



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03881

Date and time of decision: 27 June 2018 10:31:00
J Bishop, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) is a [year] old man that claims to be a national of Sri Lanka and identifies himself as a Christian Tamil. He arrived in Australia by boat [in] June 2013. On 6 April 2017 the applicant applied for a Safe Haven Enterprise Visa (SHEV).
2. On 3 November 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the applicant's visa. The delegate accepted that the applicant is a young Christian Tamil male from an area formerly controlled by the Liberation Tigers of Tamil Eelam (LTTE) and a national of Sri Lanka. However, the delegate determined that the applicant does not have a profile of interest with the Sri Lankan authorities and that he does not face a real chance of serious harm or a real risk of significant harm now or in the foreseeable future in Sri Lanka. Likewise, the delegate determined that the applicant does not have a criminal background and was not of interest to the authorities when he left Sri Lanka. The delegate was satisfied that the applicant does not hold a well-founded fear of persecution on account of being a failed Tamil asylum seeker from an area once controlled by the LTTE who departed Sri Lanka without the knowledge of the Sri Lankan authorities.

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 30 November 2017 the applicant provided an updated statement to the IAA that included the following new claims:
 - His [sibling] was in the LTTE during 2005 and 2006.
 - His business partner [Mr A] was transporting weapons for the LTTE using the shop's vehicle.
 - Officials from the Council came to the applicant's and [Mr A]'s shop to check that [product][waste] was being disposed of hygienically. In the process they began to dig the backyard and found the box containing the weapons.
 - When the applicant heard that the Sri Lankan army (SLA) had come to his home looking for him he fled [city] and reached[town]. He stayed with a person called [Mr B] who helped him leave Sri Lanka.
 - After the applicant left Sri Lanka SLA soldiers have come to his shop five or six times searching for him.
5. Under s.473DC of the Act I am not required to accept new information. New information is information that was not before the delegate and I consider may be relevant. However, even if I accept new information provided by the applicant, I must not, pursuant to s.473DD of the Act, consider that new information unless I am satisfied there are:
 - exceptional circumstances to justify its consideration; and

- the new information was not, and could not have been provided before the delegate's decision was made; or
 - the new information is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
6. There is no suggestion that the new claimed information happened after the delegate's decision or that the applicant only became aware of it after the delegate's decision. At the beginning of the SHEV interview, the delegate advised the applicant that it was his responsibility to raise all his claims and that, if his application was refused, he may not be able to raise additional claims or change the details of his claims at a later date. The applicant was put on notice that he needed to raise all his claims and he was represented. I am not satisfied that the new information could not have been provided before the delegate made his decision. The new information does not meet the requirements of s.473DD(b)(i).
7. Likewise, the applicant's representative attended the SHEV interview and provided post SHEV interview submissions to address the delegate's concerns. The new information about the applicant's [sibling] and the circumstances about how the LTTE weapons were found contradicts the applicant's previous evidence. I find it incredible that if the applicant's [sibling] was involved with the LTTE, if [Mr A] was using the shop's vehicle to transport weapons for the LTTE, if the Council came to the applicant's shop and discovered the weapons and if the SLA continued to visit the applicant's shop after he left Sri Lanka that the applicant would fail to mention those details during his SHEV interview or in his post SHEV interview submissions. Likewise, the applicant has provided no explanation as to why the new information is being provided now. In the circumstances, I am not satisfied that the applicant's new information is credible and it does not meet the requirements of s.473DD(b)(i)(ii). I am not satisfied that there are exceptional circumstances to justify its consideration. I have not had regard to the applicant's new claims.
8. I have obtained the most recent Department of Foreign Affairs and Trade (DFAT) country information report for Sri Lanka under section 473DC of the Act. The report provides general information about Sri Lanka to assist decision makers determining protection claims. The report was published after the delegate made his decision and represents DFAT's most up to date assessment. I am satisfied that there are exceptional circumstances to justify considering that new information.¹

Factual findings

9. I accept the applicant's claims that:
- His father was suspected of having links to the LTTE and was beaten by the SLA in 1997. He died as a result of his injuries in 1998.
 - In 2002 there was peace and the applicant opened a [business]. He employed his friend [Mr A].
 - In 2005 the LTTE demanded taxes from the applicant's [sales] and the SLA demanded free [product]s. The applicant complied.
10. In the applicant's Statutory Declaration dated 1 December 2016 (the Statutory Declaration) he stated that his [sibling] owned an auto and was forced to transport LTTE members at their will.

¹ See section 473DD(a) of the Act.

The SLA found out and targeted the applicant's [sibling]. The applicant's [sibling] fled to Vanni in 2006 and then went to [Country 1] where he still resides. The applicant stated that his [sibling] cannot return to Sri Lanka because he fears the SLA will target him again. During the SHEV interview the applicant stated that his [sibling] was not a member of the LTTE but would help them during the cease fire. He said the LTTE would fix speakers to his [sibling]'s rickshaw and his [sibling] would go through the streets publicising LTTE meetings and other gatherings. His [sibling] had problems with the Criminal Investigation Department (CID) and the SLA and the CID started looking for him. He went into hiding and, at a later date, the applicant found out that his [sibling] had relocated to [Country 1] and cannot return to Sri Lanka. During the applicant's arrival interview he stated that his [sibling] was an LTTE helper and he left when the LTTE left the area in 2006. He said that the SLA was suspicious and would harass and interrogate the applicant because he had paid taxes to the LTTE. His [sibling] went to [Country 1] for work and the SLA enquired about him a couple of times. I accept that the applicant's [sibling] provided some low level assistance to the LTTE during the cease fire and was of interest to the SLA and CID during the conflict. I accept that the applicant's [sibling] went to [Country 1] for work. I accept that the applicant was, during the conflict, interrogated and harassed by the SLA and that the SLA enquired about the applicant's [sibling] a couple of times after he had gone to [Country 1]. However, I am not satisfied that the applicant's [sibling] was ever in hiding or that he cannot return to Sri Lanka.

11. In the applicant's Statutory Declaration he stated that there are groups of LTTE sympathizers and LTTE sleeper groups still in operation in Sri Lanka. The Sri Lankan government are suspicious of Tamils and returning asylum seekers. They maintain SLA camps throughout the country and have checkpoints along the roads to ensure there is no future LTTE uprising. He stated that although he didn't know, his friend [Mr A] was associated with one of these LTTE sympathizers/sleeper groups and transported weapons for them. One day in 2013 [Mr A] couldn't get his weapons through to the LTTE groups because the SLA had set up checkpoints along [Mr A]'s secret transport route. He brought the box of weapons back to their [shop] and [Mr A] told the applicant it contained handguns and weapons. They decided to hide the box in the scrap hole at the back of the shop where they buried [products]. The applicant lived in fear for the next few months hoping the LTTE would come and collect their weapons. Approximately three months later the local Council excavated some of the land behind the market and uncovered the weapons. The SLA was notified and [Mr A] was arrested the next day. [Mr A]'s wife called him the next day and told him that the CID had arrested [Mr A] because of his association with the LTTE. During the SHEV interview the applicant repeated his claims about [Mr A] transporting weapons for the LTTE groups and having to hide some weapons at the back of his shop. He added that he didn't check everything that was in the box but saw that there was a pistol and some bombs.
12. The delegate put to the applicant that he said during his arrival interview that it was the SLA that was clearing the land and that [Mr A] was abducted on suspicion. The delegate put to the applicant that he failed to mention helping his friend [Mr A] bury the weapons or [Mr A]'s involvement with LTTE during that interview. The applicant responded that he had travelled on a boat for 24 days and was told to give short answers. He didn't have time to elaborate. The delegate put to the applicant that his arrival interview was conducted almost a year after he arrived in Australia and he responded that he didn't give all the details at that time. I have listened to the applicant's arrival interview. The applicant was asked why he had left Sri Lanka and was not told to give a short answer. He answered the question over a 12 minute period and was not rushed. He had more than ample opportunities to provide this information. I find it implausible that if [Mr A] came to the applicant's shop with a box full of LTTE weapons and [Mr A] and the applicant buried those weapons together, that the applicant would fail to mention it during his arrival interview.

13. The applicant provided a letter from Mr V Anandasangaree (Secretary General of Tamil United Liberation Front) dated 7 November 2013. The letter stated that the applicant is well known to him and the Sri Lankan police (SLP) wanted to purchase [product]s from the applicant for below cost. The applicant and [Mr A] agreed to sell [product]s [to] the SLP below cost. The SLA then wanted the applicant and [Mr A] to sell [product]s to them at the same price but they refused. He stated that the SLA visited the applicant's house under the pretext of holding an inquiry alleging that the applicant had been supplying [product]s to the LTTE cadres. Mr Anandasangaree stated that one day the applicant's business partner ([Mr A]) was found missing arousing strong suspicion that the SLA was involved. The delegate put to the applicant that the letter indicates [Mr A] was abducted because he was selling [product] to the LTTE and because there was a dispute about price. The delegate asked the applicant why the letter had different reasons for [Mr A]'s abduction and the applicant responded that they had other problems. He said that they were paying taxes to the LTTE and supplying [product]s to both sides. The delegate put to the applicant that he had concerns about the applicant selling [product]s to the LTTE in 2013 because the LTTE ceased to exist in 2009. The applicant responded that they were selling [product]s to the LTTE during the peace process. If Mr V Anandasangaaree knew the applicant well then I find it implausible that he wouldn't be aware that weapons were found behind the applicant's shop as claimed or that the applicant purportedly received a call from [Mr A]'s wife and told that [Mr A] was taken by the CID because of his association with the LTTE.
14. In the applicant's Statutory Declaration he stated that the CID came to his house the night [Mr A] was arrested but he was not home. When he returned his mother told him that the CID had come and that he was to report to CID headquarters at the Malakam camp. He left immediately and went to stay at his[relative]'s home about 10 kilometres away. He then made arrangement to go to [Country 1] and then to Australia. The applicant repeated these claims during his SHEV interview. The applicant provided a letter from his mother dated 24 September 2013 that stated the applicant was engaged in a [business] with his friend. His friend was abducted by certain unknown, unidentified armed youths in 2013 and his whereabouts is still unknown. She stated that these people came to her house looking for the applicant and the applicant went into hiding before going to [Country 1] and then to Australia. She stated that these people are still hunting for the whereabouts of her son.
15. The delegate put to the applicant that his mother's affidavit stated that [Mr A] was taken by unknown unidentified youths and doesn't mention the CID coming to her house asking about the applicant or telling the applicant's mother that the applicant must report to CID headquarters. The applicant responded that his mother provided information about what she knew and she didn't know all the details. His mother continues to live in the same area and is old. She cannot put too much detail about what happened because she needs to be careful. If the CID told the applicant's mother to tell the applicant to attend their headquarters in and around March 2013 I find it implausible that she would not remember or be aware of that detail in November 2013. Likewise, I do not accept that the applicant's mother provided vague details about who came to her house because she continues to live in the area and has to be careful. When the delegate put to the applicant that the situation has improved for Tamils in Sri Lanka he responded that what Sri Lanka shows on the outside is not like it is in Sri Lanka. He said people continue to be killed and it is made to look like an accident. The delegate put to the applicant that he could find no information about a weapons' cache being found or of [Mr A]'s abduction in the Sri Lankan news and the applicant responded that not everything that happens in Sri Lanka is reported.
16. The evidence before me about who discovered the weapons, why [Mr A] was abducted and who abducted [Mr A] is inconsistent. The country information before me indicates that the LTTE ceased to exist in 2009. I am prepared to accept that the applicant and [Mr A] ran a business

selling[product]. I am prepared to accept that there was a dispute between the applicant and [Mr A] and the SLP and SLA over the purchase price of their[product]. I am prepared to accept that weapons were found behind the markets where the applicant's and [Mr A]'s shop was located. However, in the context of inconsistent and implausible evidence I do not accept that [Mr A] was involved with transporting weapons for the LTTE or that he was abducted because of his association with the LTTE. I am not satisfied that [Mr A] was ever abducted. I do not accept that the SLA, CID or unidentified armed youths came to the applicant's house and were looking for him. I find that the applicant fabricated those claims.

17. During the applicant's arrival interview he stated that the SLA detained him, took him to their camps, interrogated him and let him go. He stated that [in] June 2013 the SLA came to his house and told his mother that he will not be alive if he comes back to Sri Lanka. I have accepted that the applicant was, during the conflict, interrogated and harassed by the SLA. However, I find it implausible that if the applicant was actually detained and taken to SLA camps to be interrogated or if the SLA attended the applicant's mother's house [in] June 2013 and told her that he will not be alive if he comes back that the applicant would fail to mention these claim in either his written evidence or during his SHEV interview. I do not accept either claim.
18. In the SHEV interview the applicant said that he paid an agent to obtain a fraudulent passport. The passport had a picture of the applicant and used his personal details. The delegate put to the applicant that in his arrival interview he said his friend bribed someone in the passport office to get him a passport and he didn't know if the passport he used to go to [Country 1] was genuine or not. The applicant responded that he was told the passport was obtained from the passport office but he was not sure. He couldn't get a real passport because of the problems he had in Sri Lanka. The delegate asked why he would use a fraudulent passport that contained his genuine details and the applicant responded that the agent informed him that they had their people at the airport to check his passport and pass him through. He said a person met him at the airport to check his passport and take him through all the counters until the departure gate. The applicant's evidence about someone meeting him at the airport and taking him through all the checkpoints to the departure gate was raised for the first time in the SHEV interview and was raised in response to the delegate stating he had concerns about how the applicant left Sri Lanka using a passport containing his real personal information. I am not satisfied that someone aligned with the agent took the applicant through all the checkpoints to the departure gate at the airport. I find that the applicant fabricated the claim to address the concerns raised by the delegate about the applicant using a passport with his real personal details. I do not accept that the applicant bribed someone to get a passport. I find that the applicant obtained a genuine passport in his own name and departed Sri Lanka legally via the airport.
19. I accept that the applicant went to [Country 1] and remained there for two months before boarding a boat for Australia.
20. In a letter dated 2 October 2013 from Father Reginald it states that the applicant and his family are known to him even though they are Hindus. He states that the applicant faced a lot of problems and was stressed in Sri Lanka and he believes he would be more peaceful and happy in Australia. The letter provides no details about what problems the applicant faced in Sri Lanka and has no probative value. I put no weight on it.

Refugee assessment

21. 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

22. 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.

Tamil from the Northern Province and his real or perceived links to the LTTE

23. I accepted that the applicant is a Christian Tamil from the Northern Province. That area had been under the control of the LTTE during the war. I accepted that the applicant’s father was suspected of having links to the LTTE and was beaten by the SLA in 1997. I accepted that the applicant’s father died as a result of his injuries in 1998. I accepted that the applicant’s [sibling] provided some low level assistance to the LTTE during the cease fire and was of interest to the SLA and CID during the conflict. I accepted that the applicant’s [sibling] went to [Country 1] for work. I accepted that the applicant was, during the conflict, interrogated and harassed by the SLA and that the SLA enquired about the applicant’s [sibling] a couple of times after he had gone to [Country 1]. However, I was not satisfied that the applicant’s [sibling] was ever in hiding or that he cannot return to Sri Lanka. I did not accept that [Mr A] was involved with transporting weapons for the LTTE or that he was abducted because of his association with the LTTE. I was not satisfied that [Mr A] was ever abducted. I did not accept that the SLA, CID or unidentified armed youths came to the applicant’s house and were looking for him. I did not accept that the Sri Lankan authorities detained and took the applicant to SLA camps for interrogation or that the SLA attended the applicant’s mother’s house on 13 June 2013 and told her that the applicant will not be alive if he comes back to Sri Lanka.

24. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues².

25. The UK Home Office Report³ states at paragraph 3.1.2. and 3.1.3 that:

² DFAT, “Country Information Report Sri Lanka”, 23 May 2018, CIS7B839411064 at 3.11.

- 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 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.
26. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE in Sri Lanka⁴. In this regard, the UK Home Office report⁵ identified four categories of people at risk of persecution or serious harm in an Upper Tribunal (Immigration and Asylum Chamber) decision. Those included individual who have, or are perceived to have, a significant role in post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, journalists or human rights defenders who have criticised the Sri Lankan government, individuals that have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan forces (SLF) or Sri Lankan authorities in alleged war crimes and persons on 'watch' or 'stop' lists. The Sri Lankan authorities at the airports maintain up to date watch and stop lists. Watch lists are people that have committed minor offences or are former LTTE cadres. Stop lists are people that have committed serious crimes, have an outstanding warrant or are perceived to be connected to terrorism.
27. The applicant has not claimed and there is no credible evidence before me to indicate that he has had any role in post-conflict Tamil separatism or that he has criticised the Sri Lankan government. Likewise, there is no credible evidence before me to indicate that the applicant has given evidence to the Lessons Learned and Reconciliation Commission. And if, as the applicant claimed, the SLA were looking for the applicant because of his [sibling]'s and/or [Mr A]'s purported association with the LTTE then I consider it highly unlikely that he would have been able to leave Sri Lanka legally via the airport using a genuine passport in his own name. I find that the applicant was not on a computerised stop or watch list when he left Sri Lanka in 2013 and there is no credible evidence before me to indicate that his name has been added to either list since that time.
28. The DFAT report noted that the International Truth and Justice Project cited 24 cases of torture in 2016 and 2017. However, DFAT has been unable to verify allegations of torture in 2016 and 2017 and assesses that, irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture.⁶ DFAT defines low risk as being aware of incidents but having insufficient evidence to conclude they form a pattern.
29. Based on all the information before me, I do not accept that the applicant, because he is a Tamil male that has lived in areas previous controlled by the LTTE, whose father was beaten and killed in and around 1997 by the SLA and whose [sibling] provided low level assistance to the LTTE during the conflict would be imputed with anti-government sentiments or pro LTTE behaviours.
30. I am satisfied that the applicant's profile would not give rise to any adverse interest in him by the Sri Lankan authorities on account of real or perceived links to the LTTE. I am satisfied that

³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826 at 2.3.41 – 2.3.43.

⁴ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁶ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064 at 4.16. See also the International Truth and Justice Project Press Release: Unstopped: State Torture & Sexual violence in 2016/17, 14th July 2017; Freedom from Torture; UN Special Rapporteur describes 'endemic and routine' torture in Sri Lanka, 14 July 2017. The Diplomat; Looking at Systemic Torture in Sri Lanka, 21 July 2017.

the applicant can return to Sri Lanka and would not face a real chance of any harm by any of the Sri Lankan authorities for this reason.

The applicant returning as failed asylum seeker and the Department of Immigration and Border Protection's (DIBP) data breach

31. The most recent DFAT report states that most Sri Lankan returnees, including those from Australia are questioned at the airport upon their return. I accept that by the manner of the applicant's return, the Sri Lankan authorities may know or infer that he made claims for protection in Australia.

32. The DFAT report states that:

Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department and, at times, the Terrorism Investigation Department, process returnees, including those on charter flights from Australia. These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. Australian officials based in Colombo may meet charter flights carrying voluntary and involuntary returnees. IOM⁷ meets assisted voluntary returns after immigration clearance at the airport. Processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths, and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed.

For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.⁸

33. I accept that the applicant will, upon his return, undergo a standard procedure and will not be allowed to exit the airport until all returnees in his group are processed. In his SHEV application the applicant stated that he has never been charged, convicted or wanted for an offence in Sri Lanka and he departed Sri Lanka lawfully. I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the concern of the authorities. I accept the information in the DFAT report that indicates the applicant will not be mistreated during this standard process. I find that the applicant being subject to a standard procedure does not involve systematic and discriminatory condition and does not amount to persecution within the meaning of s.5J(4).

34. In February 2014, over a period of about eight and a half days, the full names, gender, citizenship, date of birth, date when immigration detention began, the location of immigration detention, boat arrival details and the reason for being unlawful (for example illegal maritime arrival) of approximately 9,250 people were inadvertently published on the Department's website. I accept that limited details about the applicant – as outlined - were capable of being accessed on the DIBP's website for a period of eight and a half days. However, even if the data breach had not occurred, those details – apart from details about when and where the applicant was detained - would have been evident to the Sri Lankan authorities upon his return to Sri Lanka.

⁷ International organisation for migration

⁸ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064 at 5.27 – 5.29.

35. Although there has been a decrease in systematic surveillance of returnees, “DFAT is aware of anecdotal evidence of regular visits and phone calls by the Criminal Investigation Department to failed asylum seekers in the north as recently as 2017. A UNHCR survey in 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. Refugees and failed asylum seekers reported social stigma from their communities upon return; in some communities, people resent the financial support provided to refugee returnees.”⁹ The continued surveillance of returnees contributes to a sense of mistrust of returnees within their communities. I accept that the applicant may be subject to some surveillance and possibly social stigma from his community upon his return to Sri Lanka. However, I am not satisfied that, in the context of his overall profile, any surveillance or social stigma would amount to serious harm. There is no credible evidence before me to indicate that surveillance by the Sri Lankan authorities or social stigma from communities would prevent the applicant from being able to support himself or would amount to a threat to a person’s life or liberty, physical harassment or physical ill treatment or any other harm that may be described as serious harm. I am not satisfied that the applicant faces a real chance of serious harm if he returned to Sri Lanka because he is a failed asylum seeker and was subject to the DIBP data breach.

Refugee: conclusion

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

Complementary protection assessment

37. 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

38. 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.

39. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm

⁹ DFAT, “Country Information Report Sri Lanka”, 23 May 2018, CIS7B839411064 at 5.40

- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

Is there a real risk that the applicant will suffer significant harm?

40. I have considered the applicant's claims individually and cumulatively. I found that the applicant does not face a real chance of serious harm if he returned to Sri Lanka for reason of his ethnicity, familial connections to the LTTE, DIBP data breach or residence. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear".¹⁰

41. I accept that, on return to Sri Lanka, the applicant will be subject to a series of administrative processes (as outlined above). I also accept that the applicant, as a returning failed asylum seeker, is likely to be subjected to a period of surveillance from the Sri Lankan authorities and social stigma from the community. I have found that the applicant is not a person of interest to the Sri Lankan authorities and, upon his return, I am not satisfied that the applicant faces a real risk of being arbitrarily deprived of his life; of facing the death penalty or of being subjected to torture. I am not satisfied that the acts or omissions of the Sri Lankan authorities and/or the applicants' community are intended to cause pain or suffering that is cruel or inhumane in nature, severe pain or suffering or to cause extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment. I am therefore not satisfied that there is a real risk that the applicant will suffer significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Sri Lanka.

42. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka (the receiving country), there is not a real risk that he will suffer significant harm now or in the foreseeable future.

Complementary protection: conclusion

43. 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 applicants protection visas.

¹⁰ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

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.