



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05231

Date and time of decision: 12 November 2018 10:42:00
M Currie, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan citizen of Tamil ethnicity and an adherent of the Christian faith. He arrived in Australia in November 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in September 2016. In June 2018, a delegate of the Minister for Immigration and Border Protection found that Australia did not owe protection obligations to the Applicant. On 27 June 2018, the applicant's matter was referred to the Immigration Assessment Authority (IAA)

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. I note that in the s.65 decision the delegate relied upon a DFAT report about conditions in Sri Lanka which was published in January 2017. However, since that date, DFAT has produced a revised report which was published in May 2018. As the newer report more closely reflects the current conditions in Sri Lanka, I am satisfied that there are exceptional circumstances to justify the consideration of the new report and I have done so.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan citizen of Tamil ethnicity and an adherent of the Christian faith. He was born on [date] in [District 1] of the Northern Province of Sri Lanka. He lived in [Village 1].
 - In 1990, when he was a young child his family departed Sri Lanka for [Country 1] due to the civil war. The applicant lived a Tamil refugee camp in [Country 1] and attended school there. His family lived in [Country 1] until 2003, when they returned to Sri Lanka and resumed living in [Village 1].
 - After their return to Sri Lanka, the applicant commenced working as a fisherman with his father.
 - In 2012, the Sri Lankan Navy (SLN) started making inquiries about persons in [District 1] who had provided support to the Liberation Tigers of Tamil Elam (LTTE) during the war. Many people were questioned.
 - A friend of the applicant ([Mr A]) who had worked with him on the fishing boat for approximately one year was known to have provided logistic support to the LTTE during the civil war. One day he failed to show up for work.
 - Three days later the SLN came and visited the applicant at his boat; applicant he was arrested and detained. The SLN asked him about his relationship with [Mr A] and imputed the he had also been a supporter of the LTTE during the war. The. He was taken to the naval camp and interrogated. He was mistreated. After six hours, he was released into the custody of his parents. He was advised to return in three days in order to face further questions.

- The applicant feared that he would face further mistreatment, or worse. He fled Sri Lanka to [Country 1], and then travelled to Australia. After his arrival, his father was questioned about his whereabouts for two to three years.
- The applicant fears that if he returns to Sri Lanka that he would be identified, arrested, questioned and killed, since the authorities in Sri Lanka would continue to impute him with LTTE sympathies.
- He fears that his decision to flee Sri Lanka and seek asylum while he was of interest to the authorities there would be taken as further evidence of his support for the LTTE.

Factual findings

5. As part of his SHEV application, the applicant has provided a range of identity documentation. This includes copies of his Sri Lankan National Identity Card, his Sri Lankan Birth Certificate, his school leaving certificate and his Sri Lankan Fishing licence. There are some inconsistencies in the applicant's name listed on these documents. Some departmental records also list alternative names for the applicant. He has provided convincing explanations for these inconsistencies indicating that they arose due to a series of compounding translation and transliteration errors. The applicant has established his identity to my satisfaction. I accept that he is a Sri Lankan citizen of Tamil ethnicity who was born in [District 1] in the Northern Province of Sri Lanka. I accept that in Sri Lanka he resided in [Village 1] on [Island 1]. For the purposes of this decision, I find that Sri Lanka is his receiving country.

Religion

6. The applicant says that he is a Christian. He has consistently made this claim since his arrival in this country. None of the documentary evidence he has provided (referred to above) contains any evidence to support his claim. Nevertheless noting his consistent verbal evidence on this issue, I accept that the applicant is Christian. I observe that the applicant has not founded any of his claims for protection on his religion or on any religious issues.

[Country 1]

7. The applicant claims that in 1990, when he was a young child he and his family departed Sri Lanka and moved to [Country 1]. While in [Country 1], he lived in a Tamil refugee Camp. He attended school in [Country 1] where he completed studies up to Year [number].
8. As evidence of these claims, the applicant had provided copies of his Secondary School leaving certificate, evidence of his school examinations and copy of a Refugee Card which was issued in [Country 1] and which lists his family members. On their face, these materials support the applicant's claims.
9. I accept that the applicant and his family lived in [Country 1] as refugees between 1990 and 2003. For the sake of clarity, I note the applicant has not founded any of his claims for protection on this period of his life.

Fisherman, detention & mistreatment

10. The applicant claims that he returned to Sri Lanka in 2003 with his family that they returned to the same home in [Village 1] on [Island 1] that they had departed in 1990. The applicant's father worked as a fisherman. In his SHEV application, the applicant indicates that from 2004 the applicant worked with his father as a fisherman. At some stage, the applicant commenced working his own fishing boat. He says that the area he lived in came under the control of the SLN from around 2006. Despite this people in the area continued to support the LTTE.
11. Around 2012, the applicant says that the authorities in the area he lived commenced to round people who were suspected of providing support to the LTTE during the civil war. The applicant says that neither he, nor any of his family was a supporter of the LTTE. However, a friend of the applicant ([Mr A]), who had worked with him on his fishing boat for around one year (commencing in 2011), had provided support to the LTTE during the war. The applicant says he was aware that [Mr A] had provided logistic support for the LTTE between 2006 and the end of the war in 2009 by transporting supplies on behalf of the LTTE on boats.
12. [In] September 2012, [Mr A] failed to show up for work. The applicant did not know why. [Three days later], three members of the SLN navy approached him. They asked him about [Mr A]. The applicant informed the navy men that [Mr A] had not shown up for several days, and that he did not know where [Mr A] was, or why he had stopped attending work. The navy men told the applicant that they were looking for [Mr A] and another man. They detained the applicant on suspicion that he might be the second man and he was taken to a nearby naval camp.
13. At the camp, the applicant was interrogated in a small dark room. He had his Global Positioning System (GPS), taken from him and was questioned about it, and about [Mr A]. The applicant says that the navy had developed an interest in the GPS of fishermen, since they had discovered that during the war, many fishermen had used GPS to transport weapons and food for the LTTE. The navy examined the applicants GPS and questioned him about the locations stored in the memory of the device. The applicant was also questioned about his relationship with [Mr A], and his knowledge of [Mr A]'s support to the LTTE. The applicant as imputed to be a support of the LTTE like [Mr A]. During questioning, the applicant was beaten by the navy interrogators including being slapped on the face and kicked. Throughout his questioning, the applicant maintained that he was merely a fisherman, and had never been a member or supporter of the LTTE. The applicant says that he was held at the base for approximately six [hours] around [time] he was released into the custody of his parents and his GPS was returned to him.
14. Due to injuries suffered during his questioning, the applicant did not leave his home for several days. Then he returned to his occupation of fishing. The applicant says that in the normal course of events, fishermen would only keep a copy of their fishing permit on them. When they wanted to go fishing, fisherman would present themselves to a navy office in order to exchange their cop, for their original fishing permit before heading out in order to do ensure that if stopped by a navel patrol while fishing they could show the original permit. On the day the applicant attempted to go fishing, he says the naval officer present refused to hand him his original fishing permit and advised him that he had to return to the naval camp for further questioning. The officer confiscated his GPS. He was advised that he should attend the naval camp the next day.

15. The applicant was fearful that he would be detained and beaten again. He feared that he would not be released a second time. He went into hiding at a relative's house in the nearby village of [Village 2]¹ where he stayed for eight days and made arrangements to depart Sri Lanka. He departed Sri Lanka illegally by boat and travelled to [Country 1], where he stayed for around 15 days, before further arrangements were made to come to Australia.
16. After his departure, the applicant says that his father was asked about his location on an unknown number of occasions over the next two to three years when he applied for his own fishing licence. The applicant's father was told that the navy wanted to talk to the applicant and that if he returned he should present himself to the navy office.
17. As evidence of his claims, the applicant has provided two Sri Lankan fishing licences. The Fishing licences appear to be issued in his name. On their face, the licence is supportive of the applicants claim to be a fisherman. I have some doubts about these cards. I note the applicants evidence (summarised earlier) indicates that fishing licences in the [District 1] area were actually held by the navy, and only handed to fishermen when they went fishing. According to his own testimony, the applicant's last attempt to obtain his licence was refused, and afterwards he went into hiding so it is not entirely clear how he managed to provide his fishing licence to the department. I conclude that the applicant has not been entirely forthcoming about events in Sri Lanka. Nevertheless, I am willing to accept that the applicant worked as a fisherman in Sri Lanka. However, I observe he has not been able to provide any independent evidence in support of his principal claims of detention and mistreatment.
18. Country information before me indicates that the authorities in Sri Lanka remain sensitive about to the LTTE and the notion of Tamil separatism². During and after the conflict support for the LTTE could be imputed on the basis of ethnicity³. There are many credible reports which indicate that when questioning suspects Sri Lankan authorities use the type of physical intimidation reported by the applicant in order to secure confessions⁴.
19. I have carefully considered the applicants evidence about his detention and mistreatment. Despite the lack of any independent corroborative evidence for these claims, I observe the applicant's account is supported by country information which is before me. In the circumstances, he describes (working closely with a former LTTE supporter) I find that his account of being detained questioned and mistreated to be plausible. I accept that the applicant was detained and questioned about [Mr A], his friend and co-worker. I also accept that during questioning the applicant was mistreated. Nevertheless, I note that on the applicant's own evidence he was not further detained. Rather he says he was released around [time] on the same day he was arrested, after he had answered the questions of the SLN. While it is also plausible that the Sri Lankan authorities may have imputed him with LTTE motives during questioning, it seems clear that they did not actually believe him to have been a member, or an active supporter (like [Mr A]) since they released him. I note the applicant continues to maintain that he

¹ [Footnote deleted].

² Department of Foreign Affairs (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105, & Department of Foreign Affairs (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064

³ DFAT, "DFAT Country Information Report – 24 January 2017" CISED50AD105, 3.8 & DFAT, "DFAT Country Information Report – 23 May 2018" CIS7B839411064, 3.8

⁴ DFAT, "DFAT Country Information Report – 24 January 2017" CISED50AD105, 4.11 – 4.20 & DFAT, "DFAT Country Information Report – 23 May 2018" CIS7B839411064, 4.13

was never a member or an active supporter of the LTTE. I accept that he was never a member or supporter of the LTTE.

20. During and after the conflict, the Sri Lankan security forces were granted wide powers under the Prevention of Terrorism Act (PTA) which is still in force today. The evidence indicates that after the war, and for some time afterwards, persons with even remote links to the LTTE could expect lengthy periods of detention, face charges under the PTA, and to undergo a period of formal rehabilitation in Government rehabilitation camp⁵. None of these things happened to the applicant. Instead, he was released without charge.
21. I note the applicant says that after three days he was asked to report back to the navy for further questions. He says he does not know what they wanted to talk to him about. The applicant says that he was afraid to return to the camp and that he went into hiding at a relative's house. While the applicant does not know the exact reason, in the circumstances I conclude that the applicant would likely have faced further questions about his knowledge of [Mr A]. Given his earlier release without charge, I am not satisfied that the applicant was imputed to be a member of the LTTE at this time.
22. I note that the applicant has provided a full account of his departure and his travel to Australia. I accept the applicant's account of his departure. I accept that he left Sri Lanka illegally.
23. In his Protection Visa Interview when asked if there was any further interest in him after he departed. The applicant has said that in the immediate aftermath of his departure, his father (also a fisherman) was asked about the applicant's location on several occasions over a two to three year period. I found this claim to be vague and to be unconvincing. I note that the applicant had not made this claim, or any like before the date of his Protection Visa Interview and it did not appear in his written statement of claims in his SHEV application. He did not outline when these events occurred, or how he knew. I was not persuaded that he was being forthcoming about this claim. In any case, on the applicant's own evidence the authorities only asked for him, on several occasions, over a two to three year period. While this is a vague assertion, even the most generous interpretation of this claim would suggest the authorities had not showed any interest in him since at least 2015. Given these factors, I am not satisfied that the applicant would be of any interest now.

Refugee assessment

24. 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.

⁵ DFAT, "DFAT Country Information Report – 24 January 2017" CISED50AD105, 3.34 – 3.37 & DFAT, "DFAT Country Information Report – 23 May 2018" CIS7B839411064

Well-founded fear of persecution

25. 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.
26. The applicant’s mother and father, and his two siblings continue to live in the village of [Village 1] on [Island 1] in the Norther Province of Sri Lanka. I conclude that if returned to Sri Lanka, the applicant would return to [Village 1] and live with his family.
27. I have found that this applicant was never a member or supporter of the LTTE and that he was no longer of any interest to the authorities in Sri Lanka. The applicant fears he will be harmed or arbitrarily deprived of his life by the Sri Lankan authorities due to his Tamil ethnicity, his imputed support for the LTTE (political opinion) and on this basis of being a failed asylum seeker who departed illegally. He says his attempt to seek asylum in a foreign country would be taken as further evidence of his support for the LTTE.

Ethnicity, political opinion

28. The applicant claims that if returned to Sri Lanka he would face harm due to his ethnicity, and his imputed political opinion. He says that he would be imputed with a political opinion that is anti-government and supportive of the Liberation Tigers of Tamil Eelam (LTTE) due to his ethnicity and his attempt to claim asylum in another country.
29. Ethnicity continues to be a source of tension in Sri Lanka⁶. This is unsurprising given the civil war was fought along ethnic lines with the aim of creating a separate Tamil State. According to the most recent census, the Tamil population in Sri Lanka was 3.1 million in 2012, compared to 2.7 million in 1981. Tamils are the second largest ethnic group in Sri Lanka. Approximately 15% of the Sri Lankan population is Tamil⁷. Tamils live throughout Sri Lanka, but are concentrated in the Northern Province, where they comprise 93 per cent of the population⁸.
30. Despite some historic grievances, Tamils are reported to be full participants in the political process in Sri Lanka, and DFAT indicates that they have a substantial level of political influence. There are many Tamil Political parties in Sri Lanka, especially in the North, the historic centre of Tamil power. Even former LTTE members are now actively

⁶ DFAT, “DFAT Country Information Report – 23 May 2018” CIS7B839411064, 3.1

⁷ Ibid, 2.5

⁸ Ibid, 3.4

engaged in the Sri Lankan political process. There are no barriers to Tamil political participation⁹. Nevertheless, I note that DFAT reporting indicates that many Tamils in the north report that the authorities continue to monitor public gatherings in Sri Lanka and conduct surveillance on persons of interest; usually people involved in politically sensitive issues such as land rights, missing persons and memorial events¹⁰.

31. The applicant has never advanced any claim to have been involved in land rights, or in missing person's advocacy. I note that the applicant does not claim that any of his family members who continue to reside in Sri Lanka, including his father and brothers continue to suffer from any ongoing harm merely for being Tamil. He has not advanced claims that his family is monitored by the Sri Lankan authorities, and his own evidence indicates that his family have not been visited by Sri Lankan authorities since at least 2015.
32. There is a substantial body of historic information that does indicate that being known to associate with persons suspected of providing support for the LTTE could be a factor in being imputed with pro LTTE links¹¹. Reports of about the mistreatment of those suspected of LTTE links continue to emerge¹². I accept that the applicant worked with [Mr A], and that [Mr A] was himself suspected of LTTE links. Nevertheless, I note the applicant was never charged with any offences related to the LTTE. He has not offered any indication of what happened to [Mr A] including whether [Mr A] himself was ever charged. I note that, on the applicant's own evidence, he had been principally of interest to the authorities due to his links to [Mr A], not of his own links to the LTTE. He was not detained, except for a single period of questioning in 2012 and he was held for only one day. While I accept the authorities in Sri Lanka did have some interest in him in 2012, I have found above that the applicant is no longer of interest now. I note that the UK Home Office has reported as recently as June 2017 that, in the Home Office's opinion, Tamil ethnicity on its own does not in its opinion warrant international protection, and nor does past involvement in the LTTE, unless an individual is perceived to have had a significant role with the organisation, or to be active in post war separatism¹³. I do not accept that the applicant would be considered to have had significant role in the LTTE, or that he would be perceived to be involved in post war separatism. None of the evidence before me indicates that the applicant would be imputed with support for the LTTE merely for having sought asylum in another country.
33. After careful consideration, I am not persuaded that the applicant would face a real chance of harm arising from his ethnicity or that he would be imputed with anti-Government or pro-LTTE political opinion. I am not satisfied that he applicant has a well-founded fear of persecution based upon his political opinion, real or otherwise, or upon his race.

Illegal departure, failed asylum seeker

34. The applicant has claimed that he fears harm based upon his illegal departure from Sri Lanka and his status as a failed asylum seeker.

⁹ Ibid, 3.5

¹⁰ Ibid, 3.9

¹¹ DFAT, "DFAT Country Information Report – 23 May 2018", CIS7B839411064 & UN High Commissioner for Refugees, "NO LONGER VALID AS AT 18 MAY 2017 - UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

¹² US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320 & US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka ", 03 March 2017, OGD95BE926876

¹³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGD6E7028826

35. I accept that the applicant departed Sri Lanka by boat without passing through normal Sri Lankan immigration and customs checks. I note that such a departure in Sri Lanka is a breach of ss.34 and 45(1)(b) the *Immigrants and Emigrants Act* (1949) which governs exit and entry from Sri Lanka¹⁴.
36. Upon return to Sri Lanka, returnees who do not have passports, like the applicant, will likely be identified at their airport upon return to Sri Lanka. They will likely undergo an investigative process in order to establish their identity. This will likely involve a range of Sri Lankan agencies including Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department and, at times, the Terrorism Investigation Department who will interview the applicant in order to determine identity and whether the applicant is subject to any outstanding criminal matters. This processing occurs in arrival groups at the airport and can take several hours. During this time, the applicant can expect to be held at the airport while the entire cohort of returns is interviewed¹⁵. These processes are standardised and applied to all returnees regardless of ethnicity or religion¹⁶.
37. Whilst the applicant does not have a Sri Lankan passport, he does have a range of other Sri Lankan identity documents in his possession including a Sri Lankan Birth Certificate and a Sri Lankan national identity card (Sri Lanka's primary identification document¹⁷). I conclude the applicant would be able to establish his identity without difficulty if returned to his home country.
38. As the applicant departed illegally I accept that he would likely face charges arising from his breach of the *Immigrants and Emigrants Act*. This will likely result in him being arrested and charged at the airport in Sri Lanka; police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are former LTTE members (which the applicant is not). Some returnees from Australia have been charged with immigration offences and with criminal offences allegedly committed before departure¹⁸. Apprehended individuals can remain in police custody at the Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services¹⁹.
39. DFAT reporting indicates the Sri Lankan government has directed that all passengers of people smuggling ventures be charged and appear in a court closet to where the offence occurs. The frequency of court appearances depend on the magistrate and vary widely, but those charged are required to return to court when their case is being heard, or if summonsed as a witness in a case against the facilitator or organiser of a people smuggling venture. There can be lengthy delays in court processes²⁰.

¹⁴ DFAT, "DFAT Country Information Report – 23 May 2018", CIS7B839411064,

¹⁵ DFAT, "DFAT Country Information Report – 23 May 2018" CIS7B839411064, 5.27 -5.59

¹⁶ Ibid

¹⁷ DFAT, "DFAT Country Information Report – 23 May 2018" CIS7B839411064, 5.48

¹⁸ DFAT, "DFAT Country Information Report – 23 May 2018" CIS7B839411064, 5.34

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

²⁰ Ibid, 5.31

40. Penalties for leaving Sri Lanka illegally in most cases result in a fine. DFAT reports that the Attorney-General's Department, claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future. Fine amounts vary from approximately 25 AUD) for a first offence to approximately 1,670 AUD. A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine²¹. Bail is usually granted to voluntary returnees. Bail conditions are discretionary, and can involve monthly reporting to police²².
41. I accept that if returned the applicant would very likely be charged for offences related to his illegal departure from Sri Lanka. This is his first offence. I have found the applicant does not have a profile of interest to the authorities in Sri Lanka. Having considered the information above, I conclude that the applicant would very likely face a small fine, and possibly period of bail upon return, but would be otherwise free to go. The evidence before me indicates that the provisions of Sri Lankan immigration law 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 not satisfied that any process the applicant may face on return to Sri Lanka because of his illegal departure would constitute persecution for the purpose of the Act.
42. 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 documentation²³. 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 returnees²⁴. 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 communities²⁵.
43. Nevertheless, I note that the challenges outlined above are everyday difficulties faced by persons seeking to re-establish themselves after being away from the country for an extended period of time. I note my earlier finding that the applicant will be return and reside with family as he formerly did, and that this will mitigate some of these challenges. Furthermore, he has not claimed that his capacity to subsist would be threatened if returned to Sri Lanka, nor has he indicated that he fears he would be unable to obtain housing or employment. There is no information before me to suggest that Tamils who have lived abroad are facing harm at the airport or in their home areas on their return to Sri Lanka simply due to the time spent out of Sri Lanka even if they are known to be a failed asylum seeker.

²¹ Ibid, 5.32

²² Ibid, 5.33

²³ DFAT, "DFAT Country Information Report – 23 May 2018", CIS7B839411064, 5.39

²⁴ Ibid, 5.40

²⁵ Ibid, 5.42

44. Whilst government monitoring does continue in Sri Lanka, the Government it has reportedly decreased systematic surveillance of returnees. Nevertheless, 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. I accept that if the applicant is returned to Sri Lanka, and returns to the Northern Province where he previously lived, he may be the subject of monitoring for a short period by the authorities. However, I am not satisfied that he would otherwise face any real chance of harm by them. I also accept that he may experience some social stigma within his community as a failed asylum seeker and a person who has not lived in Sri Lanka for a several years. However, I am not satisfied that this treatment, if it does occur, amounts to serious harm. I do not accept that the challenges, any social stigma or monitoring he may face as a returning asylum seeker from Australia constitutes serious harm. Overall, I do not accept that the applicant would face a real chance of persecution arising from his illegal departure or his status as a failed asylum seeker or any combination of these claims.

Refugee: conclusion

45. 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

46. 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

47. 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.

48. I have found that that due to his illegal departure, the applicant will probably be identified on arrival at the airport, arrested and charged with breaches of Sri Lanka immigration law if returned to Sri Lanka. He will likely be detained for several hours at the airport and potentially for up to two days and subject to a fine or possibly bail and associated costs. He may face a period of monitoring upon return to his home in the north of Sri Lanka. He may face some social stigma and a number of everyday challenges getting re-established. However, I am not satisfied that any of these issues, either individually or cumulatively would amount to torture, the death penalty, or would result in him being arbitrarily deprived of his life. I am not satisfied that these issues amount to

cruel or inhuman treatment or punishment, or degrading treatment or punishment as defined under s.36(2A) of the Act.

49. I have otherwise found that the applicant would not face a real chance of harm arising from his ethnicity, his imputed political opinion or his status as a failed asylum seeker. As 'real chance' and 'real risk' have been found to meet the same standard, it follows that the applicant does not face a real risk of significant harm on any of these bases if returned to Sri Lanka.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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