



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03874

Date and time of decision: 22 June 2018 15:09:00
A 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. On 6 January 2016, the referred applicant (the applicant) applied for a Safe Haven Enterprise (subclass 790) Visa (SHEV). The applicant claimed to fear persecution from the Sri Lankan authorities, in particular the Sri Lankan Army (SLA) because he is a Tamil from Jaffna, and because of an imputed political opinion as a supporter or former member of the Liberation Tigers of Tamil Eelam (LTTE).
2. On 1 November 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the applicant a SHEV because she found the applicant is not a person in respect of whom Australia has protection obligations.

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. On 21 November 2017, the IAA received a submission from the applicant. A proportion of it addresses the delegate's decision and findings, as such, it is not new information and I have had regard to those elements of it.
5. The 21 November 2017 submission also contained two new claims, which are:
 - a. the applicant's father was killed by the army
 - b. should the applicant be returned to Sri Lanka as part of a larger group of Tamil asylum seekers and one member of the group attracts adverse attention for whatever reason, members of the group are likely to be affected which could expose them as persons of interest, particularly Tamil asylum seekers returning en masse, they could all be imputed with a political opinion they do not hold.
6. I am not satisfied that there are exceptional circumstances to justify considering this new information. The applicant has not previously claimed his father was killed, but that he is alive and lives in Jaffna district in Sri Lanka. I note the applicant has claimed his brother was killed by the army in a motorcycle accident, so it is possible this new claim is actually a typographical error. Particularly because there is no further detail or any other information accompanying the claim that the father was killed by the army. The second new claim is based on DFAT information which is not new. If the issue of group processing and an imputed political opinion was a real concern to the applicant, this claim would have been made when he was interviewed in January 2017, or before the decision was made in November 2017. I am not satisfied that s.473DD(a) is met.
7. The submission also contains copies of new country information, as follows: UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", Version 5.0, June 2017; ABC News report, "Dozens of men say Sri Lankan forces raped and tortured them", not dated, but appears to have been accessed in November 2017; Human Rights Council, "Report of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 27 February – 24 March 2017.

8. I am not satisfied that there are exceptional circumstances to justify considering the new information. While the ABC News report appears to post-date the delegate's decision, the other two copies of new country information are from before the decision was made. There are two UK Home Office reports already before me about the LTTE and Tamil separatism from March 2017: the report of the fact finding mission, and the country policy and information note. The new information includes information about the historical and political context, allegations of torture committed by Sri Lankan authorities, impunity for past crimes relating to the war, allegations and reports of torture committed in recent years by the Sri Lankan police, progress with the reform process and current challenges, detention conditions, and the situation for returnees to Sri Lanka with past involvement with the LTTE or perceived involvement. The information is similar in content to country information already before me, including information the applicant gave after the SHEV interview. Additionally, the quality of the ABC News report about more recent claims of torture (accessed in November 2017) is a poor copy because parts of the report are missing or blanked out, and for this reason I consider it not to be reliable, and there are other sources of information about claims of torture after the war ended and the treatment of persons perceived as LTTE, which are already before me. I am not satisfied that s.473DD(a) is met.
9. On 25 November 2017, the IAA received an additional submission from the applicant. All of it addresses the delegate's decision and findings, as such, I do not consider it to be 'information' and I have had regard to it.
10. I have decided to get new information. The new information is the DFAT country information report on Sri Lanka, dated 23 May 2018,¹ which was published about seven months after the delegate made her decision. This report provides more recent information on the situation in Sri Lanka than DFAT's January 2017 report, which the delegate relied upon. I am satisfied that exceptional circumstances exist to justify considering the latest DFAT report.

Applicant's claims for protection

11. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan Tamil of the Hindu faith from Jaffna district, Northern Province. His mother, father [and siblings] all still live in Jaffna district.
 - Where he grew up was an army controlled area that was badly affected during the civil war. Mines exploded regularly. There were several attacks carried out by the LTTE in his home area. Sri Lankan authorities targeted Tamils living in his area because they believed Tamils supported the LTTE, and he too was affected in many ways while growing up.
 - He has been psychologically affected by the conflict.
 - In around 1997, his [relative] was killed by the navy on the sea because of his political opinion.
 - Towards the end of the war, in 2009, he was targeted many times by the authorities on suspicion he was LTTE. He was caught up in many round ups. The SLA would take their National Identity Cards (NICs) and tell them to come to the army camp to collect the NICs. When he went to collect his NIC he was often questioned and threatened.

¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

- Approximately three months prior to leaving Sri Lanka, the SLA found a cache of arms in a location close to where he lived. A round up was conducted, his NIC was taken, and he was told to report to the army camp, which he did. For about an hour he was questioned intensely about whether he knew who was responsible for storing the weapons, and then allowed to return home.
- Although the war has ended, there remains a high military presence in the north and when incidents occur, authorities expect persons like him to provide information (to identify former LTTE cadres; who buried the weapons), and there is a risk of being harmed by the authorities for this reason. There is no protection for Tamil males.
- In September 2012, he departed Sri Lanka by boat for Australia.
- In March 2016, his brother was killed in an accident, which his family believe to be a conspiracy, that is, the army or people working with the army are responsible, because his brother was a supporter of the Tamil National Alliance (TNA).
- Failed Tamil asylum seeker returnees are still being targeted by the authorities despite the war having ended in 2009.

Factual findings

12. I accept the applicant is a Sri Lankan Tamil of the Hindu faith from Jaffna district, Northern Province based on the identity documents he has provided, and that his mother, father [and siblings] continue to live in Jaffna district. I find that Sri Lanka is the applicant's receiving country.
13. I accept that Jaffna district was controlled by the army during the war and that it was badly affected, including through bomb explosions and attacks by the LTTE. I also accept that Sri Lankan authorities targeted Tamils because they believed Tamils supported the LTTE. Country information supports that the war started in 1984, and the SLA launched a military operation in July 1995, which culminated in the fall of Jaffna in December 1995 to Government forces, but that it was not long before the LTTE infiltrated back into the Jaffna Peninsula, and fighting continued until the war ended in May 2009, although there were peace talks and a ceasefire agreement signed in 2002.² The applicant's examples of how he was personally affected during the war include his [relative's] death in around 1997, and being subjected to military round ups, having his identity checked, being questioned about LTTE involvement, and a lack of freedom.
14. I accept the applicant, who was born after the war had started and lived during the war in the Jaffna district, would have been psychologically affected by the conflict. However, the applicant has not provided any medical evidence of a diagnosis relating to a mental health condition. The delegate asked the applicant about his mental health during the SHEV interview, and whether he had sought any treatment / counselling and the applicant said he saw a counsellor while in immigration detention but not since, he has been involved in many activities, like playing soccer, and he has not thought about attending to the counselling.
15. I accept that in around 1997 the applicant's [relative's] dead body washed ashore in Jaffna. This claim arose during the SHEV interview when the delegate asked the applicant about his claim to have been mentally affected by the conflict. The applicant said his [relative] went fishing and on his way he was cut and killed on the sea and then his body came to the shore. The applicant said his [relative] was killed by the navy on the sea, since he was small he had

² UK Home Office, "Sri Lanka March 2012", 07 March 2012, 3523.

always been with his [relative], he was very fond of him, and his demise affected him mentally. I note the applicant would have been about [age] years old at the time. The delegate noted it was a sensitive topic and the applicant said he was a bit upset, so they did not discuss the details. However, the applicant has not otherwise given any detail about the death of his [relative]. I do not accept the claim that it was the Sri Lankan Navy who killed the applicant's [relative]. The applicant did not give any detail to support this claim, in writing or verbally. I am satisfied that the applicant has speculated that it was the Sri Lankan Navy, but that he does not know who is responsible for the death of his [relative].

16. I accept that towards the end of the war, in 2009, the applicant was subjected to a number of round ups by Sri Lankan authorities, in particular the SLA. Given country information³ about the final stages of the war, including that government troops regained control of the A-9 highway and captured the entire Jaffna peninsula by January 2009, the application of emergency laws, and checkpoints and cordon and search operations were a part of life for Sri Lankans during the war, I am satisfied that at this time, the SLA would have suspected a young, single Tamil male living in Jaffna district to be involved with the LTTE, or to be LTTE. I accept the SLA took his NIC and told him to come to the army camp to collect his NIC, as they did with others at the time, and that when he went to collect his NIC he was often questioned. I note the applicant did not claim to suffer any physical harm as a result of these round ups and questioning, just that he was suspected of being LTTE, that he had no freedom, and the military presence was a constant threat to them. The applicant spoke convincingly about this claim in his SHEV interview, about being questioned about involvement with the LTTE, about weapons, and at the end, having his NIC returned to him and being released. As to the constant threat, the delegate asked what these threats were, but the applicant did not detail any specific threats made to him by the SLA. The delegate asked the applicant if he had ever had any connection or affiliation with the LTTE, and he said no. The delegate asked what about his relatives, brothers, sisters and parents, and the applicant said, until he came here nothing happened, no, but his brother who passed away was working for the TNA after he left. I find the applicant was questioned by the SLA about his identity and his involvement with the LTTE during the final stages of the war because he was a young, single Tamil male, and that he was suspected of LTTE involvement by the SLA, but he was not of any ongoing interest to the SLA after each occasion when he was questioned and released.
17. I accept that approximately three months prior to leaving Sri Lanka, in around June 2012, the applicant was the subject of another round up in connection with the SLA having found a cache of arms in a location close to where he lived. The applicant claimed his NIC was taken, and he was told to report to the army camp, which he did. I consider this claim is supported by general country information, including that in August 2011 a senior military official from the SLA based in Jaffna informed the British High Commission in Colombo that occasionally the SLA discovered caches of arms, and it was reported that in the immediate years after the war there was an obvious large military presence in Jaffna.⁴ I consider that if weapons had been found in 2012, the military would be asking questions about them. During the SHEV interview, when asked for more information about the round up, the applicant first spoke in general terms, and said that when the round ups take place, if they are not at home, then they will collect their identity card and instruct that they should go to the army camp, and when they go to the army camp they will be questioned. The applicant said the last round up he experienced was the one in 2012, three months before he left Sri Lanka, when they found

³ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, *Danish Immigration Service*, 01 October 2010, CIS19345; UK Home Office, "Sri Lanka March 2012", 07 March 2012, 3523.

⁴ UK Home Office, "Sri Lanka March 2012", 07 March 2012, 3523.

weapons in a dilapidated house situated [a distance] away from his house, and they were called in for an inquiry, and during the inquiry they asked them how these weapons were brought to that house, and after severe investigation they were released. The investigation lasted one hour. When asked whether he recalled the specific questions he was asked, the applicant said they were asking about the arms that they found and they asked them about the arms and further they asked about whether they had any involvement with the LTTE, and he said no, "I am [an occupation], I come home in the afternoon after work". I note the applicant claimed in writing, when he arrived and in his SHEV application, to have worked as [an occupation] from 2005 to 2008, and from 2008 to 2012 he did [work] for a [business]. The delegate asked the applicant if he had any other major incidents or other experiences in relation to the military presence after the war ended in 2009, other than this claimed experience in 2012 three months before he departed Sri Lanka, and the applicant said no. I consider it is possible the applicant got confused about what he said to the SLA during this questioning and mixed it up with what he might have said in the past, when he was [an occupation]. Given the applicant was otherwise convincing, I am prepared to accept this incident happened. Given the applicant was released after one hour, and based on his evidence that nothing else happened to him, I find the applicant was no longer of any interest to the SLA in connection with the weapons and suspected LTTE involvement when they released him.

18. I accept that in late August 2012, the applicant left Jaffna and in September 2012, he departed Sri Lanka by boat for Australia.
19. I accept that in March 2016, the applicant's [brother] died in an accident in the Jaffna district. The applicant raised this claim during the SHEV interview, and gave a copy of a media report of the accident and his brother's death certificate. The applicant has claimed that his family believe his brother's death not to be an accident but a conspiracy, that is, the SLA or people working with the SLA are responsible, because his brother was a supporter of the TNA. The delegate asked the applicant to describe the accident to him. When first describing the accident involving his brother, the applicant said that while running, he appears to have been killed by a vehicle, the body was lying on the ground, it appears that his brother and his friend were returning from the temple and it appears that the vehicle which came from behind knocked them down and vanished. The accident took place near [a location], on the way back from the temple, but so far they have not identified the vehicle which knocked them down. The delegate asked the applicant if his brother was on the road at the time when he was knocked down, and the applicant said yes, and it was [in] March 2016, his brother and his friend both died on the spot. He does not have a police report about this. The applicant said that [another] brother sent him the media report (he provided the original and an English translation) about his brother's accident. The delegate asked him to describe the media report to him, he said it was from a local newspaper, published the day after the accident, and he read the report out to the delegate, as follows: two youngsters died, very pathetically died, because of the vehicle which lost control, the vehicle accident occurred at [a] junction, two youngsters got killed in a tragic accident that happened at [a] junction, a motorbike lost control and smashed with an electricity pole and two people died. The delegate said, so it was a motorcycle, and the applicant said, but when I spoke to my parents, mum, they described this. At this point the applicant was not clear, and the delegate sought clarification, and the applicant said, this happened like that, and it is completely believed that this was a planned killing because he was attached to the political party.
20. The applicant subsequently described the accident in a manner that more closely matched the media report. He said it was his brother's friend who rode the motorbike and his brother was the passenger on it. When questioned by the delegate, the applicant did not have any

information about his brother's role in the TNA. He did not offer any information as to why his brother may have been targeted by the SLA or others working with the SLA. The applicant's agent argued it would be unreasonable to expect the applicant to know much about what happened to his brother. The agent stated at the end of the interview that this accident happened after the applicant's brother was returning from a religious festivity or function and he had travelled to an area which is in a high security zone, and had passed through the army controlled area, and this is when the accident happened. That they do not have any other information, other than what the applicant said in his interview.

21. The applicant came to the SHEV interview prepared to discuss his brother's death and political support as part of his claims for protection in Australia given it was the key issue he raised at the start of the interview, which he wanted to add to his claims to be considered, and he brought supporting documentation with him. The applicant told the delegate at the start of the interview that he had regular contact with his family. The death of his brother occurred approximately ten months before his SHEV interview. I consider the applicant had sufficient time before the interview to learn from his parents about his brother's death and any involvement with the TNA. I consider it reasonable to expect the applicant would have relevant information to provide during the SHEV interview about his brother's death and claimed political involvement. However, the applicant's initial description of his brother's accident did not match the media report, which is about a motorbike losing control and there is no mention of another vehicle crashing into the two persons on the motorbike and leaving the scene. The media report does not name the two young men who died. The applicant did not have any information about his brother's involvement with the TNA to support the claim that he was targeted by the SLA or persons working with the SLA because of his involvement with the TNA. He said he did not know in detail about his brother's role with the TNA, but he was told that he was studying advanced level and he was working for the TNA. Based on the death certificate, and the media report, I find the applicant's brother died in a motorbike accident when the motorbike lost control and [crashed], as stated in the media report. I am not satisfied the applicant's brother was a supporter of the TNA and that his death was a targeted killing by the SLA or persons working with the SLA.
22. I note that in the applicant's post interview submission to the delegate it was stated that: recent information published online indicates that the need to register / "registration" of Tamils residing in 14 divisions in the Batticaloa district, an area where the applicant originates from has once again commenced. However, the applicant has not claimed to have originated from Batticaloa. The applicant has only ever claimed to have come from and resided in Jaffna district, Northern Province, and that he spent about three months [also] in the north, in 1994 due to his family having been displaced during the war. I am satisfied that the reference to Batticaloa is an error of fact in the post interview submission.
23. I accept the applicant was not a member of the LTTE, but that he was perceived to be involved with the LTTE during the war because he was a young Tamil male living in Jaffna. I find the applicant was subjected to round ups and questioning, but that he was not physically harmed or mistreated as a result of the round ups and questioning conducted by the military during the final stages of the war in Sri Lanka, and once after the war had ended in about June 2012. I find the applicant was not of any real interest to the Sri Lankan authorities for any connections with the LTTE, after having been questioned and then released during the war, and again in June 2012. I find that when the applicant departed Sri Lanka he was not of any interest to the Sri Lankan authorities, including the SLA, in connection with the former LTTE.

24. I find the applicant's [relative] died in 1997, fifteen years before the applicant left Sri Lanka, and I note the applicant did not claim to fear harm from the Sri Lankan authorities based on his [relative]'s past. I also find that the applicant's brother died in March 2016 as a result of a motorbike accident, and he was not in the TNA and his death was not the result of a targeted attack by the SLA or persons working with the SLA.

Refugee assessment

25. 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

26. 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.
27. According to country information, the military and security forces maintain a significant presence in the Northern Province, as the applicant claimed, although it has reduced in size since the end of the conflict. It is also reported that the government is reducing High Security Zones.⁵
28. The applicant argued that he comes from a famous location, put on the map by being the place where the LTTE held the first public meeting in 1997 to announce its ceasefire agreement, it is where the LTTE was born and its leader comes from, and that when he produces his NIC the authorities will know that he originates from a certain area within the Tamil majority area which could actually attract adverse attention. However, while it may be the case that in the past a Tamil male from Jaffna district was perceived as LTTE by the Sri Lankan authorities, country information from 2017 no longer supports that there is a real

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

chance of harm for that reason, and the more recent DFAT report from May 2018 does not alter that situation for Tamil males.⁶

29. In March 2017, the UK Home Office was of the opinion that a person being of Tamil ethnicity would not in itself warrant international protection, and 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.⁷ There is no evidence before me of the applicant attending or actively engaging in Tamil separatist or diaspora activities since he has been in Australia, and he did not claim to have been involved in any such activities while living in Sri Lanka, including post-conflict.
30. I found the applicant was subjected to identity checks and questioning in round ups conducted by the military during the final stages of the war in Sri Lanka, and once after the war had ended in around June 2012, and he was not physically harmed or mistreated. I also found the applicant was not of any real interest to the Sri Lankan authorities for any connections with the LTTE, after having been questioned, and then released, during the war, and in June 2012. I found that when the applicant departed Sri Lanka he was not of any interest to the Sri Lankan authorities, including the SLA, in connection with the former LTTE. I find there is not a real chance the applicant will be targeted for any harm by the Sri Lankan authorities, including the SLA, because of a perception he was involved with the former LTTE or was LTTE, or because he is a single Tamil male from Jaffna district in the Northern Province, or at all.
31. I found the applicant's [relative] died in 1997, fifteen years before the applicant left Sri Lanka. The applicant did not claim to fear harm because of his [relative]'s past. I also found that the applicant's brother died as a result of a motorbike accident in March 2016, and he was not in the TNA and his death was not a targeted attack by the SLA or persons working with the SLA. I find there is not a real chance the applicant will face any harm from the SLA or others working for the SLA for any reason related to his deceased brother, or his deceased [relative].
32. The evidence before me, including the more recent DFAT report, does not support a finding that a person will face harm for the reason that they are a Tamil asylum seeker. In 2017, DFAT reported that it was aware of a small number of unverified allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka. However, 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.⁸ 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 returning Tamil asylum seeker.
33. 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 that

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

⁷ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 4.0", March 2017, CISED50AD3779.

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

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.⁹ Taking into account the applicant's statutory declaration for the character test dated 28 December 2015, and all other information he has given, there is no evidence before me that the applicant has any outstanding criminal matters, court orders or arrest warrants. I have no reason to conclude the applicant's name would appear on a "stop" or "watch" list at the airport.

34. The applicant may be charged with an offence under the Immigrants & Emigrants Act for his illegal departure by boat from Sri Lanka in September 2012. If charged, the applicant may spend 24 hours in police custody at the airport, and depending on the availability of a magistrate, if it is a weekend or public holiday, he may be detained for up to two days in an airport holding cell, and not a prison. If he pleads guilty he will be fined and free to go. If he pleads not guilty, he will likely be released on bail until the matter is resolved by the courts. It is highly unlikely the applicant will be given a custodial sentence if found guilty of unlawful departure because information before me is that he was a fare paying passenger on the boat, and not involved in people smuggling.¹⁰ I am not satisfied the questioning and fine for illegal departure amounts to serious harm.
35. There is no information before me specific to the conditions in airport holding cells, as opposed to prisons. However, DFAT does report that the International Committee of the Red Cross (ICRC) has access to all places of detention and all categories of detainees in Sri Lanka, and the Human Rights Commission of Sri Lanka (HRCSL) is also able to access a number of places of detention without restrictions from the authorities, including for unannounced visits.¹¹
36. In any event, the information before me is that detention in relation to an illegal departure is non-discriminatory. The evidence before me does not indicate that the processes and penalties imposed as a consequence of the Immigrants & Emigrants Act are discriminatory on their face or in their application. I am not satisfied they amount to persecution.
37. I accept that the applicant has been psychologically affected by his experiences during the war, in particular his [relative]'s death, and I accept that growing up in Jaffna during the war would impact a person's mental health. However, the applicant has not provided medical evidence of a diagnosed medical condition or that he is being treated for mental health issues. Additionally, while I acknowledge that it may be distressing for the applicant to return to Sri Lanka, this is not a ground for protection in Australia.
38. The applicant does not have a well-founded fear of persecution.

Refugee: conclusion

39. 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).

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105.

¹⁰ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

Complementary protection assessment

40. 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

41. 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.
42. I accept the applicant is likely to be questioned, detained for 24 hours in police custody, and possibly a further two days in an airport holding cell, and fined on arrival or soon after arrival for having departed Sri Lanka unlawfully by sea in September 2012. In relation to the possible period of custody in an airport holding cell, there is no country information specific to the conditions of cells at airports. However, there is external monitoring of all places of detention by the ICRC and the HRCSL. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture for his unlawful departure by sea. Further, evidence does not suggest that the treatment and penalties for unlawful departure under the Immigrants & Emigrants 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 or punishment. I find there is not a real risk of significant harm on this basis.
43. I have concluded there is not a real chance the applicant will face any harm from Sri Lankan authorities, including the SLA, based on a perception he was involved with the former LTTE or was LTTE, nor because he is a single Tamil male from Jaffna district in the Northern Province, , and nor because he is a returning asylum seeker. I also found there is not a real chance the applicant will face any harm from the SLA or others working for the SLA for any reason related to his deceased brother, or his deceased [relative]. I am similarly not satisfied that there is a real risk of any harm, including significant harm on these bases.
44. 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

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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.