



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05125

Date and time of decision: 7 August 2018 16:20:00
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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu man from Sri Lanka. On 1 September 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 7 June 2018 a delegate of the Minister for Immigration (the delegate) made a decision to refuse to grant the visa on the basis that the applicant was not owed protection.

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. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He was born on [date] in [Town 1], Kandy in the Central Province of Sri Lanka.
 - He noticed tension rising between some Tamils and Sinhalese between 1982 in [Town 1] and 1985 when he moved to Jaffna.
 - In [year] a number of Sinhalese people in civilian clothes came to his house in Jaffna and burned it down so he moved to [Town 2].
 - In 1995 he moved in with his son and daughter who were living in [Town 3] and Negombo respectively and spent time equally between the two locations. Since 1995 he experienced many incidents of discrimination.
 - In 2006 [public property] near his son's house in [Town 3] went missing and his son was accused by the Criminal Investigation Division of the Sri Lankan Police (CID) of stealing the [public property] and hiding members of the Liberation Tigers of Tamil Eelam (LTTE). His son had to [replace the missing property].
 - While he was living with his son he heard of at least two Tamil people being abducted because they were presumed to be LTTE.
 - In 2012 he was on his way to the shops and two Sinhalese people called him over and asked him if he was LTTE or if he had helped the LTTE. They beat him and stole 1000 rupees from him.
 - In 2013 [CID] officers came into his son's house and accused him of harbouring members of the LTTE and storing weapons for the LTTE. The officers searched the house but found nothing. His son was told not to leave the area.
 - Approximately one month later his son told him that the officers had come back to his house to search for weapons and threatened to take him away for questioning.
 - The applicant departed Sri Lanka in May 2013 with his son and his son's family.

- He fears that if he is returned to Sri Lanka, he could be harmed by the Sri Lankan authorities because he is Tamil and they believe that he and his family have LTTE connections.
- He also fears he will be harmed on his return for departing the country illegally without a passport.

Refugee assessment

6. 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

7. 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.
8. The applicant claims he was born on [date] but his birth was not registered as he belongs to a Kuravar or gypsy caste. His family moved around from place to place working as fortune tellers and horoscope readers. He held no driver’s licence or passport and lost all of his other documentation when his home in Jaffna was burnt down in [year]. The applicant arrived in Australia with his son, daughter in law and their children who had documentation. I accept the applicant’s explanation for not being able to provide Sri Lankan identity documents. In the absence of documentation I accept the applicant’s identity as claimed based on his account of his life in the SHEV interview and on the basis of consistency with his family’s account of his life. I accept that the applicant is a Sri Lankan national of Tamil ethnicity and that Sri Lanka is the receiving country.

Imputed LTTE/Tamil ethnicity

9. The applicant has denied any involvement in the Sri Lankan conflict. During his SHEV interview he was asked if the fighting or conflict had come into his area in Sri Lanka and whether he could describe any specific incidents. He responded that he saw a lot of bomb blasts and dead bodies. He was asked if he had ever had any involvement with the LTTE or

the movement for Tamil independence. He responded that he had had no involvement of any sort. I accept that the applicant was exposed to the conflict when he was moving from place to place during the war, and given his consistency, I accept that he has had no involvement with the LTTE or any movement for Tamil independence.

10. During this SHEV interview the applicant was asked about his family in Sri Lanka and whether any of his family members had any involvement with the LTTE or the conflict. He stated that they did not, but they would often be accused of such links based on their Tamil ethnicity. He advised that one his brothers is now deceased, another is alive and in Sri Lanka but he is unsure of his whereabouts. One of his sisters is married and living in [another country] and another still lives in Sri Lanka. He has a son who is married and living in [a town] while his other [sons] have also sought asylum in Australia. The Department of Foreign Affairs and Trade (DFAT) reports that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict. While LTTE members and supporters were almost all Tamil, security forces also imputed LTTE support based on ethnicity, and emergency regulations were, at times, applied in a discriminatory manner¹. I accept the applicant's account that he has no family members who were involved in the LTTE or Tamil separatist politics but that they were at times accused of such links. I accept that since the conflict he has some family members who continue to live safely in Sri Lanka.
11. The applicant claimed that he witnessed, was involved in, or heard of discrimination against Tamils on the basis of imputed LTTE support throughout his life in Sri Lanka. He provided a number of examples in his SHEV application which he discussed in detail at his SHEV interview.
12. The applicant claims that he first noticed tension rising between some Tamils and Sinhalese in 1982 when he lived in [Town 1] and this increased in 1985 when he moved to Jaffna. He claims that in [year] a number of Sinhalese people in civilian clothes came to his house in Jaffna and burned it down so he moved to [Town 2]. Country information describes how Jaffna and other predominantly Tamil regions in the north were marked by ethnic tensions in the 1980s² and by 1990 Jaffna was the site of a number of violent confrontations³. Given the detail provided by the applicant about his experience in the north of Sri Lanka in the 1980s I accept that he experienced abuse due to being Tamil and that his house was burnt down in an act of anti-Tamil violence in [year].
13. In 2006 when he was staying at his daughter's house, the authorities visited his son and accused his son of stealing [public property]. His son was accused by the Sri Lankan authorities of harbouring members of the LTTE and that he had removed the [public property] for this purpose. The applicant explained that as a result of this incident his son had been forced to buy a [replacement]. I accept the applicant's account of this incident and that the applicant's son was targeted because of his Tamil ethnicity. The applicant has confirmed that he suffered no consequences as a result of this incident and he was not accused of harbouring LTTE members.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.8

² Jawaharlal Nehru University, "Tamil militancy in Sri Lanka: a study of the evolution and growth of the Liberation Tigers of Tamil Eelam (1976-1990)", 30 December 2013, CIS36DE0BB2594

³ Centre for International Development and Conflict Management, "Chronology for Sri Lankan Tamils in Sri Lanka", 01 January 2013, CIS26243

14. The applicant claimed that he was told by his son about Tamils who had been abducted in white vans. The applicant clarified that he was not personally affected, he had a fear that it would happen to his children. The applicant's account of hearing about Tamil people being abducted during the conflict is consistent with country information that systematic abductions using white vans, often leading to enforced disappearances, occurred during the conflict and post-conflict periods. The term 'white van abductions' describes instances where individuals were abducted by unknown perpetrators in unmarked vehicles and mostly never seen again. DFAT understands that disappearances are no longer common⁴. I accept that the applicant's son told him about people being abducted during the conflict and this resulted in him feeling fearful for his children.
15. The applicant claimed that one day in 2012 he was walking along a railway track when two Sinhalese men stopped him and his friend, grabbed his shirt, put knife to his shirt and accused him of supporting the LTTE. They took all the money from his and his friend's pockets and he escaped and ran home. The applicant stated that the men did not identify themselves but he suspects they were CID because they accused him of supporting the LTTE. The applicant's account of the attack is credible; however, I consider that his description of the attack is more consistent with an opportunistic criminal act of theft rather than a political act. I am not satisfied that the criminals were CID or other representative of the Sri Lankan authorities simply because they accused him of being LTTE, or that they specifically singled out the applicant for this treatment beyond identifying him as being Tamil.
16. The applicant claims that his son told him that in 2013 [CID] officers came into his son's house on two occasions and accused him of harbouring members of the LTTE and storing weapons for the LTTE. The officers searched the house but found nothing. The family were told not leave the area. When asked about the threat to him at interview, the applicant replied that he believes that because they came for his son, they will come for him. If the CID had received intelligence that the applicant's son had some connection to the LTTE, it is plausible that they would have visited his home as part of an investigation and searched the premises. On each occasion the applicant claims they found nothing on the premises and left. The applicant has been consistent in making this claim and I accept that this occurred. However, I consider that if the CID's suspicions were strong, the family could have been detained under the *Prevention of Terrorism Act (PTA)* without charge. The PTA (currently suspended but still in legal force) allowed authorities to detain suspects without charge for up to 72 hours. After this period elapsed, a suspect either could appear before a magistrate, or be held without charge under detention orders for three-month periods not exceeding 18 months. Suspects could be held in irregular places of detention, as well as at police stations, detention centres or prisons⁵. The 2016 the United Nations (UN) Committee against Torture fifth periodic report on Sri Lanka stated that police powers to arrest suspects without a court warrant and the subsequent practice of detaining persons while conducting investigations were used to obtain information under duress⁶. In all these circumstances I consider that if the police and CID had genuine concerns that the applicant's family presented a security threat they would very likely have detained them pending investigation. The applicant does not claim that anyone in his family has been arrested, detained or otherwise charged with any offence and as such I do not consider that, after these two visits, the authorities had any ongoing suspicion of them of being involved with the LTTE or posing any security threat.

⁴ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 4.7

⁵ Ibid, 4.20

⁶ Ibid, 4.21

17. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout Sri Lanka. According to expert testimony provided to a hearing of the United Kingdom's (UK) 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 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 monitored⁷. I find the chance of the applicant being on any stop or watch list to be remote, he was not involved in the conflict, he is not a former LTTE member or supporter, he has no outstanding court orders or warrants and he has not been involved in any separatist political activities or criminal activities either inside or outside of Sri Lanka.
18. I have considered a range of country information about Tamil people in Sri Lanka being subject to monitoring, harassment, interrogation and torture. In March 2017, the United States (US) Department of State reported that there are incidents of arbitrary arrest, lengthy detention, surveillance, and harassment of persons viewed as sympathisers of the LTTE⁸. In May the UN special rapporteur on torture and other cruel, inhuman and degrading treatment or punishment and the UN special rapporteur on the independence of judges and lawyers visited the country and delivered preliminary observations and recommendations. They concluded that torture remained a common practice in both criminal and national security cases and that the criminal justice system facilitated the use of torture to extract confessions to build cases⁹. They stated that police investigators used torture and ill treatment routinely. I have accepted that the applicant's son was investigated by the CID in 2006 and 2013 but that neither he nor any members of his family were detained, arrested or subject to any mistreatment. The applicant has not indicated that either he or any of his family members have been involved in any behaviour that would result in them being the subject of any criminal investigation on their return.
19. The June 2017 UK Home Office report on Tamil separatism opines that a person being of Tamil ethnicity would not in itself warrant international protection and neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state¹⁰. The applicant has not had any involvement in the LTTE and has not been involved in any separatist activities. Further, the applicant has reported that he still has family members living in Sri Lanka and he does not report that they have been suspected of involvement with the LTTE.
20. The May 2018 DFAT report considers a number of findings that torture in Sri Lanka continues, including from the UN special rapporteur on human rights and counter-terrorism, the UK Home Office and the International Truth and Justice Project. The reports indicate that many of the victims of torture under the Sirisena government had been involved in diaspora activities that were viewed as either separatist or a threat to national security, were ex-LTTE or were the subjects of criminal investigations. The applicant does not fit these profiles. DFAT

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.37

⁸ US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka ", 03 March 2017, OGD95BE926876

⁹ Ibid, p.4

¹⁰ UK Home Office, " 'Country Information and Guidance: Tamil Separatism', 15 June 2017, OG6E7028826, 3.1.2

assesses that, irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture¹¹.

21. DFAT also reports that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015¹². The current President, Maithripala Sirisena, was elected in January 2015. His 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 PTA and committing to reform the PTA; and engaging constructively with the UN. DFAT reported that following its election, the Government also established an Office of National Unity and Reconciliation to develop a national policy on reconciliation and has committed to establishing a range of offices to give effect to reconciliation measures such as an Office on Missing Persons; an Office for Reparations; a Truth, Justice, Reconciliation and Non-Recurrence Commission; and a Judicial Mechanism with a Special Counsel¹³. There have also been a number of symbolic changes including changing the name of the day commemorating the end of the conflict from 'Victory Day' to 'War Heroes Remembrance Day' and giving official approval for memorial events to take place in the north and east.
22. Having regard to the country information and the applicant's account of events, I am not satisfied that he faces a real chance of any harm on the basis of being imputed with a pro-LTTE political opinion due to his background, ethnicity or caste. He does not have a political profile of any kind and the real chance of him being imputed with such as profile is remote. The applicant has not undertaken any separatist activity in Sri Lanka or Australia and is not wanted for any criminal or political activity. I am not satisfied that the applicant holds a well-founded fear of persecution on the basis of his imputed or actual political opinion and/or Tamil ethnicity.

Kuravar caste/Hindu faith

23. In his SHEV interview the applicant claimed that he had been subject to discrimination as a member of the Kuravar, a low caste, in Sri Lanka. He said that other Hindus would not let him inside the temple and he was unable to send his children to school. His family had no permanent residence and just moved from place to place and, if people saw them on the road, they would laugh at them. Country information indicates that members of the Kuravar caste suffer significant societal discrimination. Members of the Kuravar caste speak Telugu and are also known as Sri Lankan gypsies who have traditionally practised fortune telling and lived a largely nomadic lifestyle¹⁴. Certain depressed caste communities continue to exist in Sri Lanka and continue to experience caste-based discrimination in areas such as education, land market, access to resources, and access to social welfare and obstacles to upward social mobility often in combination with exclusionary dynamics such as class, ethnicity and gender. On the basis of the applicant's account of his life at interview, I accept that he is a member of the Kuravar caste in Sri Lanka and that he has endured societal discrimination and some harassment as a result. I also accept that, while he has not been prevented from practicing his religion, other Hindus have restricted his access to the inside of the temple because of his caste.

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 4.12-4.19

¹² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.5

¹³ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 2.29-2.33

¹⁴ Kanchana Kumara Ariyadasa, 'We are Telugu...', Sunday Times (Sri Lanka), 17 May 2015, CXBD6A0DE19558

24. Sri Lanka is a party to the International Convention on the Elimination of All Forms of Racial Discrimination. 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 housing¹⁵. It makes no particular assessment in relation to caste.
25. In light of the above country information, I accept that caste ideology exists in Sri Lanka, and that societal discrimination exists against lower caste members such as Kuravars. I am satisfied that if the applicant returns to Sri Lanka there is a chance he will face a degree of societal discrimination or harassment at times on the basis of his caste. I do not accept that this treatment amounts to serious harm. Consequently, I am not satisfied that the applicant's fear of persecution on the basis of caste is well-founded.

Illegal departure/failed asylum seeker

26. The applicant left Sri Lanka by boat in May 2013 and arrived in Australia in June 2013. I accept that if he is forcibly returned to Sri Lanka, due to the circumstances of his return on a temporary travel document, he will be identified as a failed asylum-seeker who departed Sri Lanka illegally.
27. 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 UK and other European countries, and most returnees are Tamil¹⁶. The government has consistently said that refugees are welcome to return to Sri Lanka but human rights groups have greeted this with scepticism¹⁷.
28. DFAT 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 and due to being processed en masse, DFAT understands detainees 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 as I do not consider that he has any profile of interest to the Sri Lankan authorities beyond having departed the country illegally.
29. Where an illegal departure is suspected, returnees are charged under the *Immigrants and Emigrants Act* (I&EA). DFAT understands that in most cases, these individuals are arrested at the airport. As part of this process, police will take photographs, finger prints and statements and make relevant enquiries and checks to be sure that the person is not trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. DFAT understands that such persons are not subject to mistreatment during processing at the airport. At the earliest available opportunity police transport the individual to the closest

¹⁵ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.1-3.3

¹⁶ Ibid, 5.37

¹⁷ Ibid, 5.38

¹⁸ Ibid, 5.27-5.29

Magistrates Court. The Court then makes a determination as to the next steps for each individual. Should a magistrate not be available – for example, because of a weekend or public holiday – those charged may be held in a holding cell at the airport for up to two days¹⁹.

30. Country information from DFAT indicates that penalties applicable for passengers illegally departing in this context can include up to five years imprisonment and fines of up to 200,000 Sri Lanka Rupees. A guilty plea will attract a fine which can be paid by instalment and the defendant is free to go. Where a returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member and they are free to go. In particular, advice from Sri Lanka's Attorney General's Department to DFAT is that no returnee who left Sri Lanka unlawfully as a simple passenger on a people smuggling vessel has been given a custodial sentence for their breach of the I&EA²⁰. If the applicant is charged and fined under the I&EA, the country information indicates he would be released, or released on personal surety or guarantee by a family member. There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face a real chance of a custodial sentence. As noted above, the applicant may be detained for up to two days in a holding cell at the airport whilst waiting to be brought before a magistrate. He may incur legal and transport costs travelling to and from court and he may spend many years on bail which can involve monthly reporting to police at the returnee's expense. On the evidence before me, I find that a brief period of detention, the imposition of any fine, surety or guarantee and associated costs would not of itself constitute serious harm.
31. I am also satisfied that the provisions and penalties of the I&EA are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process or penalty the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act.
32. DFAT assesses that refugees and failed asylum seekers face practical challenges to a 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 documentation²¹. I am not satisfied 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, would threaten the applicant's capacity to subsist, or otherwise constitute or lead to serious harm.
33. The government has reportedly decreased systematic surveillance of returnees DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017. It makes no reference to monitoring in the north-west or central areas. 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 returnees²². DFAT assesses that returnees may also face some societal discrimination upon return to their communities, which could also affect their ability to

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.30

²⁰ Ibid, 5.32

²¹ Ibid, 5.39

²² Ibid, 5.40

secure housing and employment. DFAT further assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities²³.

34. I accept that if the applicant is returned to the country he may be the subject of monitoring by the authorities but not otherwise subject to harm by them. I also accept that he may experience some social stigma within his community for reasons of his caste and his return as a failed asylum seeker. However, he has family in Sri Lanka including siblings and children, and he lived with his daughter in Negombo the past. I have no information before me that she would be prevented from continuing to support her father on his return as she did prior to his departure. I am therefore not satisfied that social stigma that the applicant may face, if it does occur, amounts to serious harm. I do not accept that the challenges that the applicant may face in terms of re-establishing himself in Sri Lanka amount to serious harm. Overall, I do not accept that the applicant has a well-founded fear of persecution as a failed or returning asylum seeker to Sri Lanka.

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. 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.
38. As set out above, I have found that there is not a real chance that the applicant will face harm on his return to Sri Lanka because of his Tamil ethnicity and/or any imputed or actual political opinion as a supporter of the LTTE. Real chance and real risk involve the same standard²⁴. 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.

²³ Ibid, 5.42

²⁴ *MIAC v SZQRB* (2013) 210 FCR 505

39. I have accepted that the applicant may face some social stigma, societal discrimination and harassment in Sri Lanka as a member of the Kuravar caste and as a failed asylum seeker of the Kuravar caste and may face restrictions on entering some temples on the basis of his caste. However, 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.
40. I have accepted that there is a possibility that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally and he may be detained for several hours at the airport and potentially for up to two days. DFAT has advised that detainees are not subject to mistreatment during processing at the airport, including for those suspected of offences under the I&EA²⁵. I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport or as a result of any illegal departure. I am satisfied that any investigation process, arrest, detention process, fines and costs associated with bail, that the applicant could be subject to, would not amount to the death penalty or an arbitrary deprivation of life or torture. Further, there is no evidence of any intention to inflict pain or suffering, severe pain or suffering or to cause extreme humiliation. I am not satisfied the applicant will face a real risk of significant harm as a result of any illegal departure.
41. I have also accepted there is a possibility the applicant may face monitoring from the authorities after his return as a failed asylum seeker, and he may face challenges re-establishing himself in Sri Lanka. I also accept that these challenges may be exacerbated by his caste as he has already faced discrimination on that basis in Sri Lanka in the past. However, 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

42. 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.

²⁵ DFAT, "Sri Lanka - Country Information Report", 23 May 2018, CIS7B839411064, 5.29

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.