



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/04390

Date and time of decision: 26 March 2018 13:29:00
Kylie Allen, 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) claims to be a Tamil Christian from the Eastern Province of Sri Lanka. [In] July 2017 she lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. A delegate for the Minister for Immigration and Border Protection (the delegate) made a decision to refuse to grant the visa [in] February 2018 on the basis that the applicant is not a person in respect of whom Australia has protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 14 March 2018 the applicant's representative sent a submission to the IAA. To the extent that the submission contains argument in relation to the delegate's decision and information already before the delegate, I have considered that information.
5. The submission also provides new country information published after the decision of the Department and the representative argues that, based on this material, the political and security situation in Sri Lanka has worsened affecting religious and ethnic minorities. It is claimed that the recent 'state of emergency' will result in the Sri Lankan authorities harassing Tamils and that the local election victory of former President Rajapaksa signifies the return of Sinhala ultra-nationalism. Due to the change of country situation and sudden deterioration of political and security situation, the applicant's representative submits that the applicant will face serious and significant harm if she is returned to Sri Lanka now or in a near, foreseeable future. Supporting this are extracts from a number of news reports which post-date the delegate's decision.
6. I am not satisfied that exceptional circumstances exist to justify considering these news reports covering this political development. While the election victory is factual, the rest of the reporting is speculative as to the longer term prospects. The electoral results do not change the fact that President Sirisena is still the head of the government and I consider that the country information already before the delegate about the current government is a more reliable indicator of the conditions in Sri Lanka should the applicant return. I am therefore not satisfied that exceptional circumstances exist to justify considering this new information.
7. The submission also contains an extract from a news article dated 1 March 2018 from The Guardian, "Tamil asylum seeker deported by Australia 'harassed by Sri Lankan security forces'". Apart from the report that it was a Tamil asylum seeker deported from Australia there is nothing in the report that indicates that the circumstances of that person are similar to or relate to the applicant's circumstances in any way or have any bearing on what will happen to the applicant should she return. The delegate had a range of country information before him that related to returnees to Sri Lanka. I am not satisfied that exceptional circumstances exist to justify consideration of this particular report.
8. The final article extracted in the submission is dated 6 March 2018 from The Guardian, "Sri Lanka declares state of emergency after communal violence". The extract describes that a state of emergency was imposed after violent unrest between Sinhalese and Muslim communities and that police powers have been widened to detain suspects. Reference is also

made to Rajapaska's election victory. The applicant is neither Sinhalese nor Muslim and, as she has been living in Australia, could not be considered to be a suspect in any violence between those communities. I have considered this material and the applicant's claims and I do not consider that this information has any bearing on the applicant's claims. I am not satisfied that exceptional circumstances exist to justify considering this information.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:

- The applicant was born a Hindu Tamil in Colombo Sri Lanka on [date of birth]. When she married in 1984 she moved to [Town 1] in the Eastern Province and had [children].
- [Town 1] was a site of conflict between the Sri Lankan Army (SLA) and the Liberation Tigers of Tamil Eelam (LTTE). The applicant feared sending her children to school.
- In 1990 her husband was killed by a bomb blast when he was going to the well for water. He was not an LTTE member but did communicate with them and provide them with water.
- Between 1990 and 2005 the applicant moved to [Town 2] to be closer to her family and avoid the conflict. She worked as [Occupation 1]. She had no problems in [Town 2].
- In 2005 she moved back to [Town 1] in the conflict zone and lived there until she departed Sri Lanka.
- In 2007 and 2010 she made pilgrimages to [Country 1] and made her vows at a [Church].
- Her [children] married and moved away. Her [son], [Mr A], married at [a particular age] and lived with his mother and wife, [Ms B].
- In 2012 [Mr A] was targeted by the SLA because he was a young Tamil man. One night, the SLA took [Mr A] from the applicant's house and detained him for questioning. After [a number of] days he called his mother to tell her that he had been beaten tortured and his hands and legs were tied together. He said that he would not be free unless the applicant paid money. The applicant and [Ms B] paid the men from the SLA and [Mr A] was released.
- A month later the SLA men came to the applicant's house again seeking [Mr A] so he hid. The SLA men became angry and one of them hit the [applicant] with a [weapon]. She fainted and the next day had to have the wound [treated].
- [A number of] days later the applicant sent her son to Australia because he was not safe. His wife [Ms B] and child remained living with the applicant.
- One month after [Mr A] left the applicant and [Ms B] began to experience problems with harassment from men from the CID, the SLA, Sinhalese villagers and the Grease Men. The Grease Men were in their village a lot for 15 to 20 days. The applicant had seen them in the distance and was very afraid.
- One day, [Ms B] was grabbed by some men when she went to the shops. They attempted to sexually assault her but she screamed and was rescued by people from the nearby area. They did not find out whether these men were from the CID, SLA, Grease Men or Sinhalese villagers. This prompted the applicant and [Ms B] to leave Sri Lanka along with her grandchild and older son's family. Her [other children's] family were already in Australia.

- The applicant fears returning to Sri Lanka because she will be imputed to have supported the LTTE as a Tamil from the Eastern Province and on the basis that she departed the country illegally and sought asylum in Australia.
- She also fears harm as a single woman and she fears economic hardship as she cannot work and has no family remaining in Sri Lanka to support her.
- She also fears that she will be persecuted on the basis of her religion as she converted to Christianity after being released from detention in Australia.

Factual findings

10. In support of her stated identity the applicant has provided her National Identity Card and translation and a Baptism Certificate dated [in] 2014. The applicant's passport and birth certificate remain in Sri Lanka. Based on this limited documentation and the applicant's detailed account of her life in Sri Lanka, I accept that she is of Tamil ethnicity and was born in Colombo Sri Lanka on [a particular date] and moved to [Town 1] in the Eastern Province in 1984 when she got married. I consider that Sri Lanka is the receiving country for the applicant.
- Based on her detailed and consistent account and baptism certificate, I accept that the applicant has always been interested in Christianity, travelling to [Country 1] twice to take vows in a [Church] in 2007 and 2010, and that she converted to Christianity after her arrival in Australia. I accept that she attends church regularly in Australia and can now be described as a Tamil Christian.
11. The applicant states that she was exposed to the conflict between the SLA and the LTTE when she lived in [Town 1] in the Eastern Province from 1984-1990 and from 2005-2012. The applicant stated that she feared sending her children to school and was afraid due to harassment and abductions. In 1990 her husband was killed by a bomb blast when he was going to the well for water. He was not an LTTE member but did communicate with them and provide them with water. The applicant denies that she was in the LTTE or was approached to assist the LTTE and she refused to let her children join the LTTE.
12. I accept that, as [Town 1] is in the Eastern Province, the applicant would have been exposed to heavy fighting between the SLA and the LTTE. I accept that the applicant was afraid that if she sent her children to school that they would be abducted and I note that she also kept them at home to prevent them joining the LTTE. Country information indicates that the heavily militarised and centralised control of the north and east – with almost exclusively male, Sinhalese security forces – raised particular problems for women there in terms of their safety, sense of security and ability to access assistance¹. I accept that, as a woman living in a conflict zone in the Eastern Province the applicant would have seen woman harassed and may have felt at risk herself. The applicant also provided a medical report from her treating General Practitioner (GP) noting that she had reported that her husband was killed in an artillery shell attack in 1990. I accept that she was a widow and I accept her account of her husband's death which is consistently reported throughout her application.
13. In her SHEV application the applicant claims that in 2012, when he was [a particular age], her [son], [Mr A], was targeted by the SLA because he was a young Tamil man. One night, the SLA took her son from her house and detained him for questioning. After [a number of] days he called his mother to tell her that he had been beaten tortured and his hands and legs were tied

¹ International Crisis Group, "Sri Lanka's Conflict-Affected Women Dealing with the Legacy of War", 28 July 2017, CISED50AD4992, p.10

together. He said that he would not be free unless the applicant paid money. The applicant and her daughter in law, [Ms B], paid the men from the SLA and [Mr A] was released. A month later the SLA men came to the applicant's house again seeking [Mr A] so he hid. The SLA men became angry and one of them hit the [applicant] with a [weapon]. She fainted and the next day had to have the wound [treated]. [A number of] days later the applicant sent her son to Australia because he was not safe. His wife [Ms B] remained living with the applicant for a further six months.

14. I note that in the delegate's decision he refers to the detention of the applicant's older son, [Mr C], as he made his own claim of being detained by the SLA and being bailed out by his mother in a separate application that was before the same delegate. [Mr C] made no claim that [Mr A] was ever detained and the applicant has not mentioned that [Mr C] was detained. The applicant stated in her SHEV interview that [Mr C] was married and living separately with his wife. He worked in [a particular field]. Her [son] [Mr A], born in [a particular year], and his wife [Ms B] were living with her. [Mr A] was working in [a particular occupation] and was not a member of the LTTE. In her SHEV application she states that her claims relate to her son [Mr A] and the applicant has provided a medical report from her GP which states that she reported that her [son] was persecuted by the armed forces. I am satisfied that the applicant's claims relate to [Mr A] noting his reported age being [a particular age] in 2012 when the incident is alleged to have occurred.
15. The applicant has no documentation to confirm her version of events about the detention of [Mr A] such as a statement from [Ms B] or a medical report relating to her wound. In her arrival interview the applicant only stated that her daughter in law, [Ms B] had problems with the CID. She said that once a CID man grabbed [Ms B]'s hand and tried to take her in a van, the villagers came and the CID man ran away. She said that sometimes, officers come and knock on the door for water but she did not have any problems, just her daughter in law. I have taken into account the applicant's submission of 13 December 2017 regarding the issue of credibility in refugee claims. However, given the fact that the abduction is claimed to have occurred in 2012 some three years after the war, [Mr A] was never associated with the LTTE and the applicant can provide no supporting documentation and did not mention these events in her arrival interview, I do not accept that SLA ever sought [Mr A] or that the claimed events, relating to [Mr A], of 2012 occurred.
16. The applicant claims that [Mr A] left for Australia. One month after [Mr A] left, she claims that she and [Ms B] began to experience problems with men from the CID, the SLA, Sinhalese villagers and the Grease Men. The Grease Men were in their village a lot for 15 to 20 days. The applicant had seen them in the distance and was very afraid.
17. At the SHEV interview the applicant was asked to provide details of what harm she experienced after [Mr A] left for Australia in 2012. The applicant was unable to state any particular problems that she personally faced. She said that there were problems on and off but no particular problem. She said that men knocked on the door and asked for water. If women went to the shops they might pull their hands or sari and speak bad words but she did not point to any particular incidents where this had happened to her. When asked about the visit of the Grease Men she stated that she had seen them in the distance, they jumped from the trees and many people were affected. She was not personally affected apart from being afraid to go out.

18. Country information indicates that there was a short period of attacks on women in the north and east by the Grease Yakas, including in Batticaloa from August to September 2011². This would have been before [Mr A] left Sri Lanka and a year before the applicant claims to have seen the Grease Men. Even though Tamil women did report sexual assault and harm in the period after the conflict, based on her account, I do not accept that the applicant faced any problems from men such as the CID, the SLA, Sinhalese villagers and the Grease Men after [Mr A] left for Australia.
19. The applicant claims that one day, [Ms B], her daughter in law, was grabbed by some men when she went to the shops. They attempted to sexually assault her but she screamed and was rescued by people from the nearby area before that could happen. They did not find out whether these men were from the CID, SLA, Grease Men or Sinhalese villagers. This prompted the applicant and [Ms B] to leave Sri Lanka along with her grandchild and older son's family. Her [son], daughter and daughter's family were already in Australia.
20. In the applicant's arrival interview she claimed that a man from the CID grabbed [Ms B]'s hand and tried to take her in a van, the villagers came and the CID man ran away. In the SHEV interview the applicant clarified that [Ms B] had gone shopping and did not come back for a long time. When the applicant found her, she had people around her and she was crying. [Ms B] told her that people came and tried to attack her so she screamed, attracting people nearby and the attacker went away. The applicant took her back home and this prompted their decision to go to Australia.
21. There are some inconsistencies in the applicant's version of this event, in the arrival interview she said the attackers were the CID and they tried to take [Ms B] in a van, in the SHEV application she states that they did not know who the attackers were but they tried to sexually assault [Ms B]. The applicant has consistently claimed that an attempted assault occurred and has not wavered on this point, she has also provided significantly more detail about this incident than any of her other claims, I therefore accept that in 2012 there was an attempted attack on [Ms B] which was foiled when she screamed and she was rescued by passers-by. I accept that the applicant was not there until after the attack took place and did not know was responsible thus resulting in the earlier inconsistencies of her account.

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

² International Crisis Group, "Sri Lanka: Women's insecurity in the North and East", Asia Brief No. 217, 01 December 2011, CIS22203, p.30

- 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 Eastern Province, imputed political opinion – LTTE supporter

24. The applicant fears returning to Sri Lanka because she will be imputed to have supported the LTTE as a Tamil from the Eastern Province and on the basis that she departed the country illegally and sought asylum in Australia. I have accepted that the applicant is a Tamil woman from the Eastern Province who was never an LTTE member or supporter. Based on her claim to the department, I also accept that she departed the country illegally and sought asylum in Australia.
25. I do not accept that there is a real chance the applicant will be regarded as having an LTTE profile on her return to Sri Lanka. She has never been a member of the LTTE or otherwise involved with the LTTE and neither has anyone in her immediate family. Further the applicant was living in the Eastern Province at the end of the war in 2009 and was not the subject of any interest by the authorities. She was able to travel overseas freely in 2007 before the end of the war and in 2010 after the war, unhindered. She also travelled between [Town 1] in the Eastern Province and [Town 2] in the North Western Province without any difficulty and resided in both those areas during the war.
26. I have considered the applicant's submission of 13 December 2017 which includes extensive country information about the situation for Tamils in Sri Lanka and imputed political opinion and persecution of Tamil people who are perceived to be Tamil nationalists or suspected as LTTE supporters. While I accept that this kind of persecution has been reported, I do not consider that the applicant fits the profile of person who would be subject to this kind of harm. I consider that chance of her being imputed to be an LTTE supporter based on her history and activity is remote. Her only link to the LTTE is her ethnicity and the fact that she resided in the Eastern Province on two occasions for a total of thirteen years. I am satisfied that the situation for Tamils generally has improved significantly since the applicant left Sri Lanka. DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased since the Sirisena Government came to power in 2015³. DFAT reports that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased.
27. In May 2015 authorities allowed some gatherings in the Northern and Eastern provinces to commemorate those killed in the war for the first time since 2009. The commemorations occurred without violence but with extensive police surveillance. The president renamed "Victory Day," which celebrated the end of the civil war, to "Remembrance Day" and permitted the singing of the national anthem in both Sinhala and Tamil⁴. In contrast to the previous government, the administration permitted visits by UN staff of varying senior levels, including

³ Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.9

⁴ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

the under-secretary-general for political affairs, assistant secretary-general for political affairs, the UN Working Group on Enforced and Involuntary Disappearances, and technical staff from various UN agencies, including experts in human rights and transitional justice. In October 2015 the Office of National Unity and Reconciliation was charged with coordinating the government's efforts toward reconciliation, and the government implemented a number of confidence-building measures to address the grievances of the Tamil community⁵.

28. It is reported that the Sri Lankan police are now responsible for civil affairs across the country. Whilst a largely idle military presence remains in the former LTTE-controlled areas, these officers are generally restricted to their barracks. Members of the Tamil community have described a positive shift in the nature of their interactions with the authorities, including feeling able to question their motives or object to monitoring⁶. The applicant has never been linked to the LTTE in Sri Lanka or experienced harm on the basis of any imputed link. I am not satisfied that if the applicant returns to Sri Lanka she faces a real chance of harm based on being a Tamil from the Eastern Province or on the basis of any actual or imputed political opinion or any combination of those factors.

Older Tamil Woman

29. The applicant fears harm on her return to Sri Lanka as an older, single Tamil woman. She fears harm from men who target single women and she fears economic hardship as she will not be able to work and has no family remaining in Sri Lanka to provide her with support.
30. The applicant makes the claim that single Tamil women are specifically targeted by Sinhalese people, army officials, members of the CID and Grease Men. I have considered the applicant's submission of 18 January 2018 that sexual violence and discrimination exist in Sri Lanka. While she was afraid when she lived in [Town 1], the applicant did not point to any harm that was inflicted on her personally either in the form of sexual violence or discrimination. I have accepted her claim that her daughter in law was subjected to an attempted assault in 2012 which was interrupted when she cried out for help. The applicant does not claim that her daughter in law knew the people involved or that she was subject to any further or specific threat from them. I consider that this was unfortunately an opportunistic assault. I do not consider that it is linked to the applicant in any way.
31. Country information on the situation for Tamil women in Sri Lanka indicates that the women who are at greatest risk of harm on the basis of their gender in the east of Sri Lanka are those who were widowed during the conflict and lack physical and economic security and women who have been displaced. There have been a number of allegations of sexual assaults and rape attributed to the Sri Lankan military and the north and east and this harm appears to be focussed on vulnerable woman such as war widows⁷. I note that after her husband died the applicant did not live alone. She lived with her son and daughter in law and did not face any gender based harm such as sexual violence or exploitation. She also worked and does not claim to have faced discrimination in the course of her employment.
32. If the applicant returns to Sri Lanka I consider that she would continue to reside with her family as she did in the past, including her extended family that remain in Sri Lanka. There is no reasons to suppose that as she had done this in the past that she would not do it again. The delegate found that, if returned, the applicant will not be without familial support in the shape

⁵ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, part 5

⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 3.9

⁷ Ibid, 3.74-3.77

of her older son [Mr C], his wife and their family. He also noted that the applicant may also have the support of her [son], [Mr A], and his wife, together with her two daughters and their partners, and finally one or more of her [grandchildren]. The applicant also has extended family living in [Town 2] where she lived intermittently without problems and she has stated that she is in regular contact with them. Further on return the applicant will face a much reduced military presence in the Eastern Province which will reduce the prevalence of sexual assault as in the past a number of allegations of sexual assaults were attributed to the Sri Lankan military⁸. For these reasons, I am not satisfied that there is a real chance that, if the applicant was returned to Sri Lanka, she will face harm for reasons relating to her gender.

33. I have considered the applicant's claim that she cannot work if she returns to Sri Lanka and that will impact on her ability to survive. The applicant is currently [a particular age]. She supported herself in Sri Lanka after her husband was killed and from 1990 until 2000 worked as [Occupation 1]. In the SHEV interview the applicant was asked whether she had any medical conditions when she left Sri Lanka and whether she was fit and well at that time. The applicant replied, yes that she was okay. The applicant has provided a medical report from her treating GP dated [in] December 2017 which states that the applicant suffers from depression and anxiety as a result of her adverse experiences in Sri Lanka, the boat journey and adverse experiences in Australia. Her fear of returning to Sri Lanka makes her feel more depressed. The GP has not indicated that the applicant has any physical condition that would prevent her from working and has not indicated that the applicant's depression and anxiety are such that she could not resume her former employment as [Occupation 1]. The applicant has not provided any evidence that she is not fit to work or that she requires ongoing medical treatment. In addition to this, I have already noted that the applicant will likely be returning to Sri Lanka with her children who could assist with her support on their return. In all these circumstances I do not consider that the applicant faces a real chance of harm on her return because she is an older single Tamil woman from the East of Sri Lanka.

Christian Religion

34. The applicant also fears that if she returns to Sri Lanka she may be persecuted on the basis of her religion as she converted to Christianity after being released from detention in Australia. I have accepted that the applicant is a Christian. The applicant did not raise her religion as a factor in her SHEV application. In the SHEV interview, when asked about harm on the basis of her Christian religion, the applicant stated that religion 'could' be a factor in any harm she might experience on her return. She has not pointed to any specific risk or threat.
35. I have considered current country information about religion in Sri Lanka. DFAT assessed in 2017 that most members of religious groups in Sri Lanka were able to practise their faith freely and Sri Lanka recognises Christian religious holidays. The Christian religion is recognised through a Christian Government Minister and school students can study Christian religion in schools. The Government has established an Inter-Religious Council under the President with the participation of religious leaders from many different religions including Christianity⁹. I have had regard to reporting of violence against Christians in Sri Lanka and the fact that these have been attributed to the Buddhist nationalist organisation called Bodu Bala Sena (BBS)¹⁰. As part of the mandate of reconciliation of the Sirisena Government, the President has ordered the police to uphold the law when it comes to such violence and there have been a number of arrests of BBS officials involved in violence. Having regard to the country information, and the

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, 3.74-3.77

⁹ Ibid, 3.10-3.14

¹⁰ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251 P.114

applicant's profile and experiences I am not satisfied that there is a real chance that she faces harm on her return to Sri Lanka because of her ethnicity, membership of a social group or religion.

Failed asylum seeker/Illegal departure

36. I have considered whether the fact that the applicant sought asylum in a Western Country would lead to her facing harm on her return to Sri Lanka. Having regard to the country information in the referred material, including the applicant's submission on the treatment of returnees, I am not satisfied there is a real chance the applicant would suffer any harm by the Sri Lankan authorities because of her return after failing to obtain asylum. In particular, I note that DFAT reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia. Although there have been reported instances of returnees being harmed, DFAT has assessed that the risk of torture or mistreatment is low and continues to reduce¹¹. The information before me indicates those were people suspected of being high profile LTTE members, those suspected of committing serious crimes or those who participated in anti-government protests while out of the country. I am not satisfied the applicant has any profile that would be of interest to the authorities.
37. I note the applicant submitted a legal opinion from an attorney in Colombo, from November 2015 on the question of 'Immigration and Emigration Law in Sri Lanka.' I have also noted the applicant's submission of 13 December 2013 in relation to the Tamil diaspora and the close monitoring of Tamils who have sought asylum in Australia. While I have considered this submission, it must be considered against the much more recent country information discussed above and below.
38. I accept the applicant departed the country illegally. Country advice states that most Sri Lankan returnees, including those from Australia, are questioned by police on return and, where an illegal departure is suspected, are charged under the *Immigrants and Emigrants Act (I&EA)*¹². DFAT understands that in most cases, these individuals are arrested at the airport. As part of this process, they will be fingerprinted and photographed. DFAT assesses that detainees are not subject to mistreatment during processing at the airport¹³. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each individual. Those arrested can remain in police custody at the airport for up to 24 hours. Should a Magistrate not be available – for example, because of a weekend or public holiday –those charged may be held at a nearby prison¹⁴. DFAT rates general prison conditions in Sri Lanka as not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions¹⁵.
39. I accept that as the applicant departed Sri Lanka without a passport, she may be found to have committed an offence under the I&EA. Country information from DFAT indicates that penalties applicable for passengers illegally departing in this context can include up to five years imprisonment and fines of up to 200,000 Sri Lanka Rupees. DFAT advises that in practice, penalties are applied on a discretionary basis and usually in the form of a fine. In particular, advice from Sri Lanka's Attorney General's Department to DFAT is that no returnee who left Sri

¹¹ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 4.22

¹² Ibid, 5.17

¹³ Ibid, 5.20

¹⁴ Ibid, 5.20-5.21

¹⁵ Ibid, 4.25

Lanka unlawfully as a simple passenger on a people smuggling vessel has been given a custodial sentence for their breach of the I&EA. Fines are common, but the amounts vary depending on the circumstances of the case and can typically be paid by instalments.

40. On return to Sri Lanka, I consider that there is a real chance that the applicant would be charged and fined under the I&EA and then released. If a person pleads guilty, they will be fined and are then free to go. I am not satisfied that a fine, questioning and brief period of detention amounts to serious harm in this case. In the event that the applicant elected to plead not guilty to the offence under the I&EA, she would either be granted bail on personal surety or have a family member act as guarantor. I understand that she has family in Sri Lanka living in [Town 2]. There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that the applicant would not face a real chance of a custodial sentence.
41. I further find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. In this case, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. Accordingly, I find that the investigation, prosecution and punishment for illegal departure under the I&E Act does not amount to persecution within the meaning of s.5J(4).
42. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

43. 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

44. 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

45. 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.

46. As set out above, I have found that there is not a real chance that the applicant faces harm because she is a Tamil Christian woman from the Eastern Province of Sri Lanka, or because of seeking of asylum in Australia. Based on the same information, and for the reasons set out above, I am also not satisfied that there is a real risk that the applicant would face significant harm for these reasons.
47. I have accepted that the applicant will be identified on her arrival at the airport in Sri Lanka as having departed illegally and may be detained for several hours at the airport and potentially detained on remand for a number of days pending bail. DFAT has advised that detainees are not subject to mistreatment during processing at the airport and that the risk of torture or mistreatment for returnees, including for those suspected of offences under the I&EA is low. I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport. Should the applicant be held at prison for a brief period because of the unavailability of a Magistrate, I accept that she may be subjected to poor prison conditions during her detention. Country information indicates this is due to overcrowding, poor sanitation and lack of resources.
48. While I accept the applicant may be subjected to short term detention questioning and may be required to pay a fine or provide a surety on return to Sri Lanka, I am not satisfied that this amounts to significant harm. I find that the questioning, imposition of a fine and the potential of being held in detention and possibly in a prison, does not amount to the death penalty, arbitrary deprivation of life torture. Nor does the evidence support that there is an intention to inflict pain or suffering, severe pain or suffering, or to cause extreme humiliation. I am not satisfied that this amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment. It does not constitute significant harm as described in s.36(2A) of the Act.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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