



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03195

Date and time of decision: 14 March 2018 16:16:00
Anne-Maree Harrison, 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) arrived in Australia in November 2012. [In] February 2016, he applied for a Safe Haven Enterprise (subclass 790) Visa (SHEV). The applicant claims to be a Sri Lankan national who lived in India from the age of [age] before he came to Australia. He claimed that if he is returned to India, he fears the Indian government will force him to return to Sri Lanka. If returned to Sri Lanka, he fears persecution from the Sri Lankan Army (SLA), Sri Lankan authorities, and people who are targeting people of Tamil ethnicity.
2. [In] July 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the applicant a SHEV essentially because he found the applicant does not have a profile of interest to the Sri Lankan authorities, and did not face a real chance of persecution or real risk of significant harm for being a failed Tamil asylum seeker who departed Sri Lanka illegally, or because of the department inadvertently publishing his personal information on its website.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. [In] September 2017, the IAA received a submission from the applicant most of which addresses the delegate's decision and findings. To that extent, it may be regarded as argument rather than 'information' and I have had regard to those elements of it.
5. The submission also contains information which was not before the delegate, and I consider it to be new information. The new information is that:
 - a. The agent who organised his travel to Australia told him in strict terms not to disclose to anyone his plans to leave. This was out of fear of any repercussions to him and his family. This, coupled with the fear he had that officers of the 'Q-section' (a branch of the Indian police) had a close watch on him, compelled him to keep his plans to himself, and for this reason he did not have a chance to tell his parents about his planned departure.
 - b. He was informed by his family that shortly after he left the refugee camp in India, they were questioned by Q-section officers about his whereabouts. He fears that him leaving the camp without informing the authorities, coupled with his previous actions and surveillance that they had on him led the Q-section to pass on his details to the Sri Lankan government.
6. The applicant did not explain why the new information could not have been given to the delegate before the decision was made, or why it is credible personal information, which may have affected consideration of the applicant's claims.
7. I am not satisfied that the information in paragraph (a) could not have been given to the delegate before the decision was made because it is about events that occurred well before the decision was made, and all of it, if true, was known to the applicant. The issue of whether the applicant's parents knew he was going to travel by boat to Australia from India was discussed during the SHEV interview, but these reasons why he did not tell his parents were not given by the applicant at that time. The delegate asked why he did not tell his parents that

he was leaving, and the applicant said it did not come to mind at that time, he was disturbed and that is why he wanted to leave the country. The applicant's representative said at the time the applicant left India it was an emergency type situation. I consider that if this information were true it would have been provided to the delegate during the interview when the applicant was specifically questioned about this, or if not then, before the decision was made. The issue is significant because it arose during the interview in the context of whether the applicant knew at the time he left India about his father's involvement with the LTTE. Given the rest of the information before the delegate from the applicant, the new information emerges as a convenient explanation. I am not satisfied that these new reasons for not telling his parents are credible.

8. The applicant has not explained when he received the information contained in paragraph (b), which is a new claim relating to events that occurred shortly after his departure from India in 2012. During the SHEV interview the applicant said he spoke with his mother every day, which means he could have obtained this information at any point during those phone conversations between when he arrived in Australia and September 2017. However, he does not say whether he did obtain this information earlier, or whether it has just come to light since the delegate made his decision. The applicant has not satisfied me that this new information could not have been provided to the delegate before the decision was made. Without an explanation from the applicant as to its credibility and why he did not claim this before, I am also not satisfied this information is credible.
9. As the applicant has not satisfied me as to the matters set out in s.473DD(b) of the Act, I am prevented from considering this new information.

Applicant's claims for protection

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

- He is a Sri Lankan national, born in [District 1], Northern Province.
- His father was involved with the LTTE and helped them in a number of ways while in Sri Lanka. His father said the SLA has been searching for him since the battle of 1990 at [Location 1] between the LTTE and the SLA. His [relative, Relative 1], was taken by the SLA and has been missing for more than twenty years.
- In 1990, at the age of [age], he went to India with his father, mother and siblings and lived in a refugee camp in Tamil Nadu for 22 years before coming to Australia.
- In India, he was active in several non-violent protests against the Sri Lankan government's treatment of Tamil people. He was filmed and interviewed at these protests, and this footage was broadcast across India.
- He was investigated by a 'Q-Section' officer about his involvement in protests against the Sri Lankan Government, and he denied his involvement out of fear he would be returned to Sri Lanka. The officer said they saw his interview and images of his attendance at the protests, and threatened to deport him to Sri Lanka, and told him not to participate in another protest.
- Due to this, he decided to leave India and travel to Australia.
- He fears being returned to Sri Lanka where Tamil people still face persecution, abuse and violence despite the fact the civil war has ended, and he fears persecution because

he fled Sri Lanka illegally. If sent to India, he is afraid the Indian government will force him to return to Sri Lanka.

- In 2014, the department inadvertently published his personal information on its website (the 'data breach'). His father is concerned this mistake will cause his son (the applicant) to come to harm if returned to Sri Lanka because a connection may be made with him and his past and he will suffer the same fate as [Relative 1].

Factual findings

11. I accept the applicant is a Sri Lankan national of Tamil ethnicity, born in [District 1], Northern Province, based on the copy provided of his birth certificate. I am also satisfied that he is not a national of India or any other country as he has stated.
12. I accept the applicant's father was involved with the LTTE although the applicant, understandably, has provided very little information about his father's role in the LTTE, and stated that he still does not know the full extent of his association with the LTTE. At the arrival interview, he was asked to give the main most important reason why he left both countries, starting with Sri Lanka, if he could remember. The applicant said because they were [young] his parents took them to India. He asked his mother and she told him we cannot live peacefully in Sri Lanka which is why we took you to India, as when you grow up you will face problems there. His answer to what will happen to him if he returned to Sri Lanka was that his family is in India, how can he go back, nothing good will happen, everything will be bad for him, everything will be negative, and up to now he did not even think about it. While the applicant did not claim to fear being returned to Sri Lanka because of his father's involvement in the LTTE, and stated he did not know about his involvement when he arrived in Australia, I am satisfied that whether or not he knew his father was involved with the LTTE when he arrived, it may not have been the most important reason for the applicant to give when he arrived in Australia after having departed from India where he had been living for the past 22 years, from the age of [age], in a refugee camp.
13. The applicant explained in the SHEV interview his concern that there had been a translation error in relation to a statement he had written in 2014 which was used to prepare his later SHEV application. He said he wrote in Tamil that his father was in the Tamil Tigers and helped them, but it has been interpreted that his father was an LTTE supporter. The applicant stated he wrote about his father while still in immigration detention in Australia in June 2014. The applicant provided a copy of his written statement (in Tamil) from June 2014 which he claimed to have read to his case manager at the time with the assistance of an interpreter. And two years later, the applicant's lawyers used this June 2014 statement to prepare his SHEV application. An official translation of the June 2014 statement was provided after the SHEV interview, and it states that after the applicant told his father about the department's mistake in publishing his personal information (in February 2014, on the department's website), his father told him the problems that his family and the applicant would face as a result of this online disclosure, which is that: his father was involved with the LTTE and helped them in a number of ways while he was in Sri Lanka, the SLA has been searching for him since the battle of 1990 at [Location 1] between the LTTE and the SLA. His father told him he lived in hiding for some time until he moved to India as a refugee with the family. And that later some people tipped off the SLA about [Relative 1] and soon he was taken by the SLA. His father did not know if [Relative 1] is still alive or dead as he did not get any news about him over the last 20 years. There is no subsequent information to what he wrote in 2014 about what rank or status his father held in the LTTE, or what role he performed, what help he gave, or what he did in the 1990 battle between the LTTE and the SLA, or any further information about [Relative 1] and

what happened to him. Country information indicates that it would not have been possible for a young civilian man living in the north or north east during the conflict not to have had any contact with the LTTE – according to the leader of the Tamil National Alliance, it would have been forced upon them.¹ Given the applicant's father was from [District 1] in the Northern Province, I accept he would have had some level of involvement with the LTTE in the 1980s before the family left Sri Lanka. Beyond that however, given the absence of any further detail or supporting information from the applicant, I am not satisfied that the applicant's father was a member of the LTTE, or that the SLA has been searching for the applicant's father since the battle of 1990 at [Location 1] between the LTTE and the SLA, and that [Relative 1] was taken by the SLA and has been missing for more than twenty years.

14. I accept that in 1990, at the age of [age], the applicant departed Sri Lanka illegally by boat and went to India with his father, mother and siblings and lived in a refugee camp in Tamil Nadu for 22 years before coming to Australia in 2012 because he consistently and convincingly made this claim, and supported it with a copy of his family's refugee ration card from India and his Indian school leaving certificate. Furthermore, country information supports this claim given that in 2012, the United Nations High Commissioner for Refugees (UNHCR) reported that in India there were 69,000 Sri Lankan refugees living in 112 camps and a further 32,000 persons from Sri Lanka residing outside camps in the southern state of Tamil Nadu.²
15. I accept that in 2010, the applicant participated in a hunger strike and other peaceful protests against the Sri Lankan government while living in the refugee camp in India. However, I do not accept his participation was broadcast by the media across India. According to the June 2017 translation of the applicant's June 2014 written statement, the applicant wrote that between 2008 and 2009 in the final stage of the war many Tamil civilians were killed, and at the time some political parties and the Tamil general public in Tamil Nadu staged street protests and street blocks against the Sri Lankan government. He took part in those protests. Many TV channels telecast these events. In his SHEV application, he said the protests he attended were against the racial massacring and sexual assault of Tamil people in Sri Lanka. His evidence during the SHEV interview is that when many people were killed in Sri Lanka, they protested against that in India in 2010. He said he was not a member of a political party or organisation. He was forced to participate in protests because all the political leaders came and participated, and the camp leaders said everyone can take part in this protest and that is why he took part. The applicant did not provide copies of any of the media in which he claimed to be interviewed and showed his participation in the protests, and he did not describe the content of the interview he claimed to have given or explain why he was interviewed. The delegate stated in his decision that he was not able to find any media coverage of these protests, and there is none before me. After the SHEV interview, the applicant provided copies of media relating to protests about issues in Sri Lanka which took place in India in 2013, and nothing from 2010 or at any time when he was living in India. In 2013, the applicant was in Australia. The applicant argued that the protests he was involved in were captured on local media and they did not have the same prominence as the subsequent protests organised by students in 2013, but the reports he provided show that the authorities in India have a practice of arresting and questioning protestors. I am not satisfied there is any media coverage of the applicant in relation to his participation in protests in 2010 in India. I find the applicant was not an organiser or spokesperson for the protests but that he was a passive participant in protests in 2010.

¹ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112, p.14.

² UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

16. I do not accept the applicant was investigated by a 'Q-Section' officer or officers about his involvement in protests against the Sri Lankan Government. According to the June 2017 translation of the applicant's June 2014 statement, he wrote that later (after the protests and media coverage) he was questioned by the Camp Superintendents (G Division), who asked him if he took part in those protests supporting Tamil Tigers and against the Sri Lankan government. He said no, and they told him to tell the truth because they had seen him on the TV and asked if he was helping the Tamil Tigers. He again said no, and they harassed him. Since then, if there were any protests anywhere, they would call him and investigate him. They threatened him by saying, if we find you taking part in any sort of action against the Sri Lankan Government again, we will hand you over to the Sri Lankan government saying you are supporting the Tamil Tigers. The difference between the applicant's 2014 statement and his 2016 set of claims is that in 2014 he wrote about Camp Superintendents (G Division) questioning him, and in 2016 he claimed it was Q-section. In the applicant's arrival interview, when asked were there any armed groups, political groups, or religious groups operating in the area in India, he said Q-branch (the police). I consider the applicant has changed his version of events from G Division questioning him to Q-section. I am not satisfied that Q-section of the Indian police investigated the applicant in relation to his participation in protests in India in 2010. However, I accept that the camp administration (G Division) spoke to him about his participation in protests that he participated in in the refugee camp and warned the applicant against such activity. I consider it plausible that the Indian authorities would manage the refugee camp in this manner to prevent unrest and political tensions. I accept he denied his involvement out of fear he would be returned to Sri Lanka, and that he was threatened with deportation to Sri Lanka and told not to participate in protests again. However, I do not accept that the Camp Superintendents saw an interview given by him and images of his attendance at the protests, because I do not accept there was any media. The applicant was not deported and he remained living in India in the same refugee camp for more than two years after this incident before coming to Australia.
17. I find that when the applicant departed India in October 2012, the G Division of the refugee camp where he lived in India was not interested in deporting him to Sri Lanka, he was not of interest to the Indian police (Q-section) for his passive participation in peaceful protests against the Sri Lankan government in the refugee camp in Tamil Nadu in 2010, there is no media of the applicant's participation in the protests, and while the applicant's father was involved with the LTTE and helped them up until 1990 when he took the family to India and has lived there ever since, there is no evidence to suggest that his father would be of any real interest to the Sri Lankan authorities for his past LTTE involvement.
18. I accept that the applicant's personal information was inadvertently published for a brief period on the department's website in 2014, and that this information included his name, date of birth, nationality, that he was an irregular maritime arrival, and his detention status. According to the delegate, the information disclosed does not reveal the applicant's claims, or that he applied for a protection visa, and there is no evidence the Sri Lankan authorities were or are aware of the data breach or that they accessed the applicant's information.

Refugee assessment

19. 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

20. 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, if returned to the receiving country, 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.
21. I have found the applicant is a Sri Lankan national, and I find the receiving country is Sri Lanka.
22. In March 2017, the US Department of State reported that the most significant human rights problems in Sri Lanka in 2016 were incidents of arbitrary arrest, lengthy detention, surveillance, and harassment of civil society activists, journalists, members of religious minorities, and persons viewed as sympathisers of the LTTE. There were also allegations from Tamils throughout the country but especially in the north and east, that security forces regularly monitored or harassed members of their community, particularly young and middle-aged Tamil men.³
23. According to DFAT the security situation in the north and east of the country is significantly improved, and the monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government, and Tamils now have a substantial level of political influence and their inclusion in political dialogue has also increased since Sirisena came to power in 2015. However, DFAT noted that ethnicity, along with communal issues surrounding language and religion, are a source of division in Sri Lanka, and are defining features of day-to-day life in Sri Lanka and fundamental to the reconciliation process.⁴
24. DFAT also references a number of reputable organisations (the ITJP, Freedom from Torture, Amnesty International), who have, over the last couple of years, published allegations of torture perpetrated by Sri Lankan military and intelligence forces, mostly related to cases from the period immediately following the civil conflict and involving people with imputed links to the LTTE (but not solely). DFAT also notes the work of the UN's Office of the High Commissioner for Human Rights investigation into Sri Lanka, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the HRC of Sri Lanka which combined provide credible reports of torture carried out by Sri Lankan military

³ US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka ", 03 March 2017, OGD95BE926876.

⁴ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

and intelligence forces during police detentions and regular criminal investigations. According to DFAT however, the incidence of torture has reduced in recent years, and allegations of torture pertain to a relatively small number of cases compared to the total population.⁵

25. Furthermore, DFAT refers to the UN's Office of the High Commissioner for Human Rights investigation into Sri Lanka (covering the period 2002-2011), which found that incidents of extra-judicial killings, disappearances and kidnappings for ransom occurred frequently during the civil conflict, particularly in the north and east. The Sri Lankan security forces, the LTTE and paramilitary groups were considered responsible for these acts. However, DFAT assesses that the number of incidents of extra-judicial killing, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, which the applicant does not claim to be, has significantly reduced since the end of the conflict.⁶
26. The applicant provided country information from the Immigration and Refugee Board of Canada (IRBC) dated February 2013⁷ which referenced sources having reported that some Tamil returnees to Sri Lanka have been shown photographs of themselves and others at protests in the United Kingdom, and a professor who indicated that the Sri Lankan government has agents in "key countries" who monitor peoples' activities. The same report from 2013 referenced Tamils Against Genocide (TAG) stating that criticising or protesting against the Sri Lankan government or being returned from a country that has, through government or media, criticised the Sri Lankan government or encouraged accountability and reform was a new risk factor. This information is however five years old now. The applicant also provided an IRBC report from February 2015, which reported on the treatment of suspected members or supporters of the LTTE and whether the government was continuing to screen Tamils in an attempt to identify LTTE suspects. Information gathered from sources indicated that screening of individuals returning from abroad with the assistance of former LTTE cadres and informants was still happening although to a lesser extent, or at least not as obvious as in the past.
27. According to information gathered by a UK Home Office Fact Finding Mission to Sri Lanka which met with the leader of the TNA in July 2016, the TNA is supportive of the new government in Sri Lanka. While the TNA could not say people returning to Sri Lanka would be safe, he said there is change, that there is no longer a climate of fear, and there is not the same harassment there was, some land has been returned to Tamils and a Missing Persons Office established. Sometimes the government finds people it has not sent to rehabilitation so it sends them to rehabilitation. Former LTTE cadres are still followed and monitored, and any attempt to re-form the LTTE in the north would be dealt with very severely. According to the leader of the TNA, the LTTE is still passively active in other parts of the world. He also stated that 200,000 Tamils have returned from India with the assistance of the UNHCR, which has provided them with relief measures to start businesses on return. These were official refugees who had been hosted by the Indian government, and according to the leader of the TNA, there have been no reports of ill-treatment on return.⁸
28. More recently however, in June 2017, the UK Home Office, which has drawn on information and advice from a range of credible sources, highlighted a number of significant and ongoing human rights problems in Sri Lanka, which can disproportionately affect Tamils, particularly in

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

⁷ Immigration and Refugee Board of Canada, Research Directorate, "Treatment of Tamil returnees to Sri Lanka", 1 February 2013, CIS28614.

⁸ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112, pp.12-13.

relation to the continued application of the Prevention of Terrorism Act (PTA). However, the UK Home Office is of the opinion that a person being of Tamil ethnicity would not in itself warrant international protection.⁹

29. Furthermore, the UK Home Office was of the opinion that neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it, or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state. Further, mere participation in diaspora activities, such as attending demonstrations, is not in itself evidence that a person will attract adverse attention on return to Sri Lanka.¹⁰
30. I have found the applicant was not of interest to the Indian police (Q-section) for his passive participation in peaceful protests against the Sri Lankan government in the refugee camp in Tamil Nadu in 2010, and there is no media of the applicant's participation in the protests. I am not satisfied that the applicant's passive participation in protests in the refugee camp in India in 2010 would have caused him, or would now cause him, to come to the adverse attention of the Sri Lankan authorities. The applicant has not provided any evidence of ongoing participation in protests since coming to Australia. I am not satisfied the applicant had a significant role, or would be perceived to have been active in post-conflict Tamil Separatism and thus a threat to the state of Sri Lanka. I have also found that while the applicant's father was involved with the LTTE, there is no evidence that his father would be of any real interest to the Sri Lankan authorities for his past LTTE involvement, and I am not satisfied the Sri Lankan authorities would be interested in the applicant based on his father's past involvement in the LTTE before going to India in 1990. I find there is not a real chance the applicant will face any harm for reasons of his Tamil ethnicity, or an imputed political opinion in connection with the LTTE based on his father's involvement with the LTTE, or opposing the Sri Lankan government on account of his participation in protests in 2010.
31. The evidence before me does not support a finding that a person will face harm for the reason that they are a Tamil asylum seeker (including being imputed with an adverse political opinion towards the government). DFAT is aware of a small number of unverified allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka. However, DFAT reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, the US, Canada, the UK and other European countries, with relatively few allegations of torture or mistreatment. DFAT assessed that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce.¹¹ I find there is not a real chance of harm for the applicant for reasons of an imputed political opinion in connection with being a Tamil asylum seeker.
32. According to the International Organisation for Migration (IOM), in Sri Lankan law it is not necessary to have a passport to return to the country – it is only necessary to prove Sri Lankan nationality, which can be done by providing a birth certificate. The IOM stated that the Ministry of Foreign Affairs welcomes Sri Lankans back to Sri Lanka and there is money for reintegration to assist with resettlement, and the welcome extends to former LTTE members. According to the IOM, there were many thousands of former LTTE members, there is no reason why having this background would be a target for interrogation. At the airport, a person's record would be looked at to see if there was anything (a previous crime) to answer for. There have been allegations of ill treatment after arrival, but these allegations have not been

⁹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁰ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

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

substantiated – they may just be allegations. If people left illegally by boat to come to Australia without screening, the CID took action. The police were looking for the thousands of Sri Lankans who left the country using forged identities.¹²

33. Information from DFAT,¹³ about the processing by officials, and the offences under the Immigrants & Emigrants Act (I&E Act) does not support a finding that the applicant will face a real chance of persecution because he departed the country unlawfully.
34. The applicant will likely experience a brief period of detention and questioning by Sri Lankan immigration and law enforcement officers at the airport. DFAT information is similar to the IOM information noted above, which is that the investigative process for those returning concentrates on confirming the persons' identity and any outstanding criminal matters, including the existence of court orders and arrest warrants.¹⁴ There is no evidence before me that the applicant has any outstanding criminal matters, court orders or arrest warrants for Sri Lanka or India.
35. It is an offence under the I&E Act to depart Sri Lanka unlawfully. Given the applicant departed Sri Lanka unlawfully at the age of [age], I consider it unlikely he will be charged with an offence for unlawful departure. However, if he is charged with the offence, he may spend 24 hours in police custody at the airport, or several days in prison depending on the availability of a magistrate, if this occurs over the weekend. If he pleads guilty he will be fined and free to go. If he pleads not guilty, he will likely be released on bail without conditions and reporting requirements until the matter is resolved by the courts. The relevance of his travel from India to Australia under Sri Lankan law is unclear, however, there is no evidence the applicant was a people smuggler when he travelled to Australia by boat from India in 2012, and in 1990 he was [age] years old when he travelled by boat from Sri Lanka to India. If he is charged and found guilty of unlawful departure, it is highly unlikely he will be given a custodial sentence.¹⁵
36. According to DFAT,¹⁶ prison conditions in Sri Lanka in general do not meet international standards because of a lack of resources, overcrowding and poor sanitary conditions. However, Sri Lankan authorities have been taking steps to address prison overcrowding. DFAT also refers to the International Committee of the Red Cross visiting prisons and remand centres. I accept that if the applicant were charged with an offence, there is a possibility he would be detained in these conditions for up to a few days. I am not satisfied this detention, and the imposition and questioning the applicant is likely to face on return amounts to serious harm. Furthermore, the evidence before me does not indicate that the processes and penalties imposed as a consequence of the I&E Act are discriminatory on their face or in their application. I am not satisfied they amount to persecution.
37. Additionally, I am not satisfied that the fact that in 2014 the department briefly published on its website some of the applicant's personal information, although not his claims for protection, would increase the chance of harm for the applicant such that there would be a real chance of harm for any reason.

¹² UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112.

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

¹⁴ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

¹⁵ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

¹⁶ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

Refugee: conclusion

38. 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

39. 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

40. 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.

41. I accept the applicant is likely to be questioned and detained for a short period of time on arrival at the airport. However, I consider it unlikely although possible he could be charged with an offence for unlawful departure from Sri Lanka by boat at the age of [age] in 1990. If this happens it is possible the applicant will be detained in a prison, and fined on arrival or soon after arrival. In relation to the possible period of detention in a prison, country information indicates that the poor prison conditions are due to overcrowding, poor sanitation and a lack of resources. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture for his unlawful departure by sea when he was [age] years old. Further, evidence does not suggest that the treatment and penalties for unlawful departure under the I&E Act are intended to inflict pain or suffering, severe pain or suffering, whether physical or mental, or cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment of punishment.¹⁷ I find there is not a real risk of significant harm on this basis.

42. I have concluded there is not a real chance the applicant will face any harm for reasons of his Tamil ethnicity, or in connection with the LTTE based on his father's past involvement with the LTTE, or perceived as being in opposition to the Sri Lankan government on account of his participation in protests in 2010 in India, or for being a Tamil asylum seeker. I am similarly not satisfied that there is a real risk of any harm, including significant harm on these bases.

43. 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 he will suffer significant harm.

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

Complementary protection: conclusion

44. 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.