

61. 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.
62. I have found that the applicant does not face a real chance of harm because of: any real or imputed association with the LTTE; his association with [Relative 1]; previous incidents with the Sri Lankan authorities; being a Tamil, a young Tamil male from the North and East or a Hindu;

or being a returned asylum-seeker. As 'real chance' and 'real risk' have been found to equate to the same threshold¹⁶ and for the same reasons given above, I find that the applicant does not face a real risk of significant harm for any of these reasons.

63. I have accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally. I accept that he may be questioned and will likely be subject to prosecution on account of breaching the I&E Act. In relation to detention at the airport, the applicant may be questioned and detained there for up to 24 hours depending on the length of individual investigation and the availability of a magistrate. DFAT advises that the risk of harm for the majority of returnees, including those suspected of offences under the I&E Act is low and the material before me does not indicate that the applicant faces a real risk of significant harm during the investigation, questioning or while held in airport detention.¹⁷
64. While I have found above that the applicant will not receive a custodial sentence, there is a possibility that he may be held in a nearby prison while waiting to come before the magistrate. The information before me does not indicate that any prisoners subject to short periods of detention awaiting prosecution under the I&E Act have been subject to the death penalty, have been otherwise arbitrarily deprived of their life, or have been tortured. There is also no indication that the authorities or others, through any act or omission in implementing the I&E Act, intentionally inflict pain or suffering or severe pain or suffering, such as to meet the definition of cruel or inhuman treatment or punishment, nor that they have any intention to cause extreme humiliation.¹⁸ I am also not satisfied that the questioning, or the imposition of a fine, separately or in combination with the brief period of detention to which the applicant may be subject, constitute significant harm, as defined under s.36(2A) and s.5 of the Act. I am not satisfied that this conduct amounts to severe pain or suffering, pain or suffering that is cruel or inhuman in nature, or to extreme humiliation. Accordingly, I am not satisfied that the applicant will face a real risk of significant harm arising from any bail or fine, during any questioning or his time in detention or prison while awaiting his magistrates court hearing.
65. In summary, having regard to the circumstances and profile of the applicant, I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.

Complementary protection: conclusion

66. 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.

¹⁶ *MIAC v SZQRB* (2013) 210 FCR 505.

¹⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105 at p 33-34.

¹⁸ *SZTAL v MIBP; SZTGM v MIBP* [2017] HCA 34 6 September 2017.

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.