



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03261

Date and time of decision: 26 April 2018 07:58:00
Natalie Becke, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Eastern Province of Sri Lanka. On 23 November 2016 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 26 July 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant this visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 23 August 2017 the IAA received a submission on behalf of the applicant ('the IAA submission'). The IAA submission reiterates claims made to the delegate that are contained in the review material. It also contains arguments in relation to issues before the delegate, which I have noted.
4. The IAA submission also contains several pieces of new information which were not before the delegate and relate to events prior to the delegate's decision.
5. Firstly, the IAA submission provides further detail about the applicant's claim that his wife's relative, Mr T, was a senior LTTE commander, who has been missing since the end of the civil war and is presumed to be in India. The IAA submission lists members of the applicant's wife's family whom the Sri Lankan authorities have tortured and killed because of Mr T's profile, and makes particular reference to her cousin (the applicant's cousin-in-law) whom the submission claims the authorities abducted, for the second time, in 2015. Attached to the IAA submission is a letter of complaint from the Sri Lankan Human Rights Commission (HRC), and a 'detention attestation notice' from the International Committee of the Red Cross, regarding the arrest/detention of the applicant's cousin-in-law. I note the subject of these documents does not bear the same name as a cousin-in-law of the applicant, to whom he referred during his SHEV interview.
6. Secondly, the IAA submission asserts that the applicant's wife was only able to leave Sri Lanka and return to India in 2013 because she paid a lot of money to obtain a passport and, when the Sri Lankan authorities tried to prevent her from leaving, she told them her mother was having surgery in India. The applicant's wife failed to return to Sri Lanka and is now a person of interest to the authorities there.
7. While the applicant was unrepresented during his SHEV interview, the delegate spent some time explaining how his protection obligations would be assessed, and the importance of providing all relevant information in the first instance, which the applicant indicated he understood. The applicant also confirmed to the delegate that there was nothing in his SHEV application he wished to add to, or change. At the end of the SHEV interview the delegate gave the applicant some time to reflect on the concerns he had raised and reminded him he could provide further information after the interview if he wished. No further information was received from the applicant before the delegate made his decision several months later and nor does the IAA submission explain why the applicant did not provide this new information earlier. One would expect that, if true, then these claims would be mentioned earlier, and in the circumstances they do not appear credible. Overall, I am not satisfied exceptional circumstances exist to justify consideration of this new information.

8. The IAA submission also asserts that the applicant is a member of the particular social group, “young Tamil males from the Northern Province of Sri Lanka”. I note that at the time of the delegate’s decision the applicant was [age] years old and that he has consistently claimed to be from the Eastern Province of Sri Lanka. On the evidence before me I consider this new information does not relate to this applicant, and in any case I have assessed his claims relating to his ethnicity and place of origin below. In the circumstances I am not satisfied exceptional circumstances exist to justify consideration of this new information.
9. The IAA submission also refers to a new source of country information which was not before the delegate and pre-dates the delegate’s decision. The IAA submission does not explain why this source could not have been provided before the delegate’s decision; nor does it explain how, as general country information, it constitutes personal information. Overall I am not satisfied exceptional circumstances exist to justify consideration of this new source, nor has the applicant satisfied me as to either of the matters in s.473DD(b).
10. Attached to the IAA submission are two documents which appear to be court summonses, written in English. The IAA submission refers to only one court summons and claims that this was served on the applicant’s family, and proves that the applicant remains a person of adverse interest to the Sri Lankan authorities.
11. In the first document, a “Summons for a Witness to Give Evidence”, key details are illegible or missing from the document, including the name and addresses of the accused, and the witness required to give evidence. The particulars of the alleged offence are unclear but appear to state the accused has failed to attend court, and the summons appears to be dated 2015. The second document, a “Summons/Notice to an Accused Person” is somewhat more legible and the accused appears to be the applicant (albeit a different version of the applicant’s name in English), with the summons addressed to his wife. The particulars of the alleged offence state that the accused has failed to attend to the court, and is dated 2014.
12. As noted above, the applicant was unrepresented during his SHEV interview, however his SHEV application, for which he received legal assistance to prepare, was lodged in 2016, at least one year after these summonses were purportedly issued. While the applicant’s claim to be a person of interest to the Sri Lankan authorities is central to his claims for protection, there is no explanation before me as to why he did not provide these documents before the delegate’s decision, or even mention their existence. Furthermore, noting the form and content of these documents, I have serious concerns with their authenticity. In the circumstances I am not satisfied exceptional circumstances exist to justify consideration of this new information, nor has the applicant satisfied me as to either of the matters in s.473DD(b).
13. Also attached to the IAA submission is a “Navitiy Certificate” (sic), dated April 2017, which certifies that the applicant’s wife and [children] are Sri Lankan refugees residing in Tamil Nadu, India. There is no letterhead on the document and it is signed and stamped by an unidentified person. During the SHEV interview the applicant consistently claimed that his family relocated to India in mid-2013, and that they remain there. I have accepted this claim, and the document adds no more. In the circumstances I am not satisfied exceptional circumstances exist to justify consideration of this certificate.

Applicant’s claims for protection

14. The applicant’s claims can be summarised as follows:

- In [year] the applicant was born in Trincomalee, Eastern Province, Sri Lanka.

- Between 1986 and 1989 the applicant and his family resided in Tamil Nadu to avoid the ongoing civil conflict in Sri Lanka.
- In 1989 the applicant and his family spent a year in Trincomalee, but as it was still not safe for Tamils, they decided to return to Tamil Nadu.
- In 1998 the applicant and his wife were married in a Tamil Nadu refugee camp, where the applicant's [children] were subsequently born.
- From 2000 onwards the applicant's parents and siblings began to return to Sri Lanka.
- In 2006 the Criminal Investigation Department (CID) detained the applicant's brother, Brother B, on suspicion of LTTE links and he was later released.
- In 2007 the CID detained the applicant's other brother, Brother K, for eight months on suspicion of LTTE links and he was later released. Brother K has since obtained refugee status in [Country 1].
- In June/July 2011 the applicant, his wife and [children] returned to Sri Lanka. Upon arrival at Colombo airport the CID questioned them about a relative of the applicant's wife. The relative's name was Mr T, and he had been with the LTTE. After several hours the family were released and returned to the applicant's home village.
- The next day the CID came to the applicant's house and again questioned them about Mr T.
- Two weeks later the CID ordered the applicant to attend an interview, where he was asked the same questions about Mr T. One month later the applicant was ordered to attend another interview. On both occasions the CID threatened the applicant with a gun and said that if he didn't tell the truth he would be killed.
- The CID began to visit the applicant's house each month and ask him and his wife more questions about Mr T. The CID also threatened the applicant whenever they saw him in the street.
- The Sinhalese people in the applicant's village were also causing problems for him and his father by cutting their fishing nets.
- A cousin of the applicant's wife, who had also returned from India in 2011, went missing while in CID custody.
- In 2012 Brother B attempted to depart Sri Lanka illegally but was arrested and released on bail.
- The applicant's uncle, Mr P, was involved with the Tamil National Alliance (TNA).
- In October 2012 the applicant and Brother B departed Sri Lanka illegally by boat.
- In November 2012 the CID accused his wife and other Tamils of being LTTE supporters because they conducted a religious ceremony on an important LTTE anniversary.
- In June 2013 the applicant's wife returned to India with their children. Soon after they left the CID made enquiries with the applicant's parents.
- The applicant's parents have told him that a "white van" is regularly seen in their village and that unidentified people, possibly CID, still detain Tamils who are never seen again.
- The applicant fears the Sri Lankan authorities, and Sinhalese people, will detain, interrogate, torture or kill him because: he is a Tamil fisherman from the east; he has familial LTTE connections; his uncle was in the TNA; his wife is a person of adverse interest; and in 2012 he departed Sri Lanka illegally.

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 has been consistent in stating his identity since his arrival in Australia. In support, he has provided a certified copy of his Sri Lankan national identity card and a copy of his Sri Lankan birth certificate, with an English translation. The applicant has also provided his United Nations High Commission for Refugees (UNHCR) identification documents issued in India. On the basis of the information before me I am satisfied the applicant’s identity is as claimed and that Sri Lanka is the receiving country for the purposes of this assessment.
18. The applicant is from Trincomalee, Eastern Province, which although primarily under the control of the Sri Lankan military authorities, was an LTTE active area during the civil war (1983-2009). Historically many Tamils, particularly in the north and east of Sri Lanka, reported being monitored, harassed, arrested and detained by security forces under the former Rajapaksa government.¹
19. I accept from 1986 until 1989 the applicant and his family resided in India as refugees, due to the ongoing civil war in Sri Lanka, and then returned to Sri Lanka for one year until they relocated to India again. I accept that while in India the applicant met his wife, that their [children] were born there, and that in June/July 2011 the family returned to Sri Lanka with the assistance of the UNHCR. I accept that upon arrival at Colombo airport the CID questioned the applicant and his family for several hours. The Department of Foreign Affairs and Trade (DFAT) indicates that different government agencies at Colombo airport, including the CID, interview

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

Sri Lankan returnees and check their identity documents, as well contact their claimed home area (including former neighbours) and check criminal and court records.²

20. The applicant has claimed that his wife's home village [was] a known LTTE area during the civil war and that he and his wife were questioned about her relatives from the area, including Mr T, while at the airport. The applicant has claimed that the following day, the CID came to his house in [Town 1] and continued to interrogate him and his wife about Mr T. The applicant told the delegate that the CID then proceeded to interrogate him "countless times" regarding Mr T, even though the applicant had never met Mr T and consistently told them he had no information to give them. The applicant stated that although he was never arrested, he would often be ordered to attend the CID office where they would question and threaten him with a gun. The applicant told the delegate that when he was out fishing the CID would harass his wife about Mr T.
21. During the applicant's 2012 enhanced screening interview (ESI), which was held several weeks after his arrival in Australia, he was asked a number of questions regarding his reasons for leaving Sri Lanka. Consistent with his written SHEV statement the applicant claimed that the authorities interrogated him upon return to Colombo airport in June 2011, as well as several times after he returned to [Town 1], and that the last time they did so was a month after his return. The applicant confirmed this evidence twice during the ESI interview, and stated that nothing else had happened to him; although some of his wife's relatives who had returned from India had been taken for questioning and were still in detention.
22. The applicant's arrival interview was held one month after his ESI interview. When asked during his arrival interview why he had left Sri Lanka, the applicant responded that he had left because he had a problem with the CID, as he was new to them, and also because of the "white vans". The applicant made no reference to Mr T, or the claim he raised in his SHEV application of being repeatedly interrogated from the time of his return to Sri Lanka until his departure by boat for Australia one year later.
23. When the delegate put these discrepancies to the applicant for comment during the SHEV interview, he reiterated that his claims regarding Mr T were genuine and that the reason he had left Sri Lanka was out of fear of the CID. On the evidence I am satisfied the applicant was given sufficient opportunity to raise the issue of Mr T during his ESI and arrival interviews, but did not do so.
24. The applicant has provided an affidavit from his wife, signed and dated [in] July 2013 in Trincomalee, in which she reiterates the applicant's claims in a general sense (without reference to Mr T) and states that his life is being threatened by unknown persons. The affidavit is written by the applicant's wife, and is extremely vague. I am not satisfied it constitutes reliable evidence to support his claims. I also note the applicant has consistently stated that his wife and [children] were already in India by July 2013.
25. Overall I consider it plausible that when the applicant and his family arrived at Colombo airport in June/July 2011 the CID questioned them for several hours about a range of matters, including family members of the applicant's wife, who was from an LTTE area. However, I consider that the applicant's evidence to the delegate indicated that a greater issue for the Sri Lankan authorities was the family's 21 year absence from Sri Lanka and lack of Sri Lankan identity documents. Overall, I am prepared to accept that the Sri Lankan authorities thoroughly interviewed them at the airport as claimed, and that this process took several hours.

² Ibid.

26. I am also prepared to accept the CID came to the applicant's house in [Town 1] on several occasions to question him regarding his identity and documentation, during the first month after the family's return, because of the length of their absence. I also consider it plausible that the Sri Lankan authorities were suspicious of the applicant because of his profile as a young, undocumented Tamil male at that time. On the evidence however, I consider the applicant has fabricated his claims specifically relating to Mr T, and I am not satisfied that the applicant's wife has a relative called Mr T who was in the LTTE.
27. I accept that as the applicant had spent the majority of his life as a refugee in India, his return to Trincomalee in 2011 was a confronting experience for him. I accept that the length of the applicant's absence from Sri Lanka, and lack of Sri Lankan identity documents, meant he was afraid of the Sri Lankan authorities. I accept the applicant's evidence in his ESI interview that prior to obtaining a Sri Lankan national identity card, which took three months, he was afraid to leave [Town 1] or pass through army checkpoints. I accept the applicant was also apprehensive about the safety of his wife and [children] because of the army presence.
28. During the applicant's SHEV interview he confirmed to the delegate that once he had obtained his national identity card he resumed fishing with his father on his father's boat, and did not face any problems when they interacted with the authorities to obtain the requisite fishing passes.
29. Country information indicates that in the immediate post war period the Navy tightly regulated and patrolled the fishing industry in the north and east of Sri Lanka which created tension between the Sinhalese and Tamil fishing communities.³ I consider it plausible that Sinhalese people in the applicant's home area may have cut some fishing nets belonging to him and his father; however there is no information before me as to how many times this occurred or what the consequences were for the applicant. I note the applicant continued work as a fisherman until his departure from Sri Lanka in October 2012 and he has not claimed any other adverse experience relating to his occupation.
30. The applicant has also claimed that in 2006 the CID detained Brother B on suspicion of LTTE links, and in 2007 the CID detained Brother K for the same reason, and that both were subsequently released. Country information before the delegate indicates during this period of the civil war the Sri Lankan authorities were particularly suspicious of young Tamil males, and given they resided in the highly militarised Trincomalee area, I consider it plausible that the applicant's brothers were detained as claimed. I accept the applicant's evidence to the delegate that neither he, nor anyone else on his side of his family, were involved with the LTTE. I accept that Brother K has since successfully sought asylum in [Country 1]. I also accept that Brother B attempted to depart Sri Lanka illegally by boat in 2012 and was intercepted and jailed, but was able to depart Sri Lanka successfully with the applicant in October of that year.
31. The applicant has claimed that his wife's home village [where] she and her family resided prior to relocating to India in 1990, was a known LTTE area. As discussed above, I accept that upon return to Sri Lanka in 2011 the authorities at the airport questioned the applicant and his wife about their origins, and that they asked her for information on particular family members from her village. I also accept the applicant's claim that the CID detained his wife's cousin in 2011 after his return from India and he has not been seen since. The applicant has submitted a complaint letter with his SHEV application from Sri Lankan HRC to the Terrorist Investigation Division seeking information regarding the detention of an individual. The applicant did not specify the name of his cousin-in-law, however I am prepared to accept that he is the person

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

mentioned in the letter. The applicant has not claimed that the authorities ever targeted him in relation to the matter of his wife's cousin.

32. The applicant has claimed that approximately a month after his departure from Sri Lanka by boat, his wife was hosting a religious ceremony in her house, which happened to be on the same day as an important LTTE celebration. The Sri Lankan authorities arrived, kicked over some lamps and accused those in attendance of supporting the LTTE. I accept that this occurred, however I have serious concerns with the applicant's suggestion that his wife is a person of interest to the Sri Lankan authorities because of it.
33. In his written SHEV statement the applicant has claimed that following this incident his wife left Sri Lanka and returned to India, as she was scared the CID would detain her on suspicion she had LTTE involvement. However, during the SHEV interview the applicant suggested his family left Sri Lanka because the authorities were harassing them about the applicant's whereabouts.
34. The delegate put to the applicant that on two occasions in April and May 2013, while he was in Australian immigration detention, he had confirmed to his case manager that his family were safe and well in Sri Lanka, and did not mention that they were making arrangements to depart because they feared adverse attention from the Sri Lankan authorities. The applicant responded that his case manager had never asked him about any specific problems his family might be facing, however I do not consider this to be a convincing explanation.
35. The applicant also told the delegate that because two of his [children] were under twelve, both parents' signatures were required on their passport applications, and his wife paid an agent to circumvent this requirement, which I accept. The applicant has not claimed that the passports were otherwise fraudulent, or issued in names other than those of his wife and [children]. In light of the country information cited above regarding the thorough procedures in place at Colombo airport to identify persons of interest, I consider the ability of the applicant's family to depart Sri Lanka on these passports in June 2013 further undermines his claim that his wife was of adverse interest to the authorities because of him, her family's origins in an LTTE area, or her own activities.
36. During the SHEV interview the delegate asked the applicant to elaborate on his written claim that one of his uncles, Mr P, was a member of the TNA. The applicant stated that Mr P's job was to gather people for TNA meetings and distribute propaganda. The applicant has also provided a letter with his SHEV application, dated [January] 2013, from the 'Ilankai Tamil Arasu Kadchi' (ITAK) which states that Mr P was an ardent supporter of their political party during recent parliamentary and local government elections and because of this was threatened by an unknown armed group. The letter also notes many party members and supporters have been killed or abducted in recent years, and that Mr P has left Sri Lanka because there is no guarantee for his life.
37. When the delegate questioned the applicant about Mr P he appeared to indicate he was no longer involved with the TNA but did not mention that he had left Sri Lanka, which I consider to be a significant detail. The applicant added that he himself was not involved with the TNA and had never voted because he had been in India, and that he considered the greater risk to his own life came from his connection to Mr T, not Mr P. On the evidence I am prepared to accept Mr P was a low level TNA/ITAK member, who may have faced some threats, however I am not satisfied that Mr P has left Sri Lanka or that the applicant has any sort of profile as a result.

38. Overall, on the evidence before me, I am not satisfied the applicant was a person of interest to the Sri Lankan authorities at time of his departure from Sri Lanka by boat. The applicant has claimed that since his departure from Sri Lanka in October 2012, and his wife's departure in June 2013, the Sri Lankan authorities have questioned his parents and that his wife is required to report to the police upon her return. However, as I am not satisfied that the applicant and his wife are persons of interest to the authorities, I do not accept that this has occurred. The applicant has claimed that since he has been in Australia his parents have told him about a white van which is regularly seen in their village and that unidentified people, possibly the CID, still detain Tamils for questioning. On the evidence, I am not satisfied that this is linked to the applicant's situation and I note his parents and sisters continue to reside in Sri Lanka without incident.
39. The 2012 UNHCR Guidelines, issued around the time the applicant's departure from Sri Lanka, did not specify individuals of Tamil race as requiring protection at that time, for that reason alone. Furthermore, in the UNHCR's opinion, individuals originating from an area where the LTTE were previously active, such as the applicant, did not require protection solely on that basis unless there were additional, relevant factors which may have given rise to a profile of risk.⁴
40. I note the UNHCR also identified in 2012 family members of persons with certain links to the LTTE, as potentially in need of protection.⁵ I have accepted two of the applicant's brothers were detained for a period of time during the civil war on suspicion of LTTE links and released before the war ended in 2009, noting the applicant has not claimed to have experienced any problems because of his relationship to them. I have accepted the applicant and his wife were questioned by the Sri Lankan authorities at Colombo airport in 2011, and again shortly after their return to their village, regarding a range of matters including his wife's relatives who were from an LTTE area. I have also accepted the applicant's cousin-in-law was detained after he returned from India in 2011, and that he is still missing; however, for the reasons discussed above, I do not accept that Mr T exists. There is no credible evidence before me that any of relative of the applicant's wife was actually involved with the LTTE, despite their place of origin, and I am satisfied that the enquiries the authorities made with the applicant and his family upon their return were routine only. Overall, I do not accept the applicant would now be imputed with any LTTE association because of his brothers' experiences or because of his wife's origins in a known LTTE area.
41. Approximately five years have now passed since the publication of the UNHCR Guidelines and the country information before me indicates the situation in the north and east of Sri Lanka has continued to improve. The Sirisena government has replaced the military governor of the Northern Province with a civilian administration as a confidence-building measure to address the grievances of the Tamil community, and the monitoring of individual citizens in the north and east of the country, while still occurring, has reduced.
42. The country information before the delegate does not indicate that TNA supporters or members are being targeted; and since the applicant's departure from Sri Lanka in October 2012, the TNA has become increasingly accepted as a player in the national political process. In the 2015 parliamentary elections the TNA won 16 seats and the TNA leader was appointed as Opposition Leader, the first Tamil politician in that position in 32 years. The TNA also holds the

⁴United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁵ Ibid.

majority of seats in the Northern Provincial Council.⁶ The 2015 elections were widely considered the most peaceful and orderly in Sri Lanka's recent history.⁷

43. Furthermore, the situation for Tamil citizens' land and fishing rights in the north and east has improved since the applicant was last in Sri Lanka and DFAT assesses that the reconstruction of the Northern Province's agriculture and fishery sectors has resulted in broad benefits for Tamil citizens' land and fishing rights.⁸ While I accept there are still issues in Sri Lanka's fishing industry and tension between the Navy and fishermen in patrolled waters, the country information before the delegate does not indicate that Tamil fishermen are being targeted.
44. In 2016 the UK Home Office assessed that: "A person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidences past membership or connection to the LTTE unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport."⁹ The applicant has not been in Sri Lanka since the current government came to power and there is a lack of credible evidence to indicate he was, at the time of his departure, or will be on return, of adverse interest.
45. I am not satisfied the Sri Lankan authorities, or Sinhalese people, will target the applicant, or otherwise impute him to hold a pro-LTTE, or anti-Sri Lankan government political opinion because of his status as a Tamil fisherman from the east, his extended residence in India, his uncle's TNA involvement, or his familial connections (including his wife's place of origin). Based on the applicant's personal circumstances, and the greatly improved country information, I find the applicant does not face a real chance of harm for these reasons, should he return to Sri Lanka.

Returning Asylum Seeker from Australia – Illegal Departure

46. I accept the applicant departed Sri Lanka illegally in October 2012 and sought asylum in Australia.
47. I note DFAT assesses the risk of mistreatment for the majority of returning asylum seekers to be low and the country information before me does not support a finding that the applicant will be imputed with an anti-Sri Lankan government political opinion simply because he, a Tamil, sought asylum in Australia, a western country.¹⁰ I have found the applicant is not of any interest to the authorities, and overall I am not satisfied that the applicant faces a real chance of harm on account of him having sought asylum in Australia.
48. The applicant departed Sri Lanka without a passport and, as noted in the delegate's decision, persons who depart Sri Lanka illegally ('illegal departees') can be penalised under the Immigrants and Emigrants Act (I& E Act) upon return. Country information before the delegate indicates that persons who have departed Sri Lanka illegally may face penalties that can include imprisonment and fines although in practice, penalties are applied to such persons on a discretionary basis and can be paid by instalment, with the accused then free to go.¹¹

⁶ Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508

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

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

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

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

¹¹ Ibid.

49. Illegal departees who are charged under the I&E Act can remain in police custody at the airport for a short period after arrival, and should a magistrate not be available before this time – for example, because of a weekend or public holiday – may be held at a nearby prison. Whether such a loss of liberty, such that the applicant may face under the I&E Act processing, would constitute serious harm is a qualitative judgment, involving the assessment of matters of fact and degree; as well as an evaluation of the nature and gravity of that loss of liberty.¹²
50. With reference to the applicant’s particular circumstances, I have found he was not of interest to the authorities at the time of his departure from Sri Lanka, or that he was anything other than an ordinary illegal departee. Accordingly, while I accept there is a real chance the applicant will be questioned, fined, and held briefly as part of the re-entry process, I do not accept he would face greater scrutiny or penalty upon return than other illegal departees. On the evidence before me I am not satisfied that any routine questioning at the airport upon return, which all illegal departees undergo, amounts to serious harm.
51. I am also not satisfied that the payment of a fine, or being held in detention for a period of up to 24 hours at the airport, or possibly a nearby prison for a brief period, cumulatively amounts to serious harm for this applicant. Country information indicates that the applicant may experience poor conditions if imprisoned for this brief period, as the result of ageing prison infrastructure, overcrowding and shortage of sanitary and other basic facilities.¹³ However I am not satisfied that such conditions of themselves, in this case, constitute serious harm as defined by the Act.
52. If the applicant pleads not guilty, he will be released on his own personal surety. I note in some cases a family member is required to collect illegal departees who are released, or to act as a guarantor if personal surety is not granted.¹⁴ There is no evidence before me to suggest a member of the applicant’s family would not be available to go to Colombo, or act as guarantor, if this is indeed required.
53. I am not satisfied on the evidence that even if he pleads not guilty, there is a real chance he will be detained any longer than a brief period.
54. Furthermore, the country information before the delegate indicates the I&E Act applies to all Sri Lankan citizens, and is not discriminatory on its face or in its application. A generally applicable law will not ordinarily constitute persecution¹⁵ and I am satisfied that the law itself, and application and enforcement of the law, in this case does not amount to systematic and discriminatory conduct.
55. As such I find the treatment the applicant will face as a consequence of the application of the I&E Act is not persecution within the meaning of s.5J(4) of the Act.

Refugee: conclusion

56. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

¹² *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610

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

¹⁴ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105

¹⁵ *Chen Shi Hai v MIMA* (2001) CLR 293

Complementary protection assessment

57. 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

58. 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.

59. I accept in 2011 the Sri Lankan authorities questioned the applicant and his family when they first returned to Sri Lanka after 21 years in India, because they were suspicious of the applicant. I accept the applicant's brothers were detained during the civil war on suspicion of LTTE connections and that his uncle was a TNA member/supporter. I also accept the applicant's wife was from a known LTTE area and that her cousin went missing in CID custody. I accept the applicant faced some issues with Sinhalese fishermen. However I have not accepted that the applicant, a former resident of India, a Tamil fisherman from the east of Sri Lanka, and an asylum seeker, with these experiences, would face a real chance of harm in relation to these reasons upon return. For the same reasons I also find there is not a real risk he will suffer significant harm.

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

61. DFAT has reported that detainees are not subject to mistreatment during processing at the airport.¹⁶ The applicant may be required to spend approximately 24 hours in police custody at the airport, or possibly a nearby jail, to resolve his offences under the I&E Act. Country information indicates that Sri Lankan prison conditions do not meet international standards due to old infrastructure, gross overcrowding, and a shortage of sanitary and other basic facilities.¹⁷ I am not satisfied this, or the imposition of a fine, would amount to the arbitrary deprivation of life, the death penalty or torture. I am also not satisfied there is an intention to 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

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

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

degrading treatment or punishment. I find there is not real risk of significant harm on this basis.

62. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.

Complementary protection: conclusion

63. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.