



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/04912

Date and time of decision: 2 July 2018 14:21:00
R Adolphe, 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 claims to be a Tamil from the Eastern Province of Sri Lanka. He arrived in Australia on 8 November 2012 as an unauthorised maritime arrival. On 7 January 2016 he lodged a valid application for a Class XE, Subclass 790 Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister of Immigration and Border Protection refused to grant the visa on 2 May 2018. The delegate accepted the applicant was a Tamil Hindu from the Northern Province. However, the delegate was not satisfied the applicant was a person in respect of whom Australia has protection obligations for the purposes of s.36 of the *Migration Act 1958* (the Act).

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Act.
4. I have obtained new information on the issue of Tamils and returning asylum seekers, namely the country report from the Department of Foreign Affairs and Trade (DFAT) for Sri Lanka published on 23 May 2018.¹ This report was published after the delegate's decision for the purposes of informing of protection status determinations and the delegate relied upon the earlier 24 January 2017 version. I am satisfied that there are exceptional circumstances to justify considering this information.
5. The IAA received an email from the applicant's representative on 18 June 2018. The email contains three attachments, a legal submission and the following:
 - an extract of Amnesty International Annual Report 2017/2018 containing information pertaining to Sri Lanka;
 - an article from the Guardian dated 1 March 2018 titled "Tamil asylum seeker deported by Australia 'harassed by Sri Lankan security forces'".
6. The submission contains discussion on claims before the delegate and why the applicant does not agree with the decision made by the delegate. To that extent those elements may be described as argument rather than information, to which I have had regard.
7. The legal submission also refers to an unrelated IAA decision. The IAA decision referenced is also legal argument and does not amount to 'new information'. I have had regard to it, noting that IAA decisions are not binding on me and that the decision referenced was determined on its own individual facts and particular circumstances.
8. The Amnesty International Annual Report 2017/2018 was published on 22 February 2018, several months prior to the delegate's decision. The submission quotes from what is footnoted as the Amnesty International Annual Report with a link to the 2017/18 report, however the extracted material contained within the submission does not appear in the report provided to the IAA. The source of the extract that the submission quotes and argues to rely upon cannot be verified, and I do not accept it. In regards to the Amnesty Report that has been provided, it covers a range of human rights issues in relation to Sri Lanka during 2017, including continuing reports of ill treatment and torture in detention, impunity for excessive use of force, action

¹ Department of Foreign Affairs and Trade (DFAT), "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

against human rights defenders, legal constitutional and institutional developments and discrimination. The report is brief and provides only broad detail about the issues discussed. I note that there are several reports from a range of credible sources before me which deal with the matters raised in this new report. I am not satisfied that there are exceptional circumstances to justify considering the information.

9. The Guardian article also pre-dates the delegate's decision. The article reports on an individual returnee who was a former member of the LTTE. A first name is provided but the individual is not otherwise identifiable. Although the applicant has claimed to have attended training with the LTTE for a few months in 2005, he has denied ever being recruited into the LTTE, and for the reasons given later in this statement, I have concluded he would not be imputed to be a former LTTE member. Apart from the fact that the reported case is of a Tamil asylum seeker returning from Australia, the reported individual circumstances do not appear to reflect those of the applicant before me. I am not satisfied that exceptional circumstances exist to justify consideration of this information. Furthermore, I am not satisfied that the article could not have been provided to the delegate, or that it contains personal information for the purposes of s.473DD(b)(ii).

Applicant's claims for protection

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

- He is a Tamil male of Hindu faith from the Eastern Province of Sri Lanka.
- In 2005, whilst in [school], the applicant undertook compulsory LTTE training.
- In 2006 the applicant and his family were displaced by the civil conflict and lived in a refugee camp in Trincomalee.
- The applicant travelled to [Country 1] for work in 2007 and returned to Sri Lanka in December 2008.
- The applicant's friends from school who lived at the refugee camp were being detained and questioned by the Sri Lankan Army (SLA) for participating in the compulsory LTTE training in 2005. The applicant feared he would be subjected to mistreatment so he lived with relatives outside of the refugee camp.
- In May 2012 the applicant decided to leave Sri Lanka and with the assistance of his father he made arrangements to depart illegally by boat.
- Since departing Sri Lanka the Criminal Investigation Division (CID) have stopped and questioned his father about his whereabouts. His brother has been questioned by other participants of the LTTE training and he suspects they are now working for the SLA or CID.
- His cousin was abducted by the SLA.

Factual findings

11. The applicant provided a Sri Lankan passport, National Identity card and Birth certificate in support of his identity. I am satisfied the applicant is [an age] year old Tamil male of Hindu faith hailing from the Eastern Province of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.

12. The applicant claimed that whilst he was in [school] in 2005, he attended compulsory LTTE training with his classmates. The applicant told the delegate that he completed the first stage of training which ran [for a period of time] in 2005. It comprised of physical and weaponry training. He explained that there was a second stage which started in the following January, however, he negotiated with the LTTE and was excused from continuing with the training so that he could [study].
13. The delegate asked the applicant if he was ever officially recruited to the LTTE to which he replied that he was not, however, when the conflict broke out again in April 2006, he claimed the LTTE requested he fight for them. He told the delegate that he had not complied with this request. The applicant claimed that he avoided any consequences of refusing to fight for the LTTE by hiding. He told the delegate that he would hide inside his house and avoid them and would sleep in the ceiling. He then later claimed in interview that he was captured by the LTTE but was able to escape and pay his way out of the LTTE controlled area. I am not satisfied this is credible. I consider that if the LTTE had of required the applicant to fight for them, they would have been able to easily locate him and forced him to do so, particularly as the LTTE were aware of which school he attended and he provided evidence that indicates he continued to attend classes until [date]. I am also concerned the applicant did not raise any claims of being captured by the LTTE, escaping and paying bribes to leave the area in his written statement. The evidence he presented at interview in relation to these incidents I find nebulous and vague. The delegate also raised credibility concerns regarding the applicant's ability to avoid recruitment with the LTTE. Despite this, neither in interview or the post interview submission was further evidence provided to support these claims.
14. Country information reports that during the war the majority-Tamil civilian populations of areas that were controlled by the LTTE were required to interact with the regime as a matter of course, and that the LTTE was supported by voluntary and forced recruitment of Tamils.² I am willing to accept that the applicant may have undergone some combat training with the LTTE in 2005 for a few months whilst at [school]. However, I do not accept that he was called up to fight in 2006 and that he was caught by the LTTE, later escaped from them, and paid a bribe to leave the LTTE controlled area. I do not accept that he was forcibly recruited by the LTTE. I find that the mandatory training he attended while at school; [the period in] 2005 was the only involvement the applicant had with the LTTE.
15. The applicant has been consistent in claiming that he travelled from Sri Lanka to [Country 1] in 2007 for work purposes. He worked there for just under two years and performed jobs as a labourer and as [an occupation]. He stated he travelled to [Country 1] on a passport issued by the Sri Lankan authorities and exited and re-entered Sri Lanka via the International Airport in Colombo. The applicant said he had no issues. This suggests the applicant was not known by authorities or did not hold a profile that would warrant the adverse attention of security. I am satisfied that the applicant travelled legally to [Country 1] for work from 2007 until 2009.
16. The applicant returned to Sri Lanka in 2009 and departed for Australia in October 2012. He claimed that during this period he feared being imputed with LTTE involvement by the Sri Lankan authorities for undertaking the LTTE training in 2005.
17. In the SHEV statement, the applicant claimed that his friends who he had undergone LTTE training with had been interrogated by the SLA in the refugee camp. The applicant stated that he had heard that they were being taken away by the SLA and he became extremely scared. The applicant claimed that he had heard there was an informant in the camp who was

² DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

reporting to the authorities those who had attended the training. The delegate asked the applicant if he had ever been questioned, arrested or detained by the authorities himself to which he responded that he had not. I find the applicant's evidence regarding what he believed to have happened to his friends and why he now believed that he would be subsequently targeted to be unsupported and unconvincing.

18. In his application the applicant stated that upon return from [Country 1] in January 2009 he was too scared to go back to the refugee camp where his family were living. He stated that he stayed with various relatives. At interview the applicant told the delegate that he was living with his parents and siblings after he returned from [Country 1] who had rented a house in Trincomalee. Despite this, the applicant has also provided a registration document from the [named] IDP camp that is dated [in early] 2009. The contradiction regarding his residency was put to the applicant at interview who explained that after he returned from [Country 1] his family rented a house outside of the camp and that he lived there with them. He explained that he and his family would visit the Village Officer (Grama Niladhari), who was located in the refugee camp, to attend to the mandatory registration requirements. He told the delegate that on these occasions, when he visited the refugee camp, he did not encounter any issues with the authorities. I am willing to accept the applicant's explanation and that he lived outside the camp with his family while maintaining his registration with the authorities located inside the refugee camp. I note that despite these interactions with the authorities, the applicant appears not to have encountered any problems.
19. In May 2010 the applicant began working as a tradesman performing duties of an [occupation] or [related] apprentice. He was supervised by a more experienced [tradesman] and he would perform work at different sites across Trincomalee. I accept that the applicant performed this work from May 2010 and continued until he departed for Australia in 2012. The applicant did not claim to have any issues with the authorities whilst moving around the city in the course of his employment or at any other time.
20. The applicant stated that he decided to depart Sri Lanka in May 2012 as "he heard that a lot of people were being taken away". He did not depart Sri Lanka for Australia until October 2012. He tried to obtain a visa to go to [a named country], however, this was not successful.
21. The applicant also claimed he had a familial links to the LTTE due to his [specified relatives] who were members of the LTTE. The applicant told the delegate that [one relative] was killed in the civil conflict. He claimed that one of his [other relatives] had gone missing and the other one had left Sri Lanka and now lives in Switzerland. The applicant did not claim that he personally had ever been subjected to any issues on account of their LTTE membership. The delegate asked the applicant if he knew of what roles they had in the LTTE or was aware of their ranking. Although he believed one of his [relatives] had a high ranking position he was not able to provide any further detail. He instead described him returning from war with missing fingers. I am willing to accept that the applicant had extended family that were connected to the LTTE and may have died or were injured from the war. However, I am not satisfied on the evidence before me that they were of high ranking positions or that their involvement resulted in any adverse consequences for the applicant.
22. None of the applicant's other family members have had any issues with the authorities on account of the limited profile resulting from his [specified relatives'] LTTE membership. The applicant's mother and father and [siblings] continue to reside in Sri Lanka. The applicant's mother works as [an occupation] in Trincomalee and lives there with her [children] who are completing their [studies]. They travel back to [their home town] to visit their father who has

moved back to their home town where he continues to work as [specified occupations]. The applicant's [brother] works as [an occupation].

23. After the applicant departed Sri Lanka and in support of his SHEV application, his father obtained a letter from a Member of Parliament in the Trincomalee District which was provided to the delegate. The letter claims that the applicant was a person who came under strict surveillance of the SLA. The delegate questioned the applicant about this in interview to which the applicant replied that this was meant generally and offered no examples or evidence of being under surveillance. I do not accept that the applicant was under strict surveillance as the letter states.
24. The applicant has claimed that he has a [relative] who lived close by to him in Sri Lanka who was abducted. The delegate asked the applicant if this was one of the same [relatives] who were in the LTTE, to which he responded no it was another one. The applicant has not provided any details as to why this other [relative] would have been targeted for abduction or how his alleged abduction had impacted upon or placed him at risk of harm. The claim was also raised again in a post-interview submission, however, the applicant has not provided any other information or documentation to substantiate these claims. In the circumstances I am not satisfied that this occurred.
25. I accept that [in] October 2012 the applicant departed Sri Lanka from [a named city]. I accept that he sought the assistance of people smugglers to travel by boat to Australia.
26. In the 2016 statement of claims the applicant claimed that since his departure from Sri Lanka the CID have stopped and questioned his father about his whereabouts and his father told them that the applicant was no longer living in the country. He also claimed his brother was questioned by people who had completed the 2005 LTTE training with the applicant which he believes to mean that these people have joined the SLA as a CID. The claimed questioning of the father was not reasserted at interview although the applicant told the delegate his brother had applied to [join a public agency] and was questioned by the interviewer about the applicant's LTTE involvement and was not offered the position on account of their suspicions of him. I do not accept that the applicant was a person of interest to the authorities when he left Sri Lanka in 2012. The applicant was able to transit international airport security without issue in 2007 and again in 2009. He has never been questioned, detained or arrested himself. He has been able to engage in work both overseas and domestically in Sri Lanka without apparent issue. He was able to engage with authorities on a number of occasions without issue, including obtaining a passport (2007), and a driver's licence (2012), and registering with Grama Niladhari when required. I consider it implausible that his brother would have been prevented from being employed by the [public agency] on account of his relationship to the applicant. The applicant's evidence about his the claimed questioning of his father and his brother's job interview was scant and not compelling. I do not accept that the applicant's father and brother were questioned by the authorities about his LTTE training in 2005 or for any other reason.

Refugee assessment

27. 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

28. 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.

29. I accept that the applicant is a Tamil male from the Eastern Province of Sri Lanka. I accept that for a few months in 2005, he participated in some LTTE training while he was in [School], and that he had some relatives with LTTE associations but am not satisfied that the Sri Lankan authorities have ever had any interest in the applicant as a result, when he departed Sri Lanka, or since he has been in Australia.

30. At the time the applicant departed Sri Lanka, the United Nations High Commission for Refugees (UNHCR) Eligibility Guidelines for Sri Lanka (December 2012) considered that certain persons with LTTE links including family members may have been in need of international protection.³ More recently DFAT has reported that some Tamils with imputed links reported monitoring and harassment in 2016.⁴ The UK Home Office assessed in 2017 that being of Tamil ethnicity would not in itself warrant international protection. Neither, in general, would a person who evidenced past memberships or connection to the LTTE, unless they had or were perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.⁵

31. Nevertheless, country information indicates that Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country, and that the focus of the Sri Lankan government is on preventing the resurgence of the LTTE or any similar Tamil separatist organisation which may revive a civil war within Sri Lanka.⁶ The applicant has not claimed to have participated in any Tamil separatist or anti-government activities and I am not satisfied that his minor historical links to the LTTE would result in him now, or in the reasonably foreseeable future being imputed with an LTTE connection being perceived as a pro-separatist or be perceived as a threat to the government.

³ United Nations High Commissioner for Refugees (UNHCR), "Eligibility Guidelines for Assessing International Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

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

⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

⁶ Ibid

32. The country information before me indicates that there has been a significant change in the situation in Sri Lanka for Tamils since the applicant's departure in 2012 and particularly since the election of the Sirisena government in 2015. The current government has taken a more proactive approach to human rights and the issue of reconciliation than the previous government with the formation of such bodies as the Office of National Unity and Reconciliation (ONUR) which was setup to assist in the coordinating the government's efforts towards reconciliation.⁷ Notwithstanding this, there are a number of credible reports from 2015 and 2016 that document accounts of torture being inflicted by the authorities with impunity.⁸ The Freedom from Torture from 2015 documents case studies of torture since 2009. In nearly all cases the victims had an association with the LTTE. In the few cases where there was no association with the LTTE it was reported that one was imputed because they either had unknowingly carried out activities for the LTTE or had been deemed guilty by association through friends, work colleagues, employers and family members who were connected to the LTTE.⁹ Other reports indicate that those at risk of torture include suspects arrested under the PTA and persons being interrogated for serious crimes.¹⁰ Nevertheless, the UN Special Rapporteur has reported that the practice of torture is less prevalent today.¹¹ In 2017 the UK Home Office also reported a notable reduction in torture complaints,¹² and more recently DFAT reported that Sri Lankans face a low risk of mistreatment that can amount to torture.¹³ While the continued incidents of torture and serious mistreatment cannot be discounted, the country information indicates that it is a limited class of persons at risk. DFAT has also assessed that monitoring of Tamils in day-to-day life has decreased significantly, although surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues.¹⁴ I am not satisfied that the applicant is associated with politically sensitive issues (including pro-separatists ones) or that he has a profile that would otherwise be of concern to the authorities. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds'. DFAT assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. Some Tamils report there is discrimination in employment particularly with government jobs, however DFAT assesses that this is not based on official discrimination based on ethnicity, but rather limited Tamil appointments are a result of a number of factors, including disrupted education because of the conflict and language constraints. DFAT further assesses that societal discrimination on the

⁷ US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka", 3 March 2017, OGD95BE926876

⁸ Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", 1 August 2015, CISEC96CF13070; International Truth & Justice Project (ITJP), "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; Office of the United Nations High Commissioner for Human Rights, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

⁹ Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", 1 August 2015, CISEC96CF13070

¹⁰ International Truth & Justice Project (ITJP), "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; Office of the United Nations High Commissioner for Human Rights, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

¹¹ Office of the United Nations High Commissioner for Human Rights, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

¹² UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

¹³ DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

¹⁴ Ibid

basis of ethnicity can occur, although those assessed at risk of are former LTTE members of particular profiles.¹⁵ The applicant does not have a profile of this kind.

33. Having regard to country information before me and the applicant's own circumstances, I am not satisfied that the applicant faces a real chance of any harm on account of his ethnicity, origins in the East, his LTTE training or his relationship to his [other specified relatives].
34. I accept that it is possible the applicant would be identified on return as having sought asylum in Australia. The Sri Lankan Prime Minister in 2017 publicly stated that failed asylum seekers from Australia would be welcome back to Sri Lanka. Between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka. Many others returned from the US, Canada, the UK and other European countries, and most returnees are Tamil.¹⁶
35. Country information indicates Sri Lankan law enforcement agencies maintain regularly updated "Stop" and "Watch" lists updated lists of persons of interest by. "Stop" lists include names of individuals who have extant court order, arrest warrant or orders to impound their passport. "Watch" lists include names of those individuals that the Sri Lankan security services consider to be of interest, including due to separatist or criminal activities.¹⁷ There is no information to suggest that the applicant is on either the Stop or Watch lists.
36. DFAT have recently reported that failed asylum seekers, can face practical difficulties on return. Limited reintegration assistance is available upon return which proves for practical challenges in finding suitable housing and employment. In addition, bureaucratic inefficiencies in processing requests for identification documents inhibits returnees ability to access services such as banking, education, social welfare and employment.¹⁸ DFAT also notes there have been reports of failed asylum seekers facing social stigma; in some communities people resent the financial assistance given to returnees.
37. The applicant has completed [studies] and is multi-skilled with many years of varying experience both in Sri Lanka and abroad. The applicant has relatives including both his parents and siblings that live in Sri Lanka. I am not satisfied the applicant will be unable to find accommodation or employment.
38. DFAT is aware of anecdotal evidence of regular visits and phone calls by the Criminal Investigation Department (CID) to failed asylum seekers in the north as recently as 2017. DFAT assesses that this surveillance of returnees contributes to a sense of mistrust of returnees within the community. However, in interviews with returnees conducted by UNHCR in 2016 only 0.3 per cent indicated they had any security concerns following their return.¹⁹ It is possible that the applicant as a returning asylum seeker may be visited or monitored by the authorities for a period after his return. It is also possible that he may experience some social stigma on return. However, I am not satisfied that any such treatment amounts serious harm in this case. I am not satisfied that the applicant faces a real chance of serious harm as a returning asylum seeker.

¹⁵ Ibid

¹⁶ Ibid

¹⁷ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)', 15 June 2017, OG6E7028826

¹⁸ DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

¹⁹ Ibid

39. Country information reports that it is an offence to depart Sri Lanka other than via an approved port of entry or exit.²⁰ Penalties for persons leaving Sri Lanka illegally can include imprisonment up to five years and a fine of up to 200,000 rupees. In practice, the penalties are applied to such persons on a discretion basis and in most cases only a fine is issued (which may be paid in instalments) often to act as a deterrent.²¹ According to the Sri Lankan Attorney-General's Department, no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally.²² The applicant has not claimed that he was involved in facilitating a people smuggling venture and as such do not consider that there is a real chance of a custodial sentence.
40. Returnees are questioned and their identity confirmed and likely charged under the I&E Act. DFAT assesses that returnees are processed in accordance with the standard procedures regardless of ethnicity and are not subjected to mistreatment during processing at the airport.²³ The process may take several hours and is conducted en masse so individuals cannot exit the airport until all returnees have been processed. Police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are former LTTE members.²⁴ Those charged with offences under the I&E Act are transported to the closest Magistrate's Court. Returnees may remain in custody at the CID's Airport Office for up to 24 hours. In certain circumstances where a Magistrate is not available, for example, because of a weekend or public holiday, returnees may be held up to two days in an airport holding cell.²⁵
41. Country information before me does not support that the enforcement of the I&E Act is discriminatory on its face or that it is applied in a discriminatory manner. I am not satisfied on the evidence that the questioning, detention and the financial penalties that the applicant may potentially face as a result of his illegal departure are discriminatory. I am not satisfied that they amount to persecution.
42. In addition, I am not satisfied that the penalties and treatment the applicant may face as a consequence of his illegal departure, namely questioning, a fine and brief detention, constitutes serious harm for this applicant.
43. I am not satisfied the applicant faces a real chance of persecution for his illegal departure.

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

²⁰ DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid

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. For the reasons given above, I have found that the applicant would not face a real chance of any harm as a consequence of his ethnicity, origins in the East, his LTTE training or his relationship to his [specified relatives]. As the real risk standard is the same as the real chance standard, I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

48. I accept that the applicant as someone who is returning to Sri Lanka after having sought asylum in Australia may be monitored by the authorities for a period and face social stigma. Country information before me indicates that some communities resented financial support provided to refugee returnees. Additionally, DFAT assess that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities.²⁶ The evidence does not suggest that the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of being a returnee. I am also not satisfied that such treatment amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.

49. I accept that the applicant has departed Sri Lanka illegally. I also accept that it is possible the applicant may be charged under the I&E Act should he return to Sri Lanka. In the absence of any warrants for the applicant, and on the basis the applicant was a passenger on a people smuggling venture and does not otherwise hold a profile of interest to the authorities, the likely punishment will be an imposition of a fine and short term detention which in some circumstances, if a magistrate is not immediately available in an airport holding cell. 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 departee 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 or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.

²⁶ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105;

Complementary protection: conclusion

50. 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.