



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/04967

Date and time of decision: 23 July 2018 15:00:00
K 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) is a Tamil/Sinhalese Christian man from Batticaloa, Sri Lanka who lodged an application for a Safe Haven Enterprise Visa (SHEV) on 8 June 2017.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) made the decision to refuse to grant the visa on 10 May 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. I have also considered a new report by the Australian Department of Foreign Affairs and Trade (DFAT) on Sri Lanka published on 23 May 2018. This report contains information on the situation for Sri Lankans who are of Tamil ethnicity, people suspected of involvement with the LTTE, Christians, people who are forced to return to Sri Lanka after failing to seek asylum and Sri Lankans living overseas. It updates the DFAT report on Sri Lanka published on 24 January 2017 which was before, and relied upon by, the delegate. The report has been specifically prepared for the purpose of assisting in determining protection obligations. I am satisfied there are exceptional circumstances to justify considering this information.
5. No further information has been received.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He was born in Batticaloa, Sri Lanka on [date] to a Sinhalese mother and Tamil father but from the age of [age] he was raised by his aunt and only speaks Tamil.
 - His religion is Christian and he attends [church] in Australia.
 - His Tamil father was a member of the paramilitary group the Eelam People's Democratic Party (EPDP). The applicant has never met him and does not know his whereabouts but heard from his aunt that his father has killed people.
 - His mother left him as a baby but in the early 2000s she returned to his village and married a man called K in 2005. K was a local [worker].
 - In 2006 he witnessed K being shot and killed by an unknown person out the front of his house. K's murder is unsolved but he could have been killed by people who were affected by his father's actions with the EPDP.
 - He was afraid he could be harmed by the same people that killed K so he moved to uncle's house situated in a Sinhalese area. He was not happy there as he did not speak Sinhala.
 - His aunt therefore arranged for him to travel to [Country 1] on a work visa from December 2007 until May 2009.

- After he returned to his aunt's house he was afraid to leave the home as there was an army camp close to the house and a heavy military presence in the area and Tamil paramilitary groups such as the Karuna group and Pillaiyan group were targeting Tamil males.
- He departed Sri Lanka illegally and claimed asylum in Australia and fears he could be imprisoned and could be suspected as a member of the Liberation Tigers of Tamil Eelam (LTTE) due to departing illegally and claiming asylum in Australia.
- At his SHEV interview he made a new claim that he fears harm on the basis of his Christian religion from local Hindus who made him practice vegetarianism during their festivals and threw rocks at his home when he failed to do so.

Refugee assessment

7. 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

8. 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.
9. In support of his claimed identity, the applicant has provided a copy of his birth certificate and translation which states that he was born in [Batticaloa] District in Sri Lanka to Sri Lankan Tamil parents; and a copy of his United Nations (UN) High Commission for Refugees Asylum Seeker Certificate issued in [Country 2]. He claims his other identity documents were destroyed on the instruction of the people smuggler so he no longer has his passport or National Identity Card. I am satisfied based on his documentation and account of his life in Sri Lanka that he was born in Sri Lanka and that Sri Lanka is the receiving country.

Ethnicity and imputed LTTE support

10. The applicant claims to have had a father of Tamil ethnicity and a mother of Sinhalese ethnicity. However, they left him as a very young baby and he was raised by his maternal aunt and he only speaks the Tamil language. He fears harm on the basis of his mixed ethnicity and his fears harm from paramilitary groups as a Tamil male.
11. The applicant's birth certificate translation indicates that both his parents are of Tamil ethnicity. However, the applicant has consistently claimed that his mother is Sinhalese. It is not clear why his maternal aunt only spoke Tamil and the applicant never learned to speak Sinhalese. However, the applicant clearly considers himself to be of Tamil and Sinhalese ethnicity and claims he spent time with a maternal uncle who lived in Sinhalese area. I am willing to accept that the applicant has both Tamil and Sinhalese ancestry. The applicant claims that if he returns to Sri Lanka, the authorities would immediately suspect him as a spy because, although he is part Sinhalese, he does not speak the language. He fears they would interrogate him about his activities and why he does not speak Sinhala. As the applicant was raised by his aunt and only speaks Tamil, is identified as Tamil on his birth certificate and has a Tamil wife, I consider that will be identified as Tamil if he returns to Sri Lanka. He has not described being harmed on the basis of being Tamil or mixed Tamil and Sinhalese ethnicity in the past when he lived in Sri Lanka. I find that the chance of the applicant facing harm in Sri Lanka at the hands of the Sri Lankan authorities on account of being of mixed Tamil and Sinhalese ethnicity to be remote.
12. The applicant claims to fear harm from the army and paramilitary organisations that target Tamil males and he has named the Karuna and Pillaiyan groups. Country information indicates that these groups have disbanded their paramilitary operations. DFAT reported in 2015 that these groups had renounced paramilitary groups and has not reported on them being active since. None of the other independent information before me points to the Karuna and Pillaiyan groups currently being active in a paramilitary role. The applicant does not claim to have ever been threatened or harmed by anyone in a paramilitary group or anyone in any other military role.
13. I have considered whether the applicant's Tamil heritage would lead to him being imputed with an association with the LTTE and subject to harm from the Sri Lankan authorities including the army. Tamils are the second largest ethnic group in Sri Lanka. According to the most recent census, the Tamil population was 3.1 million in 2012, compared to 2.7 million in 1981. Tamils live throughout Sri Lanka, concentrating in the Northern Province, where they comprise 93 per cent of the population, and the Eastern Province, where they comprise 39 per cent of the population¹. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015².
14. Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. According to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of those individuals who have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals whom the Sri Lankan security services consider to be of interest, including

¹ Department of Foreign Affairs & Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.4

² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.5 & DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.9

for suspected separatist or criminal activities. The UK Home Office reported that the 'watch list' comprised minor offenders and former LTTE cadres. DFAT assesses those on a watch list are likely to be monitored³. The applicant has not described ever being a former LTTE member or supporter and he has not been suspected of involvement in any separatist or criminal activities, consequently I am satisfied that he would not have a profile of interest to the authorities which would result in his inclusion on their 'stop' and 'watch' databases.

15. The current president, Maithripala Sirisena, was elected in January 2015. The Sirisena Government has prioritised human rights and reconciliation and has made significant progress, including: replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict-era back to its former owners; releasing some individuals detained under the *Prevention of Terrorism Act* (PTA) and committing to reform the PTA; and engaging constructively with the UN. The Government also established an Office of National Unity and Reconciliation to develop a national policy on reconciliation⁴. In January 2015 President Sirisena swore in a new Tamil Chief Justice of the Supreme Court - the first Tamil chief justice in more than two decades⁵. DFAT assesses that, while monitoring of Tamils in day to day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Those issues include missing persons, land release and memorial events⁶. The applicant does not claim to have been involved in any of these sensitive issues. A recent UK Home Office report opines that since the end of the civil war in 2009, a person being of Tamil ethnicity would not in itself warrant international protection⁷. The Sri Lankan government has publicly encouraged all Sri Lankans living overseas to return or invest in the Sri Lankan economy⁸.
16. Having regard to the above, I find the chance of the applicant now being imputed with an LTTE association on the basis of his Tamil ethnicity is remote. Further the applicant was not politically active in Sri Lanka, has not been politically active since he departed Sri Lanka and does not have a political profile of any kind. Overall, I find that being Tamil in Sri Lanka in itself is not a reason for the applicant to be imputed with an LTTE connection. I am not satisfied the applicant faces a real chance of any harm on the basis of his ethnicity.

Association with father and the EPDP

17. The applicant claims that he was told by his aunt that his father was with the EPDP and committed killings and he fears he could be harmed as a result of being a family member of his father. It is reported that the EPDP emerged in 1990 from a plethora of Tamil groups and is still active to this day. With the Sri Lankan government's support, the EPDP became more politically orientated and won a number of parliamentary seats in the 1994 elections, becoming well established in the Jaffna district. The paramilitary wing of EPDP was reportedly involved in tit-for-tat killings and other acts of violence. Towards the end of the conflict in 2009, the EPDP was frequently cited as operating inside the closed military-run Internally Displaced Persons camps. The freedom of movement that EPDP enjoyed in the camps clearly indicated official approval of their presence and activity. The EPDP dissolved its paramilitary group after the defeat of the LTTE in May 2009. However, 2011 sources said that the EPDP still had a paramilitary presence in the north. In May 2016, the International Crisis Group

³ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.29

⁴ Ibid, 2.3

⁵ Ibid, 5.8

⁶ Ibid, 3.8-3.12

⁷ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826, 3.1.2

⁸ DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CIS7B839411064, 3.58

described the EPDP as a former Tamil militant group which supported the United People's Freedom Alliance in the parliamentary elections of August 2015 and the EPDP holds one seat in parliament since the elections in August 2015⁹. Based on this compilation of country information I do not consider that the applicant's father, if he was with paramilitary wing of the EPDP, would have been active after the end of the war. The evidence also indicates that the EPDP has ceased paramilitary activity and is currently a legitimate political party.

18. The applicant claims his father left him when he was [an infant]. He has not met or spoken with his father and has no information about his current status or location or involvement with the EPDP. I accept that the applicant's father could have been involved with the EPDP at some stage but the applicant has no other evidence to support this and, in particular no evidence that he was involved in killings as suspected. All the information he has provided is second hand and speculative in nature. The applicant lived in his home village for the majority of his life and did not experience any harm on account of his father's claimed activities. I do not accept that the applicant was harmed or at risk of harm in Sri Lanka on account of his father's activities. Further, given that the EPDP is a now legitimate political party in Sri Lanka and that the civil war finished in 2009, I do not consider it plausible that government authorities or the EPDP would harm the applicant in the future because of his distant father's earlier involvement in the group.
19. The applicant claims that he witnessed his step-father being shot dead outside his house sometime in 2006. He has consistently made this claim and, in the context of conflict in the east of Sri Lanka, I accept that this occurred. However, the applicant has also consistently claimed that the assailants were unknown and, in spite of a police investigation the matter remains unsolved. The applicant has speculated that his step-father could have been murdered by people who were affected by his father's actions when he was in the EPDP and that he could be next. This is speculative at best. That people who had been affected by his father's actions would kill a person in an act of revenge, whose only link to the applicant's father was that he had married the applicant's mother, appears to me to lack any logical basis. In addition to this the applicant and his mother, in spite of living nearby, were never harmed either before the murder or from the time of the murder in 2006 until the applicant's departure in 2012. I do not accept that the fact that the applicant's step father, with whom he had never lived, was killed during the war has any impact on the applicant's risk of harm in 2018 or the reasonably foreseeable future.
20. I find that the chance of the applicant facing harm in Sri Lanka at the hands of the authorities or any person affected by his father's involvement with the EPDP or any other person, on account of his father's involvement with the EPDP to be remote. I am not satisfied the applicant faces a real chance of any harm because of his connection to his father or his step-father's death.

Christian religion

21. The applicant claims that he is a practising Christian and has faced difficulties from Hindus. The applicant made no claims harm on the basis of his religion until the SHEV interview when he claimed that the Hindu majority in his area of Sri Lanka prevented Christians from practising their religious faith; made non-Hindus in the village practise vegetarianism during their festivals; and threw rocks at his house if they did not observe vegetarianism. When

⁹ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251 p.51-52

asked by the delegate for details, the applicant claimed that this occurred four or five times over a number of years.

22. The applicant claims that he attends [church] in Australia and this is where he met his wife, also a Sri Lankan Christian. The applicant has not provided any documentation to support his claimed religion but, he has consistently claimed to be a Christian. Country information indicates that there is a sizeable Tamil Christian community in Sri Lanka¹⁰ and I accept that the applicant was a Christian in Sri Lanka and remains a Christian and is likely to practise his Christian faith if he returns to Sri Lanka.
23. I accept that religion plays a significant role in daily life in Sri Lanka and Sri Lanka Constitution provides for freedom of religion, and freedom of public and private worship. Acts intended to insult religion and attacking places of worship or religious objects are punishable with a fine and or imprisonment. Sri Lanka recognises religious holidays for Buddhists, Hindus, Muslims and Christians. Prominent Buddhist, Hindu, Muslim and Christian leaders attend national functions, although most events include only Buddhist rituals. Ministers with portfolio responsibilities for the four major religions are practising followers of the faith for which they are responsible. School students are able to study their choice of Buddhist, Hindu, Muslim and Christian religious classes in most public and private schools, depending on the availability of teachers. DFAT assesses that while no laws or official policies discriminate on the basis of religion, adherents of religions other than Buddhism face a low risk of official discrimination from local government authorities, which can affect their ability to practise their faith freely¹¹.
24. At his SHEV visa interview, the applicant stated that there was no church in his local village but that he and his aunt and he were able to attend a church at a nearby village in Batticaloa without difficulties. Accordingly, he has not claimed that he was ever forced to stop practising Christianity and I do not accept that he was ever stopped from practicing his religion.
25. The applicant claimed that the only issued he faced in his village was that during Hindu festivals he was made to practise vegetarianism. He said that there were three temples in his village and he would have to refrain from meat a number of times a year. He claimed that if he did not practise vegetarianism at the appropriate times, rocks were thrown at his house. At the SHEV interview the delegate asked the applicant how often he had rocks thrown at his house, he stated that it had occurred four or five times over a period of four to five years. He does not claim to have been physically harmed or that his property was harmed. He did not claim to have reported the matter to the police and he did not claim that the police refused to offer him protection. He did not explain how the local Hindu population knew he was eating meat or provide any detail about rocks being thrown at the house which he shared with his aunt. Overall I consider that the applicant's claims in this regard to be vague and unconvincing and I do not accept the applicant's account of these claimed events.
26. The National Christian Evangelical Alliance of Sri Lanka documented 96 attacks against Christians during 2017, compared to 90 in 2016 and 89 in 2015. The incidents primarily involved violence, discrimination and intimidation, but also included demands for closure of churches, legal challenges and police inaction. Buddhists were the perpetrators of most of the reported incidents¹² rather than Hindus. DFAT assesses that Christians in Sri Lanka face a low risk of official and societal discrimination and the number of incidents targeting

¹⁰ DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CIS7B839411064, 3.25

¹¹ Ibid, 3.17

¹² US Department of State, "International Religious Freedom Report for 2016 - Sri Lanka", 01 August 2017, OGD95BE927119

Christians has remained largely static over recent years, and is highest in Buddhist majority regions in the North Central, South and Western Provinces.

27. The applicant claims that his fear stems from the local Hindu population in his home village in the east of Sri Lanka and not the Buddhists. He provided a link to a website citing evidence of attacks on Christians in Sri Lanka but did not provide or point to the relevant extracts. I was unable to locate any information on that website relating to violence towards Christians by Hindus or Christians being forced to practice vegetarianism. I am not satisfied that the applicant has ever been prevented from practising his Christian faith in Sri Lanka and I do not accept that he faces a real chance of harm on the basis of his Christian religion if he returns to Sri Lanka.

Failed asylum seeker

28. The applicant claimed in his application that he left Sri Lanka illegally and that this illegal departure would result in him being suspected as an LTTE member on his return to Sri Lanka. At the SHEV interview the delegate put to the applicant that he had travelled lawfully to [Country 1] on his own passport with a work visa in 2007 and returned using that same passport. The applicant was asked if this passport was the one he had used to depart from Sri Lanka prior to catching a boat to Australia to which he replied that it was not. He claimed to have lost all his original documentation including his passport in Sri Lanka after he returned from [Country 1]. His mother then retained an agent to obtain a new passport in his name which he burnt prior to departing [Country 2] on the instruction of the people smuggler. The delegate asked the applicant why, in his arrival interview, he stated that his work visa for [Country 1] was in the passport that he burnt. This indicated that the passport he used to leave the country en route to Australia was the same legal passport that he used to travel to and from [Country 1]. After detailed questioning by the delegate the applicant conceded that he had departed Sri Lanka lawfully on his Sri Lankan passport. Accordingly, I do not accept that the applicant departed Sri Lanka illegally. The fact that the applicant was able to obtain a passport, travel to and from [Country 1] and then depart for Australia indicates to me that he was not of any interest to the authorities in 2012 when he departed the country.
29. The applicant fears harm on his arrival at Colombo airport as a failed asylum seeker returning from Australia. DFAT reports that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka. This includes nationals who were returned from the Australian community, and those removed from Australian onshore immigration detention centres. Many others returned from the United States, Canada, the United Kingdom and other European countries, and most returnees are Tamil¹³.
30. There are a number of reports available of arbitrary detention, interrogation and torture of returnees to Sri Lanka after they have sought asylum or worked overseas including those since the election of the Sirisena Government. In 2016 Freedom from Torture (FFT) provided an update on of referrals to FFT of people tortured in Sri Lanka since the end of the civil war in May 2009¹⁴. Of the referrals to them since 2015 the majority were specifically interrogated about their reasons for being in the United Kingdom (UK), their activities and/or their contacts in the UK in particular because of their involvement in lawful protests or their association with the LTTE in some way. The International Truth and Justice (ITJP) reported that in 2016/17 both the military and police in Sri Lanka continue to abduct, unlawfully detain, torture and rape Tamils with impunity¹⁵. Like the FFT findings, the ITJP found that the

¹³ DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CIS7B839411064, 5.37

¹⁴ Freedom from Torture, "Sri Lanka - Update on torture since 2009", 06 May 2016, CIS38A8012881

¹⁵ International Truth and Justice Project, "Unstopped: 2016/17 Torture In Sri Lanka", 14 July 2017, CISED50AD4849

profile of victims appears to indicate that in nearly all cases there were accusations of specific LTTE involvement or links including involvement in separatist activity in the UK. Policy guidance from the UK Home Office indicates that people suspected of LTTE involvement remain at risk of detention and if detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection¹⁶. The UK Home Office also opines that this risk extends to anyone who is known to the authorities, such as having their name on a 'stop' or 'watch' list or having a court order or an outstanding arrest warrant against them, they are likely to be at risk of ill-treatment whilst in custody which may amount to persecution or serious harm¹⁷. There are reported instances of torture carried out in Sri Lanka but the instances are reducing and the risk is linked to people with very particular profiles. I do not accept that there is any basis on which the applicant would be regarded by the authorities as having any kind of LTTE profile on his return to Sri Lanka or would be imputed as supportive of the LTTE. He is not a person who has been involved in separatist activity or is likely to join or be recruited to a separatist movement. He has not claimed to have been of interest to the authorities for any other matter prior to or since his departure from Sri Lanka.

31. The 2018 country information report from DFAT provides the most current available information about treatment of returnees including returning asylum seekers like the applicant. It reports that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. While returnees might be at the airport for several hours while these procedures take place, DFAT understands returnees are not subject to mistreatment during processing at the airport¹⁸. I am not satisfied that the applicant will come to any particular attention of the authorities as a result of this process.
32. The Sri Lankan Government has consistently said that refugees are welcome to return to Sri Lanka. During a visit to Australia in February 2017, Sri Lankan Prime Minister Ranil Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka, although, human rights groups greeted this statement with scepticism¹⁹. Despite positive government sentiment, DFAT assesses that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation. Those who have skills that are in high demand in the labour market are best placed to find well-paid employment²⁰. I accept that the applicant may face these practical challenges and it may take some time for him to find employment and secure suitable accommodation. I consider that these are practical difficulties which would be faced by any person seeking to re-establish themselves after being away from the country for an extended period of time, I do not consider that they would threaten the applicant's capacity to subsist and I am not satisfied that they are for any reason stated in s.5J(1).

¹⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826, 3.1.6-3.1.7

¹⁷ Ibid, 3.1.18

¹⁸ DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CIS7B839411064, 5.27-5.29

¹⁹ Ibid, 5.38

²⁰ Ibid, 5.39

33. The government has reportedly decreased systematic surveillance of returnees however DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017. Refugees and failed asylum seekers also reported social stigma from their communities upon returning to some communities as people resent the financial support provided to refugee returnees²¹. DFAT assesses that returnees may also face some societal discrimination upon return to their communities, which could also affect their ability to secure housing and employment. DFAT further assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities²².
34. The applicant is originally from Batticoloa, but his wife is from the north of Sri Lanka. There is possibility that the applicant may be the subject of monitoring by the authorities for a period if he returns to the north and may experience some social stigma within his community. However, I am not satisfied that this treatment, if it does occur, amounts to serious harm. I do not accept that the challenges that the applicant may face in terms of re-establishment would be as a result of systemic and discriminatory conduct. Overall, I am not satisfied that the applicant has a well-founded fear of persecution as a returning asylum seeker.

Refugee: conclusion

35. 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

36. Under s.36(2)(aa) of the Act, 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

37. 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.

²¹ DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CIS7B839411064, 5.40

²² Ibid, 5.42

38. As set out above, I have found that there is not a real chance that the applicant would face harm because of his ethnicity, imputed LTTE support, his relationship to his father and the EPDP, his father's actions, his step father's death and beliefs and Christian religion or any combination or accumulation of those factors. Real chance and real risk involve the same standard²³. On the same factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm on those grounds, including significant harm, should he be returned to Sri Lanka.
39. While there is a possibility the applicant may face monitoring and social stigma for a period as a returned asylum seeker and may face practical challenges re-establishing himself, I am not satisfied that such treatment would amount to significant harm as defined. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied that it amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka there is a real risk he will suffer significant harm.

Complementary protection: conclusion

40. 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.

²³ *MIAC v SZQRB* (2013) 210 FCR 505

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.

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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.

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36 Protection visas – criteria provided for by this Act

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- (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.