



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/04088

Date and time of decision: 1 August 2018 15:51:00
A Harrison, Reviewer

Decision

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

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

Background to the review

Visa application

1. On 28 February 2017, the referred applicant (the applicant) applied for a Safe Haven Enterprise (subclass 790) Visa (SHEV). The applicant claimed to fear persecution from the Sri Lankan authorities for reasons of his Tamil ethnicity, an imputed political opinion in connection with the former Liberation Tigers of Tamil Eelam (LTTE) because of his brother and his cousin and their past real and/or perceived connections with the LTTE during the war, he has been accused of being LTTE in the past, and because he departed illegally and sought asylum in Australia.
2. On 14 December 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the applicant a SHEV because she found he was not a person in respect of whom Australia has protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 12 January 2018, the IAA received a submission from the applicant. Some of the submission addresses the delegate's decision and findings; it is not new information, and I have had regard to those elements of it. The applicant gave new information, which can be summarised as him fearing persecution based on: his close relationship with his cousin who was a former LTTE member; and his membership of a fishermen group who has continued to rebel against the Sri Lankan Navy (SLN).
5. The applicant newly claimed that: his cousin spent more than [number] years with the LTTE and was arrested at the end of the war; he and his mother signed papers to release his cousin in [2010], his cousin was then subject to reporting conditions and he lived with them and then his [relative]next door; he was always seen with his cousin and they were regularly intercepted by the Sri Lankan Army (SLA) and questioned, and faced trouble with the authorities; they fished, played volleyball and ate out together; he would accompany his cousin to sign the roll with the local CID and he was always questioned about his involvement with the LTTE and whether they were planning any anti-government actions; they were stopped on many occasions and interrogated, slapped and subjected to degrading actions; his cousin left Sri Lankan and came to Australia; the authorities asked him where his cousin was because he was missing and failed to report; he had to attend the police station and was questioned about his cousin's disappearance and was beaten, tortured, humiliated, spat on and ill-treated – they said unless the applicant brings his cousin and surrenders him to the authority within 24 hours he would be arrested and held in indefinite detention in lieu until his cousin is located, so he also fled to Australia; he has already experienced indescribable torture; he has been accused of aiding his cousin to run away, and he has been questioned as to how many other LTTE members he has helped escape.
6. I am not satisfied these new claims could not have been provided before the decision was made. I am also not satisfied these new claims are credible personal information, and had they been known, may have affected consideration of the applicant's claims. The applicant argued that he did not provide such detailed disclosure about his cousin previously due to the

fact that his cousin also sought asylum in Australia and told him not to say anything about this, otherwise he would have adverse ASIO findings and not be released from detention.

7. The applicant had two arrival interviews, the first one on 14 October 2012, and the second on 24 January 2013, and he did not mention this cousin in either interview. He said he had two cousins who travelled on the boat with him. The cousin in the new claims is alleged to have travelled to Australia before the applicant. When asked if he knew anyone in Australia, he said he knew one person in Australia from his area, he did not know where he was, he did not know his family name, and he had spoken with him once 15 days prior.
8. The new claims are light on detail. The applicant did not name this new cousin, there is no information about when the cousin arrived in Australia, or whether he was in immigration detention in Australia when the applicant arrived. The applicant did not state where this cousin is now and what he is doing to further explain why he can now give this information, when he was unable to previously. The applicant did not give the date for when he was released from detention in Sri Lanka and told by the Sri Lankan police to surrender his cousin to the authorities within 24 hours, nor did he explain how he managed to flee Sri Lanka within this 24 hour period and avoid further detention in lieu of his cousin.
9. Previously, the applicant made claims involving his brother and the LTTE, and claims in relation to a cousin who he claimed was killed in 2006 because he was suspected of being LTTE, and that is the only cousin he made claims in relation to. The applicant was released from immigration detention over four years before his SHEV interview on 7 July 2017, and he did not mention this cousin and this set of claims at all during this SHEV interview. In light of this I do not accept the applicant's explanation that he was told not to mention his cousin otherwise he would have adverse ASIO findings and not be released from detention.
10. The applicant has not satisfied me that s.473DD(b) is met. Furthermore, it is not apparent to me that there are any exceptional circumstances to justify considering this new information. I am not satisfied that s.473DD(a) is met.
11. The applicant newly claimed that: once he started fishing he confronted the SLN and the Criminal Investigation Department (CID), he was intercepted by the SLN on many occasions, during which he and his brother were harassed and commanded to jump into the sea; it was systematic harassment and constant interrogation by the SLN whenever he went fishing; if returned he will be denied access to employment, it is unlikely the SLN will give him the pass to go fishing again; and he will be restrained from his usual employment due to fear of continued harassment and discrimination by the army because he is a young Tamil fisherman.
12. I am not satisfied these new claims could not have been provided before the decision was made. I am also not satisfied these new claims are credible personal information, and had they been known, may have affected consideration of the applicant's claims. These new claims relate the applicant's existing claim about being a fisherman and fishing with his [relative] and brothers but they expand on and contradict the existing claims, without explanation.
13. The applicant did not previously claim any past mistreatment that he personally experienced from the CID or SLN while fishing, or any of the claims involving future harm.
14. The applicant made claims relating to the fishing society and his brother having to do LTTE training, the death of his father and [relative] in connection with fishing activities in 1991 and 2003 respectively, and he raised other claims of mistreatment from Sri Lankan authorities in

connection with round ups at meetings held in 2008 and 2009, and being asked questions when walking about after the war. Given what the applicant did claim, I am surprised he did not mention these new claims about past mistreatment he allegedly experienced repeatedly and the fears he claims to now hold in connection with future employment as a fisherman. I am satisfied the applicant had ample opportunity during the SHEV interview, with the assistance of a Tamil interpreter, to present his claims for protection. That he did not do so raises significant questions about the credibility of these new claims which he has not resolved or sought to resolve.

15. I am not satisfied that s.473DD(a) is met.
16. I have also considered a new report by the Australian Department of Foreign Affairs and Trade (DFAT) on Sri Lanka published on 23 May 2018. This report contains information on the situation for Sri Lankan Tamils, and persons with actual and imputed LTTE profiles who are forced to return to Sri Lanka after failing to seek asylum. It updates the DFAT report on Sri Lanka dated 24 January 2017 which was before, and relied upon by, the delegate. The report has been specifically prepared for the purpose of assisting in determining protection obligations. I am satisfied there are exceptional circumstances to justify considering this information.

Applicant's claims for protection

17. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan Tamil of the Christian faith from [Town 1], Jaffna Peninsula, Northern Province. His mother, [number] sisters and [number] brothers live in [Town 1].
 - In March 1991, his father was killed by the SLN when he was very young.
 - In [2003], one of his [relative]s, a fisherman, died in an accident, but he suspects he was killed by the SLN.
 - In 2003 or 2004, his eldest brother was forced by the local fishing society to undergo LTTE training because the LTTE demanded that one person per family registered with the fishing society be sent to train with them. He does not know whether his brother had further contact with the LTTE the training.
 - In 2006, one of his cousins was killed by an intelligence officer, three days after attending a meeting held by the [Political Party 1] because he was suspected of being an LTTE supporter.
 - He was a fisherman, and he used to go fishing with his [relative] and brothers.
 - During the war, in around 2008 and 2009 when attending compulsory military held meetings he was separated out [number] times because he was suspected of being connected with the LTTE.
 - The area where he lived is currently controlled by the army. Before he left, when he walked up and down the road the army personnel would ask him questions and hassle him. They would ask if he or his brother were part of the LTTE, if he had any connection with them, if they knew certain people, or if these people had any connection with the LTTE.

- If returned to Sri Lanka he will be identified at the airport immediately and detained because he left Sri Lanka illegally. He will be held in jail, taken to court, and even if he is released on bail he will have to check in at the police station every month.
- His life will be in danger because he left the country illegally. He will have problems with the military because he is Tamil. He will be connected to his brother and the LTTE training he has done, they will think he supported the LTTE because of his brother and his cousin, and they will find this out when they interrogate him.
- Sri Lankan authorities will not protect him. He cannot relocate within Sri Lanka. It is a small country and he will be at risk of being hurt by the authorities anywhere. The Sri Lankan Army is everywhere.

Factual findings

18. I accept the applicant is a Sri Lankan Tamil from [Town 1], Jaffna Peninsula, Northern Province based on his identity documents. The applicant did not discuss his Christian faith or make any claims based on it, but I accept he is a Christian as claimed. The applicant gave a copy of a support letter dated [December] 2012 from the parish priest for the Catholic church in [Town 1] who said the applicant was known to him. I also accept the applicant's mother, and [siblings] continue to live in [Town 1].
19. I am satisfied that in March 1991, the applicant's father died as a consequence of injuries sustained during the conflict when the applicant was [age] year old. The applicant's father's death is evidenced by the copy of his death certificate. The certificate records the applicant's father was a fisherman, he died [in] March 1991 in [Town 1], and he died due to an attack by the Navy. In writing, the applicant claimed his father was killed by the military; his father was sitting on the shore and was attacked by members of the army; he was beaten and subsequently died, and this is shown on his register of death. The applicant said he does not know the specific reason his father was targeted, he never asked about this as he was a small boy at the time. His father was a fisherman like him and his brother and he was also a member of the [the fishing society]. During the SHEV interview the applicant said his father was killed by the SLN, that he was born in [year] and [time period] later his father passed away. His father was fishing with a net from the shore and the SLN assaulted him with a [item], he was injured, went to hospital and died of the wounds.
20. I accept that in [2003], one of his [relatives], a fisherman, died in an accident, and that the applicant suspects he was killed by the SLN. The applicant claimed in his application that his [relative] was out fishing one night and there was an accident with a navy boat. His [relative] passed away during this incident. He claimed the death certificate records his death as an accident, but a Sri Lankan newspaper published what actually happened, and he would get that translated. He said he did not know much about what occurred and he is not sure why they killed his [relative]. During the SHEV interview the applicant showed the delegate copies of what he claimed was his [relative]'s death certificate and the newspaper article, but both were in Tamil. He said it would be difficult to translate his [relative]'s information, but he would try to get other documents had had with him translated and give to the delegate. The delegate gave the applicant one month to provide any translations. There are no English translations before me of the [relative]'s death certificate or the newspaper article. Nevertheless, the applicant has consistently and convincingly made the claims involving his [relative]'s death. I am satisfied the applicant's [relative] was a fisherman who died in 2003 during the war after an incident at sea.

21. I accept that in 2003 or 2004, the applicant's eldest brother was forced to train with the LTTE because the LTTE demanded that one person per family registered with the fishing society be sent to train with them. This claim is supported by country information about the LTTE's policy and practice of forced recruitment and civilian training.¹ In his statement of claims the applicant said if you want to fish you have to register with the fishing society so his brother was registered, as was he. He said he did not ask him about the training he received and did not know much about it, other than that LTTE training usually involved weapons training, so if there was a fight they would know what to do and would be able to assist the LTTE. He said he did not know whether his brother had further contact with the LTTE after he received the training. He also stated the military would have had some suspicion that the fishing society was connected to the LTTE. He claimed the military know that people have gone to training through the fishing society, but they do not know who received the training. In his SHEV interview, the applicant said his brother had [number] days of training with the LTTE, he was taken in a vehicle and returned in the vehicle. The delegate asked if after that his brother did any work or fight for the LTTE, and the applicant said no, nothing, he went for training, he had his own business and was not involved in anything. I am satisfied based on the applicant's evidence that his eldest brother only undertook [number] days of training and did not have any further involvement with the LTTE.
22. I am also satisfied that in 2006 one of the applicant's cousins was killed. However, I do not accept that he was killed by an intelligence officer because he was suspected of being LTTE or that the killing has a connection with the cousin's attendance at the EPDP meeting even if it was three days after he attended the meeting. The applicant claimed in writing that in 2006 there was a public meeting held by a Tamil political party, the EPDP, which was working with the Sri Lankan government. During this meeting his cousin spoke and members of the EPDP posed questions to him and his answers were critical of them. He suspects his cousin may have refused to provide the EPDP with supplies from his [shop]. There was an argument at the meeting when his cousin refused to provide the EPDP with money, and when he refused to provide them with money they accused him of supporting the LTTE. He claimed that on the third day after the meeting, an intelligence officer, not in uniform, came and shot his cousin. His cousin's father grabbed the officer who shot him as well, and the officer ran away. His cousin's father was not killed and is very elderly now. The applicant claimed his cousin was shot because he was suspected of being an LTTE supporter. The applicant's answers during the SHEV interview are consistent with his written claims, but he did not offer much more. The applicant said his cousin was running a business, a [shop], he went to an EPDP meeting, he argued at the meeting, and that is why he was killed. He said he did not know who killed his cousin; it was a problem with the EPDP. The applicant was not present during these claimed events and I am satisfied that the applicant has speculated as to who killed his cousin and why, but he does not know. The applicant presented to the delegate a copy of what he claimed was his cousin's death certificate, but it was in Tamil. While he undertook to provide an English translation after the SHEV interview, there is no translation before me. I am satisfied based on the applicant's own evidence that his cousin was killed in 2006 but the identity of the murderer and reasons for the murder are not known.
23. I accept the applicant was a fisherman, and that he used to go fishing with his [relative] and brothers. When the applicant arrived in Australia, to support his identity and claims he gave a copy of a document dated [October] 2012, which states he is a member of the [fishing society], [Town 1], and he was involved in fishing in their area for [number] years. In the SHEV

¹ Joanne Richards, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828.

interview, the applicant stated that after his father died he was supported by his elder brothers and when they got married, he started going fishing, that he went fishing with his [relative] and brothers, and that this was all he did for work in Sri Lanka.

24. I accept that during the war, in around 2008 and 2009, when attending compulsory military held meetings, the applicant was separated out three times. The applicant claimed they were under the control of the military at the time and all people in the village had to attend these meetings. That these meetings occurred one or twice a month, they would happen in different places each time and each time a different person would be in charge of the meeting, and that this occurred throughout the war. At the meetings, if suspected of being connected to the LTTE they were lead to one side. If they look at you and see some difference in your appearance they will suspect you. For example, if a person had a beard, or long hair tied at the back, they would think they were part of the LTTE. And after they separated them out, they would ask if they were connected with the LTTE and would hit them. They could not do anything. He claimed he was separated out three times because he was suspected of being connected with the LTTE.
25. In the SHEV interview, when asked about this claim, the applicant said during the round ups the army would take them, harass and torture them, beat them, that when there was a fight between the LTTE and the army and people vanished, and they would round up the village and arrest all of the youth and torture the youth. He said this is what happened when there was any problem between the LTTE and the army, the villagers got rounded up. The delegate asked if that ever happened to him and he said he was arrested two or three times and beaten very badly, tortured and interrogated about whether he knew people who had attacked and the whereabouts of the LTTE. The applicant claimed, in this context, he was being investigated and assaulted to get the answers. The delegate sought confirmation that it happened two or three times and they let him go each time, and the applicant responded that when the problems subsided, these incidences also subsided. Based on the applicant's own evidence, while I accept he was caught up in a number of round ups and separated out based on appearance and suspicion of LTTE links, I am not satisfied the applicant was ever arrested or detained for any length of time. The applicant did not detail these claimed incidences of torture, any period of detention or arrest, rather he spoke more generally and asserted he was tortured. The applicant did not describe any incidents of having been beaten badly, nor did he describe any associated treatment, wounds or injuries. The applicant's evidence in relation to his claims of physical mistreatment was not convincing. I am satisfied the applicant was subjected to round ups during the war, and that on three occasions he was separated out for brief questioning by the SLA about any LTTE involvement, but that when he was let go he was not of any real interest to the SLA in connection with the LTTE.
26. I accept that before the applicant left Sri Lanka, army personnel asked him questions when he was walking on the road about whether he or his brother were part of the LTTE or if he had any connection with them, and questions about certain people and if they knew them or if these people had any connection with the LTTE. The combined evidence from the applicant's two entry interviews is that the reason he left Sri Lanka was he was scared. When he was a baby his father passed away. He is in Australia in case there is any war. After the war the army used to round up people and beat them up, and this happened to him. In Australia you can have long hair and a beard, but if you have that in Sri Lanka they suspect you are part of the movement (LTTE) and they beat you up. When asked when the last time was this happened to him, he said after the war. The other reason was that the army shot and killed people in front of his house. The applicant did not subsequently make any claims in relation to anyone being shot in front of his house. The applicant's entry interview information is otherwise consistent with his SHEV claims. During the SHEV interview, the delegate asked

whether his brother who did the training with the LTTE was living peacefully now, and the applicant said he is okay now, earlier the CID came and interrogated him and harassed him, now he is alright, no problems. I accept that in the aftermath of war the applicant, as a Tamil male, experienced harassment and questioning from the SLA about suspected LTTE involvement and knowledge he might have because he was a young Tamil male living in the north. I am not satisfied that it rose above this or that the SLA had any particular interest in the applicant in connection with the LTTE, or because they had any particular interest in the applicant's eldest brother in connection with the LTTE or for any other reason.

27. During the SHEV interview, the delegate asked the applicant about where he lived in Sri Lanka, and he said that he lived in [Town 1] all his life except for [number] years when he was in the [Area 1], and that his family relocated to the [Area 1] when he was young because of the war. This is consistent with the applicant's entry interview information and residential history in his SHEV application which is that he lived in the [Area 1] between [year] and [year]. The delegate asked the applicant if he was ever detained in a military camp, and he said they were for about two or three months when returning from the [Area 1], that his mother was investigated as to why they were in an LTTE controlled area and then returning to the army controlled area, and she said they went to seek protection and they were returning to the home village. He said after they investigated why the family returned, the military released them back to their home town. This is also consistent with the applicant's residential history as listed in his SHEV application, which records two to three months in a military-run camp in [City 1] after the [number] years in the [Area 1]. The applicant did not claim to have ever been detained in an Internally Displaced Persons (IDP) camp, or a rehabilitation centre for LTTE combatants or LTTE suspects when the war ended.
28. I accept the applicant departed Sri Lanka illegally in September 2012 when he travelled by boat to Australia.
29. In the SHEV interview, the delegate put to the applicant a summary of current country information which indicated it was very unlikely he would be targeted for any harm if he returned to Sri Lanka given changes since he departed around five years ago. In summary, the applicant said it may be very few people who are at risk, but he fears return and he questioned if his safety could be guaranteed. He also said that 90 per cent of refugees are departing voluntarily because they think they can go back, but 10 per cent are afraid to go back to Sri Lanka although the Department of Immigration has rejected their case and they appeal, and appeal and continue on in Australia because they fear returning. He said those who have undergone pain in life, like himself, do not want to go back because they fear for their lives.

Refugee assessment

30. 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

31. 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.
32. Country information no longer reports that Tamils are targeted for harassment, arrest and detention by security forces, with LTTE support imputed based on ethnicity, as occurred during the war. Although DFAT reports that some Tamils with imputed LTTE links reported police monitoring and harassment in 2016. DFAT also references a UK Home office assessment in 2017 that anyone actively promoting Tamil separatism could risk persecution. However, 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 of those associated with politically sensitive issues.² There is no evidence before me that the applicant was directly associated with politically sensitive issues while in Sri Lanka or that since leaving Sri Lanka he has been engaged in or associated with politically sensitive issues, or that he has been actively promoting Tamil separatism.
33. I found that when the applicant departed Sri Lanka he had experienced harassment from the SLA during the war and in the aftermath of the war because he was a young Tamil male living in the north, but he was not of any particular interest to the SLA or other Sri Lankan authorities in connection with the LTTE because his eldest brother did LTTE training in 2003 or 2004, or because his cousin was killed in 2006 by an unidentified person, or because he and his brother were registered with the fishing society, nor because of his father or his deceased [relative] who were fishermen, nor for any other reason.
34. I am not satisfied there is a real chance the applicant will be targeted for any harm by Sri Lankan authorities for reasons of his Tamil ethnicity, nor because of his eldest brother or his deceased cousin and any perceptions about their LTTE involvement or support in the past, nor because he and his brother were registered with the fishing society, nor because of his father or his deceased [relative] who were fishermen.
35. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many returnees have difficulty finding suitable employment. DFAT assesses that reintegration issues are not due to a failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face on return.³

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

³ DFAT, “DFAT Country Information Report Sri Lanka”, 23 May 2018, CIS7B839411064.

36. A United Nations High Commission for Refugees (UNHCR) survey from 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. And refugees and failed asylum seekers reported social stigma from their communities upon return. The UNHCR also interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return. As at May 2018, DFAT states that while the government has reportedly decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017.⁴
37. While it is possible the applicant may be monitored for a period on return to the north, and experience social stigma on return as a returning asylum seeker, I am not satisfied that it would amount to serious harm. I am not satisfied there is a real chance of serious harm for the applicant in connection with being a returned asylum seeker.
38. DFAT reports that for returnees travelling on temporary travel documents, police undertake an investigative process, which can include: an interview, contact with the local police, contact with the person's claimed neighbours and family, and checking criminal records and court records, in order to confirm identity, and persons with a criminal or terrorist background, or with court orders or arrest warrants. These are standard procedures, applied regardless of ethnicity and religion, and DFAT understands that detainees are not subject to mistreatment during processing at the airport.⁵ There is no evidence before me that the applicant is the subject of an outstanding court matter or arrest warrant.
39. Based on country information, it is very likely the applicant will be questioned at the airport upon return and he could be charged under the Immigrants and Emigrants Act (1949) (the I&E Act) for his illegal departure, and arrested by the Sri Lanka Police Airport Criminal Investigations Unit at Colombo international airport. If this happens, the applicant will have his photograph and fingerprints taken, and he will have to give a statement.⁶
40. DFAT advice is that illegal departees who are charged are at the earliest opportunity after investigations completed transported to the closest Magistrate's Court, after which custody and responsibility shifts to the court or prison services. The magistrate will then make a determination as to the next steps for the person. Such a person may remain in police custody at the CID's airport office for up to 24 hours after arrival, and if a magistrate is not available before this time, for example because of a weekend or public holiday, they may be detained for up to two days in an airport holding cell.⁷
41. Country information is that if charged the person will be required to appear in court in the location where the offence occurred, which can involve legal and transport costs. Penalties for leaving Sri Lanka can include imprisonment of up to five years and a fine of up to LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,670). In practice, most cases result in a fine and not imprisonment. The Attorney-General's Department in Sri Lanka claims that no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. There is no evidence before me that the applicant was involved in people smuggling activities. If the applicant pleads guilty to an offence for illegal departure he will be fined, which he can pay in instalments, and he will be free to go. If he pleads not guilty, he will be granted bail by the magistrate on the

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

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

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

basis of personal surety or guarantee by a family member. Although DFAT was unable to obtain any data in support, it reports that anecdotal evidence is that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. Bail is usually granted to voluntary returnees, conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.⁸

42. The evidence before me does not indicate that the processes and penalties imposed as a consequence of the I&E Act are discriminatory on their face or in their application or enforcement, and I am not satisfied that the processes and penalties imposed as a consequence of the I&E Act amount to serious harm. I am not satisfied they amount to persecution.
43. I am not satisfied the applicant has a well-founded fear of persecution in Sri Lanka.

Refugee: conclusion

44. 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

45. 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

46. 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.
47. While there is a possibility the applicant may face monitoring and social stigma for a period as a returned asylum seeker, I am not satisfied that such treatment would amount to significant harm. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied that it amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment.

⁸ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

48. I accept that the applicant may be charged under the I&E Act for his illegal departure and is very likely to be questioned, fined, detained for up to 24 hours in an airport holding cell and may incur associated costs relating to the judiciary process. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of his unlawful departure. The evidence does not suggest that the treatment and penalties the applicant may experience as an illegal deportee are intended to inflict pain or suffering, severe pain or suffering, whether physical or mental, or are intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment of punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.
49. I have found there is a not a real chance the applicant will be targeted for any harm by Sri Lankan authorities for reasons of his Tamil ethnicity, nor because of his eldest brother or his deceased cousin and any perceptions about their LTTE involvement or support in the past, nor because he and his brother were registered with the fishing society, nor because of his father or his deceased [relative] who were fishermen. I am similarly not satisfied that there is a real risk of any harm, including significant harm on these bases.
50. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk he will suffer significant harm.

Complementary protection: conclusion

51. 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.