



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03923

Date and time of decision: 10 July 2018 14:29:00
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 [an age] year old man that claims to be a national of Sri Lanka and identifies himself as a Catholic Tamil. He arrived in Australia by boat on 1 May 2013. On 26 May 2017 the applicant made an application for a Safe Haven Enterprise Visa (SHEV).
2. On 13 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 was a Catholic Tamil from an area once under the control of the Liberation Tigers of Tamil Eelam (LTTE), that he had a brother in the LTTE and that he would be returning as a failed asylum seeker. However, the delegate determined that the applicant does not have a profile of interest and does not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Sri Lanka.

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 IAA received from the applicant a two page letter and supporting documents. To the extent that the letter argues errors and/or omissions in the delegate's decision based on the information that was before the delegate I have had regard to it.
5. The applicant's letter raised the following new claims:
 - That people in the applicant's village know that the applicant's brother was in the LTTE and that is the main reason he fears persecution on his return to Sri Lanka.
 - His brothers A and K have applied for refugee status in Australia and K has been granted protection.
 - His brother R is in [Country 1].
 - His sister and her family have been granted refugee status in [Country 2].
 - His siblings were granted refugee status on the same basis as the applicant; that is being a member of a LTTE fighter family.
6. The applicant provided copies of documents supporting his claims about his siblings being granted refugee status in [Country 2] and [Country 1].
7. 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.
8. I accept that the claim about the applicant's siblings being granted protection in other countries is credible personal information. However, whether a person does or does not meet the requirements to be granted protection is based on the facts of each individual case. The mere fact that some of the applicant's siblings have been granted protection on the basis the applicant claims is the same as his own claims, has no probative value when assessing the applicant's claims for protection in Australia. In those circumstances, I am not satisfied that there are exceptional circumstances to justify considering the new information and I have not had regard to it.
9. I note that despite ample opportunities to do so prior to the delegate making his decision the applicant first raised the issue of villagers knowing of his brother's LTTE connections after the decision was made. The delegate accepted that the applicant's brother was a member of the LTTE – as have I - and that the applicant was a Tamil when he considered the applicant's real or imputed political association with the LTTE. I am not satisfied that had the delegate known that people in the applicant's village knew about his brother's LTTE connections that it may have affected the consideration of the applicant's claims. I am also not satisfied that there are exceptional circumstances to justify considering the new information and I have not had regard to it.
10. I have obtained the most recent DFAT country information report for Sri Lanka under s 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 information¹.

Factual findings

11. I accept the applicant's claims that:
- He is a national of Sri Lanka and identifies as a Catholic Tamil. He lived in areas that were once under the control of the LTTE.
 - His [brother] was recruited by the LTTE sometime between 1987 and 1990 and died while serving in the LTTE in 1995/1996. The applicant said during his screening interview that he did not know what his brother did for the LTTE and I accept that claim.
 - The applicant's father did not want any of his other children in the LTTE and advised them to leave the area.
 - In 2005 the applicant was arrested and detained for two hours by the Sri Lankan army (SLA) on suspicion of being an LTTE cadre. The applicant was beaten and told that he would be arrested again if he tried to join the LTTE.
 - In 2006 the applicant's father arranged for the applicant to move from [Town 1] and continue his studies in Jaffna.

¹ See section 473DD(a) of the Act.

- In 2008 the applicant was playing with friends and a clamour bomb blast occurred near them. The SLA arrived and suspected the applicant and all the Tamil students/young boys were LTTE cadres. The SLA arrested and detained the applicant for four hours. The SLA beat the applicant severely during his detention.
 - In 2010 the applicant stopped studying his [degree] and found out that his brothers had gone abroad.
 - His father arranged for the applicant to leave Sri Lanka and go to [County 3] for work in March 2011. He returned to Sri Lanka in March 2012.
12. In the applicant's signed statement he stated that the LTTE approached him when he was at school and forced him to join them stating that he would be imprisoned as LTTE because he 'hailed' from [Town 1]. His classmates in Jaffna joined the LTTE one after the other and forced the applicant to go along with them. However, during the SHEV interview the applicant € to the Criminal Investigation Department (CID) and taken to the fourth floor in Colombo (CID headquarters). The applicant, P and A were photographed and fingerprinted and detained [in another area] with other LTTE suspects. P was found to have LTTE involvement and was taken away. The CID told the applicant and A that they were found to be former LTTE cadres that had escaped during the war and returned to Sri Lanka to join other LTTE cadres and regroup. The applicant stated that his father found out that he had been taken to the fourth floor and was going to be taken to [an] Army camp for further investigation. The applicant's father used his influence with the Sri Lankan authorities and bribed them to release the applicant. During the applicant's SHEV interview he repeated the claim of being taken at the airport and said that they were beaten with batons and knives. He was kept for three weeks and, because P was involved with the LTTE, 'they' believed the applicant was also involved with the LTTE. His father bribed the police and he was released.
13. The delegate put to the applicant that in his enhanced screening interview conducted on 11 May 2013 his evidence was that he had not been taken or beaten by the SLA since 2009. The delegate put to the applicant that he stated that, after he came back from [County 3] in March 2012, 'they' came to his home looking for him but he was not there. The delegate put to the applicant that his evidence during his arrival interview was that the CID came to his house looking for him in March 2012 and he wasn't home at the time. His mother told him about the visit and he left Sri Lanka. The delegate asked the applicant why his claims of being arrested, detained and beaten on his return to Sri Lanka in 2012 were not raised during his screening or arrival interviews and the applicant responded that he was scared. He didn't know if he could trust the Australian authorities. He didn't know if the Australian authorities were like the Sri Lankan authorities and, if he was sent back to Sri Lanka, he didn't want to give full details. The applicant said he has been in Australia for four years now and has decided to stay here. The delegate put to the applicant that it is illogical he would choose to come to Australia if he genuinely believed that the Australian authorities were like the Sri Lankan authorities and the applicant responded again that he has been here for four years and he trusts the Australian authorities now. I find it incredible that if the applicant was arrested, detained and beaten over a three week period, he would fail to mention it in either his advanced screening or arrival interview because of fear; especially when the applicant provided other details of being arrested and beaten by the SLA. In the context of inconsistent evidence, I am not satisfied that the applicant was arrested, detained and beaten by the CID for three weeks when he returned from [County 3]. I am not satisfied that the CID found the applicant to be a former LTTE cadre that had escaped during the war and returned to Sri Lanka to join other LTTE cadres and regroup. I am not satisfied that the CID photographed and fingerprinted the applicant and detained him on the fourth or sixth floors. I am of the view that the applicant fabricated these claim to strengthen his claims for protection.

14. In his screening interview the applicant said that the CID was looking for him and so his parents sent him to Colombo to get a passport and a visa to go to [County 3] for one year. In the applicant's arrival interview he stated that he was issued with a Sri Lankan passport in 2010 and the passport was taken by the agent [overseas] before coming to Australia. In his written statement he stated that "with the help of an agent" he went to [County 3] to work in March 2011. During the SHEV interview the delegate put to the applicant that if he was wanted by the SLA he would not have been able to leave Sri Lanka via the Colombo airport using a passport in his own name. The applicant responded that his father bribed an agent. The agent had a good relationship with the Sri Lankan authorities and managed to get him through the airport. The agent organised the passport, took all responsibility for the passport and saw the applicant off at the airport. The agent also organised his work visa for one year. The delegate asked the applicant if he used his 2010 passport to leave Sri Lanka for [Country 4] in 2012 and he responded that the agent got him a new passport in the applicant's name. The agent bribed the Sri Lankan authorities at the airport when he left for [Country 4] and so he didn't have any problems. The delegate put to the applicant that during his arrival interview he stated that he had a passport and that passport was issued in 2010. The applicant responded that he went to [County 3] and returned to Sri Lanka using his first passport. He never had two passports. He handed his first passport to the agent and received another one. He said that is what he meant during his arrival interview when he said he had one passport issued in 2010. When the delegate asked the applicant how much his agent bribed the Sri Lankan officials he responded that he didn't know. His mother and father organised it. When the delegate asked the applicant about the bribes at the airport he responded that the agent and Sri Lankan authorities were talking in a friendly way and that is why he thought the agent had some deal with them. The agent gave him his second passport and was talking to the Sri Lankan authorities. The delegate asked the applicant if he knew the agent was bribing people at the airport or if he thought the agent was bribing people and he responded that he didn't know but thought so.
15. The applicant's evidence about an agent organising two passports and facilitating his passage through the Colombo airport was raised for the first time during his SHEV interview. The evidence was given in response to the delegate putting to the applicant that if he was of interest to the SLA then he wouldn't have been able to get through the Colombo airport. I find it implausible that if the applicant was issued two passports and required the assistance of an agent to get through the airport that he would fail to mention it prior to the delegate's question. In the context of inconsistent and implausible evidence I find that the applicant obtained a genuine passport in his own name in 2010. I find that the applicant used that passport to exit and enter Sri Lanka on three separate occasions without incident. This is consistent with the applicant's evidence provided during his arrival interview that he didn't have any issues passing through immigration when he travelled to [Country 4] because his mother took him to Colombo to get a visa. I find the applicant's evidence about having an agent organise two passports and assist his passage through the airport was fabricated to explain how he could exit and enter Sri Lanka via the airport without incident. I find that the applicant's fabrication of evidence to strengthen his claim for protection undermines his credibility.
16. In the applicant's screening interview he stated that his mother was taken by the SLA and then questioned and beaten. His mother received a court order and was suspected of being involved with the LTTE. When the officer asked the applicant if his mother was involved with the LTTE he responded that she was. He said that the Sri Lankan police (SLP) took her to court and the court released her. This happened in 1997. When the officer asked if his mother had been questioned or harmed recently he responded that she hadn't and was too old. If the applicant's mother had been involved with the LTTE I find it unbelievable that he would fail to

raise the claim again in his arrival interview, statement of claims or SHEV interview; particularly when he mentioned his brother's LTTE involvement. I am not satisfied that the applicant's mother was involved with the LTTE or that she was issued with a court order.

17. In the applicant's screening interview he said that his father was questioned about his involvement with the LTTE. When the officer asked the applicant when his father had been questioned he responded 1997. In the applicant's arrival interview he stated that his father was beaten by the SLA. In the applicant's statement of claim he stated that:

- in 2010 the CID was visiting his father and questioning him about the applicant's elder brother's involvement in the LTTE.
- after his father bribed the Sri Lankan authorities to release the applicant from the CID in 2012 – his father was severely beaten by the CID when they attended his home looking for the applicant.
- the SLA threatened his father that the applicant would be shot on sight for leaving without permission.
- the SLA told his father that the applicant would be found in any part of Sri Lanka and sentenced to prison.
- the CID told his father that they had witnesses to prove that the applicant was a former LTTE member who escaped arrest.
- his father was continuously beaten by the SLA every time 'they' did cordon operations and, as a result, his father became ill.
- the SLA attended his father's funeral searching for the applicant and asking his mother where the applicant had gone. The applicant's mother told the SLA that she had no idea where all her sons had fled. The SLA told the applicant's mother that if the applicant was found he would be killed.

18. During the applicant's SHEV interview he stated that the SLA continued to harass and torture his father about the whereabouts of his children. He said that after he left Sri Lanka the Sri Lankan armed forces tortured and beat his father asking about the applicant and his brothers' whereabouts. He made no mention of his father being severely beaten by the CID because he had bribed the Sri Lankan authorities to release his son. I am prepared to accept that the applicant's father and mother were questioned and/or beaten in 1997 because one of their sons was involved in the LTTE. However, I find it implausible and do not accept that 14 to 15 years after the applicant's LTTE brother died, that the CID would be visiting the applicant's parents questioning them. Likewise, I find it implausible and do not accept that the applicant's father would be able to bribe the Sri Lankan authorities/SLP to have his son released from CID headquarters and then be beaten by the CID because of his release. I do not accept that the CID/SLA threatened to shoot the applicant or send him to prison. I find that the applicant has fabricated the claims of the CID and/or SLA coming to the applicant's home and harassing/beating his father. This finding is consistent with my finding that the applicant fabricated his claim of being arrested, detained and beaten in 2012 when he returned from [County 3]. It is also consistent with my finding that the applicant left Sri Lanka using a genuine passport in his own name without the assistance of an agent and without incident.

19. During the SHEV interview the delegate put to the applicant that because he had a Sri Lankan ID card and was enrolled in school the Sri Lankan authorities already knew where he was. The applicant responded that the Sri Lankan authorities didn't know his address. The delegate put to the applicant that all his siblings left Sri Lanka lawfully via the airport and - apart from one brother - none of his siblings were members of the LTTE. The delegate put to the applicant that the Sri Lankan authorities didn't need to question his parents about their children's whereabouts because they already knew he and his siblings were overseas. The applicant responded that he will be suspected of being involved with the LTTE. He was caught at the airport before and will be tortured and killed if he returns to Sri Lanka.
20. The applicant and his siblings all left Sri Lanka legally and I do not accept that the SLA and/or the CID would, over a protracted period of time, continue to harass the applicant's parents about their children's whereabouts. I do not accept that the CID told his father that they had witnesses to prove that the applicant was a former LTTE member who escaped arrest. I do not accept that the applicant's father was continuously beaten by the SLA every time 'they' did cordon operations and, as a result, his father became ill. I find the applicant's claim that the SLA attended his father's funeral as far-fetched and do not accept it. I do not accept that the applicant's mother told the SLA at her husband's funeral that she had no idea where all her sons had fled or that the SLA told the applicant's mother that if the applicant was found he would be killed.
21. The applicant claimed in his SHEV interview that a condition of his release from the CID was that he had to go and sign in at the camp on the first day of each month. He said that when he went to sign in, 'they' would question and torture him about the whereabouts of his brothers. He last signed in August 2012 and, when he missed the September 2012 sign in, the Sri Lankan armed forces turned up and beat his father asking about the applicant's whereabouts. The applicant failed to mention reporting requirements in his advanced screening interview, arrival interview or statement of claims. I have found that he has fabricated some of his claims and his credibility is undermined. I am not satisfied that the applicant was ever required to sign in at the camp or that his father was beaten because he failed to sign in. I find that the applicant fabricated these claims to, once again, strengthen his claims for protection.

Refugee assessment

22. 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

23. 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

24. I accepted that the applicant is a Tamil from an area that was once under the control of the LTTE. I accepted that the applicant's brother was a member of the LTTE from 1987/1990 until his death in 1995/1996. I accepted that the applicant's parents were questioned and beaten by the Sri Lankan authorities in 1997 because one of their sons was involved in the LTTE. I accepted that the applicant was arrested and beaten on suspicion of being a member of the LTTE by the SLA in 2005 for two hours and 2008 for four hours. However, since 2008 I am not satisfied that the applicant has been of any interest to the Sri Lankan authorities.

25. The UK Home Office Report² states at paragraph 3.1.2. and 3.1.3 that:

- A person being of Tamil ethnicity would not in itself warrant international protection.
- Neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have 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 applicant provided numerous news articles from 2016/2017 about Sri Lankan authorities abducting, torturing and killing Tamils³. These news articles are consistent with local and international organisations alleging that instances of torture in Sri Lanka continued in 2016 and 2017⁴. The Department of Foreign Affairs and Trade (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 issues⁵.

27. I accept that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country.⁶ The Sri Lankan authorities are aware that Sri Lankan Tamils went overseas as economic migrants and that 'everyone' in the Northern Province had some level of involvement with the LTTE during the war. A person's past history is only relevant to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state or the Sri Lankan Government.⁷ The applicant has not claimed and there is no credible evidence before me to indicate that he has had any post-conflict Tamil separatism role

² UK Home Office, "Sri Lanka: Tamil separatism. Version 4", March 2017, CISED50AD3779 at 2.3.41 – 2.3.43.

³ See for example UN raises concerns over abuses, torture in Sri Lanka Aijzeera 4 March 2017, SL Forest Department suspected of shooting to kill Muslim villager in Mannar [Mon, 22 May 2017, 23:39 GMT], Colombo frames cases to prolong imprisonment of Tamil political prisoners [TamilNet, Wednesday, 04 January 2017, Ezhuka Tharnizh has sent sharp message to all corners: Fr Ravichandran Tamilnet 27 September 2016, Reconciliation prospects look as grim as ever: Rev., Fr Mangalarajah Tamilnet 20 September 2016, Colombo reinvigorates genocidal military intelligence in North-east Tamilnet 17 August 2016.

⁴ See "Silenced: survivors of torture and sexual violence in 2015", International Truth and Justice Project Sri Lanka (ITJP), 7 January 2016, CIS38A801275.

⁵ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064 at 3.11.

⁶ Ibid. at 3.37 – 3.39.

⁷ UK Home Office, "Sri Lanka: Tamil separatism. Version 4", March 2017, CISED50AD3779 at 2.4.9.

or that he has criticised the Sri Lankan government. I have found that the applicant never served or joined the LTTE and I was not satisfied that the CID ever arrested, detained, beat, photographed or fingerprinted the applicant in 2012, that the CID found the applicant to be a former LTTE cadre that had escaped during the war and returned to Sri Lanka to join other LTTE cadres and regroup, that his father bribed the CID for him to be released in 2012, that the applicant was required to sign in each month at the camp after his release in 2012 or that, since 1997, his parents have been harassed and/or beaten about the whereabouts of their children. I do not accept that the applicant, because he is a Tamil male that has lived in areas previously controlled by the LTTE and had one brother that was a member of the LTTE who died in 1995/1997, would be imputed with anti-government sentiments or pro LTTE behaviours.

28. The DFAT report refers to stop and watch lists at the airport. It stated that stop lists included names of people who have an extant court order, arrest warrant or order to impound their Sri Lankan passport and watch lists include names of people that the Sri Lankan authorities considered were of interest; including for suspected separatist or criminal activities. DFAT assesses those on a watch list are likely to be monitored.⁸ I have found that the applicant exited and entered Sri Lanka on a genuine passport in his own name without incident on three separate occasions without the use of an agent. I am of the view that the applicant was of no interest to the Sri Lankan authorities when he left Sri Lanka in 2012 and there is no credible evidence before me to indicate that his profile has changed since that time or that his name has been placed on a stop or watch list.
29. Based on all the information before me, I am not satisfied that the applicant's profile would 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 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.

Catholicism

30. The applicant claimed during his SHEV interview that he will be in trouble if he returns to Sri Lanka because he is a Catholic. He submitted that the Sinhalese are Buddhists and will try to convert him. He submitted that 'they' are putting their status in Catholic churches. When the delegate asked who 'they' were the applicant responded the Southern Sinhalese, the Sri Lankan government and the Sri Lankan armed forces. The delegate put to the applicant that it is against the law in Sri Lanka to discriminate on the basis of a person's religion and the applicant responded that the Buddhist monks are beating the Tamil people.
31. The DFAT report states that about 82% of Christians in Sri Lanka are Catholics and assesses that Christians in Sri Lanka (about 7.4% of the Sri Lankan population) face a low risk of official and societal discrimination. Official discrimination is defined as a legal or regulatory measure that impedes access to state protection or services. Societal discrimination is behaviours by members of society that impedes access to goods or services or exclusions by members of society. A low risk is defined by DFAT as being aware of incidents but having insufficient evidence to conclude they form a pattern. DFAT assesses that the number of incidents (including violence, police inaction, demanding closures of churches) has remained static over recent years and is highest in the North Central, South and Western Province regions where Buddhists are the majority. It stated that there were 96 documented attacks against Christians in 2017 and most were

⁸ Ibid.

perpetrated by Buddhist. The DFAT report indicates that the majority of the population in Jaffna are Hindus followed by Christians⁹.

32. Based on the country information before me, I accept that the applicant may face a low risk of official and societal discrimination because he is a Catholic if he were to relocate to an area where there was a Buddhist majority. However, I am not satisfied that such treatment would amount to serious harm. There is no credible evidence before me to indicate that the applicant would be prevented from supporting himself, that his life or liberty would be threatened, that he would suffer from 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 Catholic.
33. Given the profile of the population in the Northern Province, I find that the applicant's chances of facing any official or societal discrimination because he is a Catholic in that area to be more remote.

The applicant returning as failed asylum seeker

34. 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.
35. 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. IOM¹⁰ 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.¹¹

36. 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

⁹ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁰ International organisation for migration

¹¹ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064 at 5.27 – 5.29.

involve systematic and discriminatory condition and does not amount to persecution within the meaning of s.5J(4).

37. 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.”¹² 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.

38. The delegate considered whether the applicant would face a real chance of serious harm if he returned to Sri Lanka because he has lived outside Sri Lanka since 2012. There is no credible evidence before me to indicate that a person who has lived outside Sri Lanka for a long period of time would face a real chance of any harm if he returned to Sri Lanka for that reason.

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).

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

¹² Ibid. at 5.40

- the person will be subjected to degrading treatment or punishment.

42. 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
- 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?

43. I have considered the applicant's claims individually and cumulatively. I found that the applicant does not face a real chance of any harm if he returned to Sri Lanka for reason of his ethnicity, area of residence in Sri Lanka, brief periods of detention in 2005 and 2008, familial connections to the LTTE and having lived outside Sri Lanka since 2012. 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".¹³

44. 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 possible 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 applicant's community amount to pain or suffering that is cruel or inhumane in nature, severe pain or suffering or extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment.

45. I have found that the applicant may experience a low risk of societal and official discrimination because he is a practising Catholic if he lived in an area where Buddhists were the majority. I am not satisfied that any societal and/or official discrimination the applicant faces would amount to 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 applicant's community amount to pain or suffering that is cruel or inhumane in nature, severe pain or suffering or to extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment. If the applicant didn't relocate on his return to Sri Lanka and remained in Jaffna, I have found that his chances of experiencing even a low risk of societal and official discrimination because he is a practising Catholic would be even more remote.

46. 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.

¹³ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

47. 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

48. 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.