



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05356

Date and time of decision: 12 October 2018 10:24:00
G Deal, 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 applicant (the applicant) claims to be a Tamil from Sri Lanka. [In] April 2013 he arrived by boat in Australia. On 31 January 2017 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now part of the Department of Home Affairs.
2. On 18 July 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate generally accepted most of the applicant's claims, including the deaths of family members and the disappearance of one of his brothers during the conflict and that the authorities had threatened the applicant to obtain a death certificate for his missing brother, but did not accept he continued to be of interest to the authorities because of this. She also accepted the applicant was intercepted by authorities twice when trying to leave Sri Lanka illegally, charged and placed in jail for a period but did not accept there were any pending charges in connection with this. She did not accept the applicant had a profile of on-going interest to the authorities, and found he did not meet the relevant definition of refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia had protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 5 and 8 August 2018 the IAA received a submission and supporting documentation from the applicant. In addition to arguments and the restating of claims that were before the Department (which I have considered) it also contains new claims and documents.
5. There are two new claims made in the submission. Firstly, the applicant claims that the minor variations in the spelling of his first name (which the delegate noted) in his identity documentation may attract the adverse attention of the authorities who may suspect document fraud as a consequence. The second new claim is that the applicant, as a result of being processed en masse at the airport on his return, will be subject to long delays and possible imputation with political opinions found to be held by other returnees processed in the same group. The applicant has not explained why these claims are only being raised now. There is no suggestion the claims relate to events or information the applicant only became aware of after the delegate's decision was made. I am of the view that the applicant has had adequate opportunity to put forward his claims including in an extensive post interview submission. In support, the applicant has provided general country information in relation to document fraud in Sri Lanka and en masse processing at the airport (which was before the Department) but nothing materially supportive of the claims now made. He has not said his documents were fraudulently obtained or provided any other detail in this regard. Little detail has also been provided in relation to his new claim regarding imputed legal opinion during processing at the airport. I am not satisfied exceptional circumstances exist to justify consideration of the information.
6. The applicant provided a copy of a report by the Committee Against Torture published in 2016, referred to in his submission in support of the assertion that those with suspected, even remote, links with the LTTE have been abducted and brutally tortured. This report was

published a number of years prior to the delegate's decision and the applicant has not explained why it was not provided earlier. It is also not 'personal' information, in the relevant sense. More recent information on the systemic use of torture in Sri Lanka was before the delegate such as DFAT's 2018 report on Sri Lanka and a July 2017 United Nation's news article warning that torture is routinely used against suspects in Sri Lanka (referred to by the applicant in a post interview submission). I am not satisfied exceptional circumstances exist to justify consideration of the information. In addition, the applicant has not satisfied me as to the matters in s.473DD(b).

7. The applicant provided a copy of a Gazette Notification which he claims contains a list of names of person sought by the authorities for terrorism related offences and a list of variations of those names. This is new information. The applicant makes the new claim that one of the names on this list resembles his own and could result in him coming under closer scrutiny by the authorities. I have reviewed both documents. Neither contains the name identified by the applicant in his submission and that he claims closely resembles his own (or a name that even remotely resembles his name). In these circumstances I do not consider either document or the new claim relevant.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - He is a male Tamil from the north of Sri Lanka, an area controlled by the LTTE during the conflict. He and his family were displaced during the conflict.
 - His [uncle] was a commander and his brother was a [certain rank] in the LTTE and they were killed in combat in 1989 and 2008, respectively.
 - He was forced to do work for the LTTE in 1999 and undertook self-defence training with them.
 - In 2006 he married [an LTTE leader's relative].
 - His father was killed and he and his child were injured in shelling attacks during the conflict. He still has scars from this.
 - He was in a refugee camp with his family from the end of the conflict until October 2009.
 - At the end of the war his sister was shot and killed, one of his brothers was injured and he was shot in the arm by army officers. His brother has been missing since. He lodged an application with an international organisation to find his missing brother.
 - In mid-2012 the army asked him to obtain a death certificate for his missing brother and questioned him on suspicion of LTTE involvement.
 - He subsequently made enquiries with an organisation in Jaffna about his missing brother.
 - A few months later the army threatened him to obtain a death certificate for his missing brother when he refused they twisted his ear and accused of working against the government. He feared for his safety after this and decided to leave Sri Lanka.
 - He unsuccessfully attempted to leave Sri Lanka on two separate occasions. The first time he was caught he was briefly imprisoned, beaten and taken to court. The second time, he was imprisoned for a month and had to pay [amount] rupees bail and was

accused of LTTE links. When he subsequently left Sri Lanka he had a pending court hearing and will be imprisoned on his return because of this. He successfully departed Sri Lanka by boat for Australia in October 2013.

- His hometown is still under the control of the army and there are a lot of land mines.
- Authorities have been to his home looking for him since being in Australia questioning his wife about his missing brother and his pending charges.
- He will be a failed asylum seeker who has spent many years in Australia. The authorities will assume he has been critical of the Sri Lankan government. He left Sri Lanka illegally.

Factual findings

9. Based on his evidence, including his documentary evidence, I accept he is a Tamil male from the north of Sri Lanka and his family were displaced during the conflict. I also accept he has a wife [and specified family members] in the north of Sri Lanka and that he has completed primary and secondary schooling and has [worked].
10. The applicant claims he was not told the information provided in his arrival interview would be used for the purposes of assessing his claims for protection. Shortly after arriving in Australia the applicant had an arrival interview in May 2013 (first arrival interview) and a second interview was conducted in August 2013 (second arrival interview). I have listened to the audio of both interviews. I found both interviews detailed and the applicant was very clearly told in the first arrival interview that they were seeking information about why he feared being harmed in Sri Lanka and that the information provided could be used to assess his claims for protection and reference was made to this in his second arrival interview. I also consider the interviewer in both interviews probed the applicant for further details when little information was provided by him and that he was given an opportunity to provide details about his claims in both interviews. He was also advised in his SHEV interview that all the information he had provided to the Department would be used to assess his claims. I do not accept the applicant was not advised that the information provided in his arrival interviews may be considered when assessing his claims for protection.
11. The applicant belatedly raised the claim his [uncle] was a commander in the LTTE and killed in combat in 1989 (in his SHEV application), but this this could be because it happened some 28 years prior. It has otherwise been consistently claimed and the applicant was able to respond to the delegate's questioning in the SHEV interview about this. I am willing to accept this claim.
12. The applicant has consistently claimed, since his first arrival interview that one of his brothers was forcibly recruited by the LTTE and then killed. In the first arrival interview when asked what his brother did for the LTTE the applicant said he did not know because his brother did not stay near them. In his SHEV application he said his brother was an LTTE cadre and died fighting on the battlefield. In his SHEV interview he said his brother was a [certain rank] and a fighter. He also provided a copy of his brother's death certificate. The country information before me indicates that the LTTE forcibly recruited civilians during the conflict.¹ In light of the above, I accept his brother was forcibly recruited into the LTTE and killed in the war. However the belatedly raised claim he was a [certain rank] is inconsistent with his earlier statements and lacking in detail and I do not accept this aspect of the claim.

¹ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

13. Since his second arrival interview the applicant has consistently claimed he was forced to work for the LTTE during the conflict. While this was not mentioned in his first arrival interview, I consider this may be because at that time these events had taken place some 27 years prior, in 1999 (as stated by the applicant in his SHEV interview). In the SHEV interview he said he had to distribute food parcels to LTTE members and undertook self-defence training but that everyone had to do this. The country information before me indicates that Tamils in LTTE controlled areas were often forced to interact with the LTTE as a matter of course during the conflict.² I accept the applicant was forced to assist the LTTE with digging bunkers, distributing food parcels and undertook basic self-defence training some 28 years ago.
14. At the conclusion of his first arrival interview the applicant mentioned his wife (who he married in 2006) was [an LTTE leader's relative]. No further detail was provided and the claim was not included in his SHEV application or been mentioned by the applicant since. While I accept he was married in 2006 I do not accept his wife is [an LTTE leader's relative].
15. Based on the consistency of the claim and the country information before me which indicates large numbers of civilians were killed or injured during the conflict and his documentary evidence, including photos and death certificates, I accept the applicant's claim that his father was killed in a shelling attack during the conflict and that the applicant and his child were also injured in a shelling attack.³ The applicant first claimed in the SHEV application that he still had scars from his injuries. He has provided photos of his child's injuries. He has not provided any supporting information, such as photos, in relation to his claims regarding his own scarring. While I am willing to accept he may have some scarring I do not accept it is significant or pronounced.
16. The applicant claims that at the end of the war while being placed in a refugee camp with his family, the army indiscriminately shot at the crowd killing one of his sisters and injuring his brother and he was shot in the arm. He has not seen this brother since but people have told his family that they have seen his brother in hospital. While in the refugee camp he reported his brother as missing to an international organisation and the police. He was in the refugee camp from about May 2009 to October 2009. In mid-2012 he was called by the army for questioning in Vavuniya on suspicion of LTTE involvement, about his scars and told to withdraw his request regarding his missing brother because it reflected badly on the government. He said he would but instead continued to search for his brother and approached another organisation in Jaffna for assistance. A few months later he was called for questioning by the authorities in Jaffna about his missing brother, he said he would not get a death certificate, they twisted his ear and threatened him to get a death certificate and accused him of working against the government. After this incident he feared for his safety and decided to leave Sri Lanka.
17. The applicant consistently mentioned most of these claims in his arrival interviews. However it was in his SHEV application that he first mentioned being shot in the arm by the army and that he was questioned on suspicion of LTTE involvement, his scarring and accused of working against the government. He also said for the first time that he reported his brother missing to the police. In the SHEV interview when the delegate asked the applicant how he was threatened by the authorities in connection with his missing brother he said he spoke to them they told him they would have a look to see if his brother was being held by them and that the second time they told him there was no one like him in custody and that he should get a death certificate. He mentioned protests about missing persons but said he did not participate in

² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

³ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

these. At the end of the SHEV interview the applicant's lawyer also mentioned the applicant was fragile as he had witnessed the death of many of his family members.

18. The country information before me indicates that many human rights abuses were committed on both sides toward the end of the war and that hundreds and thousands of civilians fled conflict zones surrendering to the army and many were placed in refugee camps and interrogated and mistreated.⁴
19. In light of the country information detailed above I find the applicant's consistent claim that his sister was shot and killed and his brother injured at the end of the war and that he was placed in a refugee camp plausible and I accept this aspect of the claim. He has also provided a copy of what appears to be an application to find his missing brother which claim has been consistently made and I accept this and that his brother is still missing. Given its belated raising and lack of detail I do not accept he reported his brother as missing to the police. He only first mentioned approaching a second organisation to report his brother missing in Jaffna in his SHEV application and I have found this aspect of the claim to also lack detail and do not accept it. The applicant has provided little detail about his belatedly raised claim to have been shot in the arm and I do not accept this.
20. The country information before me reports of families being pressured by authorities to obtain death certificates for missing family members.⁵ The applicant first lodged an application for his missing brother in 2009. He claims the authorities did not contact him or threaten him in connection with this until three years later. He has not said he was detained or severely mistreated by the authorities in connection with this. He has not claimed to have been involved in protests in relation to missing persons. The claim they questioned him about his scars and involvement with the LTTE was belatedly raised and lacking in detail and I do not accept it. In light of the above I accept the applicant was questioned by authorities about his missing brother, that they checked their records discovering he was not held by them and then asked him to get a death certificate for his missing brother as he was presumed dead and may have twisted his ear but I do not accept the applicant was of on-going interest to the authorities in connection with this, or otherwise.
21. The applicant claims that at the end of 2012 he attempted to illegally leave Sri Lanka and was intercepted by the authorities, questioned and beaten, briefly held in [a named] prison then released and believes the charges were withdrawn. In early 2013 he attempted to leave by boat a second time and after being out at a sea for a day the boat was intercepted and he was arrested, accused of being an LTTE member and questioned about of his scars. He was detained in [another prison] prison for one month and formally charged for trying to leave Sri Lanka illegally. He went to court and had to pay [amount] rupees bail, which was paid by his wife through the people smuggler and he was released but had pending court hearings when he left Sri Lanka.
22. The applicant did not mention his unsuccessful attempts to leave Sri Lanka or claimed pending court hearing in his first arrival interview. This is despite these claimed events having occurred only months prior to the arrival interview. I have found his evidence in relation to the timing of these events vague; while he has generally said the first time he was caught was in late 2012 and the second time in early 2013, in the SHEV interview he said he was not too sure and when he first mentioned the incidents in his second arrival interview he provided no dates or years. I have also found the applicant's evidence in relation to these incidents, increasingly

⁴ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

⁵ Colombo Gazette "OHCHR wants accountability in Lanka", 22 September 2014, CX1B9ECAB6050.

exaggerated and he only first mentioned a number of significant details in the SHEV application, despite having been questioned at great length about these claimed incidents in his second arrival interview. For example, in his second arrival interview he said that in between being released after first being caught and his second attempt to leave, he returned home for a couple of days yet in his SHEV application he said he did not return home during this period as he was too afraid. In the second arrival interview he said that the second time he was caught he was released from jail after [number] days after paying [amount] rupees. In his SHEV application he said he was released after a month and had to pay [amount] rupees, and specifically said this was for bail. He also mentioned for the first time that the court told him that the penalties would be harsher because it was the second time and that he had been questioned on suspicion of LTTE involvement, his scars and he had a pending court hearing when he left Sri Lanka.

23. The applicant provided little detail in response to the delegate's questioning about his failed attempts to illegally depart Sri Lanka in the SHEV interview. When the delegate asked the applicant if he had any supporting documentary evidence in relation to these events the applicant said "no". When the delegate asked if he had any outstanding arrest warrants the applicant said the police went to his house but he provided no further detail. The country information before me indicates that mere passengers on people smuggling ventures are rarely given custodial sentences and that if pleading guilty they are issued with a fine but then free to go.⁶ It has been reported that fines start at about 3,000 for a first offence but can go up to 200,000 rupees and that bail would only be relevant when not pleading guilty in which case a person would generally be released on bail on personal surety or guarantee by a family member.⁷ Given the consistency of the claim I am willing to accept the applicant was caught when attempting to illegally depart Sri Lanka, briefly imprisoned, beaten and that the charges were withdrawn. However, given the significant inconsistencies, belated raising of significant details and lack of detail I do not accept he was caught a second time or that he had a pending court hearing in connection with this when he left Sri Lanka or that he was questioned about his scars or on suspicion of LTTE involvement.
24. In his SHEV application the applicant first mentioned authorities had gone to his home looking for him while in Australia in connection with his brother and his claimed pending charges. In the SHEV interview he mentioned for the first time that authorities went to his home took his number and called it and that his wife and mother answered and they went to their offices. No further detail has been provided about these belatedly raised claims. I do not accept the applicant was wanted by the authorities in connection with his brother or pending charges for his attempted illegal departure. It follows that I do not accept the authorities have gone to his home looking for him since being in Australia or that they called him or that his wife and mother went to their offices.
25. In a post interview submission the applicant's lawyers made a number of claims. These include that the applicant was a member of the LTTE and had joined them as he wanted to help the Tamil cause and feared revealing these links earlier, he has [number] children, he left Sri Lanka in about 1990 and was in India for a period and has significant health issues and requires on-going treatment. None of these claims were previously mentioned by the applicant in his application or interviews and most are highly inconsistent with his evidence previously provided such as that he had only ever lived in Sri Lanka, only had [a different number of] children and was forced to assist the LTTE in 1999 like many other people in the area were. These claims were also presented in the post interview submission as statements with no

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

⁷ Ibid.

supporting information and very little detail. In light of this, I do not accept these claims. Many appear to have been included in the post interview submission in error.

26. I accept the applicant left Sri Lanka illegally and may be identifiable as someone who has attempted to seek asylum overseas.

Refugee assessment

27. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

28. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

29. The country information before me indicates that the conditions in Sri Lanka have improved since the applicant left in 2013, particularly after the election of the Sirisena government in 2015, which has since replaced military governors with civilians in parts of Sri Lanka, returned some confiscated land, released some detainees held under the *Prevention of Terrorism Act* (PTA), committed to reform the PTA and engaged constructively with the United Nations, among other things.⁸ In 2017 the government also formally established the Office of Missing Persons and appointed commissioners in February 2018.⁹ It has been noted, however, that the Sirisena government’s progress has been slow, for example, there are still reports of the systemic use of torture and the PTA remains in force.¹⁰

30. Nevertheless in 2018 DFAT reports that Tamils have gained a significant amount of political power and that the monitoring of Tamils in day to day life has significantly decreased under the Sirisena government. DFAT notes there have been reports that authorities continue to monitor

⁸ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105.

⁹ DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064.

¹⁰ United Nation, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313.

certain Tamil activities in the north and east but also states that Tamil communities have reported feeling more empowered to question this.¹¹ Overall DFAT assesses that Tamils face a low risk of official discrimination on the basis of ethnicity, including in relation to access to education, employment and housing and consistent with this the UK Home Office states that being of Tamil ethnicity, in itself, does not warrant international protection.¹²

31. DFAT understands that close relatives of high profile former LTTE members, who are wanted by the authorities, may be subject to monitoring. DFAT also reports that the government remains sensitive to the potential re-emergence of the LTTE and that the authorities maintain 'stop' and 'watch' electronic databases, to alert security forces to those of particular interest, such as former LTTE cadres, those who have engaged in separatist or criminal activities or those with an extant court order, arrest warrant or order to impound their passport.¹³ If detained in these circumstances an individual may be severely mistreated by the authorities.¹⁴
32. The country information indicates that while the conditions in Sri Lanka have greatly improved for Tamils in recent years, issues remain. In particular close relatives of high profile former LTTE members or those who have engaged in separatist or criminal activities are at risk of being detained and mistreated by authorities under the PTA or otherwise. While the applicant's uncle and brother were former LTTE members they were killed some 28 and 10 years ago, respectively, and there is no credible evidence to suggest the applicant has been pursued by the authorities in connection with this or because he was forced to work for the LTTE about 28 years ago. I have not accepted the applicant was wanted by authorities in connection with his missing brother or that the applicant had pending court proceedings in connection with an illegal departure attempt and there is no credible evidence before me to suggest he has an extant court order, arrest warrant or order to impound his passport. I do not accept the applicant was wanted by the authorities in connection with an adverse security profile when he left Sri Lanka in 2013. I am not satisfied the applicant faces a real chance of harm by reason of his origin, ethnicity or his or his family's past experiences in Sri Lanka.
33. I accept the applicant may be identifiable as someone who has attempted to seek asylum in Australia and who has been in Australia for a number of years. DFAT states that the biggest problems facing returnees are bureaucratic inefficiencies and social stigma which can affect a returnee's ability to secure employment and housing and that many have to meet the costs of their boat journey. While noting the evidence is only anecdotal DFAT also notes of reports of returnees to the north being monitored by authorities on their return. Other country information indicates that those of interest to the authorities in the past have had significant ties with the LTTE.¹⁵ The applicant claims he cannot return because of the army presence and the prevalence of land mines in his area. While the country information indicates there are uncleared land mines in the north, the applicant has said his wife and children continue to reside in the family home and in these circumstances I do not accept he cannot return to his home area because of land mines.¹⁶ As a Tamil asylum seeker returning to the north the

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

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

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁴ UN News Service, UN rights expert warns torture routinely used against Sri Lankan security suspects, 18 July 2017; United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313.

¹⁵ Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065.

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

applicant may face some social stigma, initial bureaucratic and reintegration issues and be visited by authorities on his return but I am not satisfied this, taking into account his stated fragility, amounts to serious harm.

34. I accept the applicant left Sri Lanka illegally and does not have a valid passport. DFAT¹⁷ and the UK Home Office¹⁸ indicate that following arrival at the airport, returnees will be processed in a group by a number of government agencies and this process can take several hours. If returning on a temporary travel document, police will undertake further investigations in particular to ensure an individual does not have a criminal or terrorist background or an outstanding court order or arrest warrant. Overall, DFAT understands returnees are not mistreated during processing at the airport. Those who departed illegally by boat may be found to have committed an offence under the *Immigrants and Emigrants Act 1949* (I&E Act). If arrested they will be photographed, fingerprinted, a statement will be taken, they will be transported to the closest magistrate's court where the next steps will be determined. If a magistrate is not available, for example on a weekend or public holiday, they may be held for up to two days in an airport holding cell. They must also appear in court when their case is being heard or they are summonsed as a witness in a case. The offence will be heard in, and they must attend, the court closest to the occurrence of the offence which involves legal and transportation costs. Cases are only heard when all members of a people smuggling venture have been located, which can result in long delays. Penalties can technically include imprisonment however the country information indicates no mere passenger has been given a custodial sentence and the fines are relatively low starting at 3,000 rupees for a first offence and go up to 200,000 rupees. Fines are able to be paid in instalments. A fine will generally be issued and the person will be free to go immediately, if they plead guilty. If not pleading guilty they will likely be granted bail on the basis of personal surety or guarantee by a family member and so will have to wait for a family member to pick them up. DFAT states that the cumulative costs for returnees associated with the court process can be high.
35. I have accepted the applicant was caught once trying to illegally leave Sri Lanka but that the charges were withdrawn. There is no credible evidence before me that suggests the applicant has a criminal or terrorist background or outstanding court orders or arrest warrants or is otherwise wanted by the authorities. He has not said he was anything other than a passenger on a people smuggling boat. Based on the country information above I accept the applicant may be detained at the airport for processing and may be briefly (up to two days) held in a holding cell if a Magistrate is not available, as part of the usual procedures for those who left illegally but I am not satisfied there is a real chance he would be otherwise detained. Further, if the applicant pleads guilty, he has not indicated he would do otherwise, after being issued with a fine he will be free to leave immediately. There is nothing before me to suggest the applicant would receive differential treatment because he had been caught trying to leave Sri Lanka illegally on an earlier occasion in circumstances where the charges were subsequently withdrawn. Given his family support in Sri Lanka, his ability to work and option to pay the fine in instalments I am not satisfied that he would not be able to pay the fine or that there is a real chance this would threaten his capacity to subsist. If he does not plead guilty he would likely be granted bail on certain conditions, such as personal surety or guarantee by a family member in which case he would be released once a family member picked him up and the evidence before me does not suggest his wife would be unable or unwilling to do this if required. While he may have to meet costs associated with the court process given his family support and ability to work and taking into account his stated fragility I am not satisfied there is a real chance this would threaten his capacity to subsist or would otherwise amount to serious harm.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGE7028826.

36. I accept the applicant, as a consequence of illegal departure, may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this, but I do not accept these experiences would amount to 'serious harm'. Furthermore, I am not satisfied that the relevant laws and procedures dealing with those who depart Sri Lanka illegally are discriminatory, or intended to apply or are applied or enforced in a discriminatory manner.
37. I am not satisfied the applicant faces a real chance of persecution because of his illegal departure.
38. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

39. 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

40. 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

41. 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.
42. For the reasons already discussed, I accept the applicant may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this. However, I am not satisfied that these circumstances, taking into account his stated fragility, amount to 'significant harm' as defined for the purposes of s.36(2A). There is not a real risk the applicant would be arbitrarily deprived of his life or subject to the death penalty on his return or be subject to torture. Furthermore, the evidence before me does not support a conclusion that there is an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman in nature or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of significant harm as a consequence of his illegal departure.
43. I accept that the applicant may face some social stigma and initial bureaucratic and reintegration issues. I am not satisfied that these circumstances, even when coupled with what he may experience for having departed Sri Lanka illegally and stated fragility would amount to

‘significant harm’. The harm does not include deprivation of life, the death penalty, or torture; nor am I satisfied he will be subject to cruel, inhuman or degrading treatment or punishment, as defined.

44. In considering the applicant’s refugee status, I have otherwise concluded that there was no ‘real chance’ the applicant would suffer harm on his return to Sri Lanka for the other reasons claimed. ‘Real chance’ and ‘real risk’ involve the same standard.¹⁹ For the same reasons, I am also not satisfied the applicant would face a ‘real risk’ of significant harm.

Complementary protection: conclusion

45. 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.

¹⁹ *MIAC v SZQRB* [2013] 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

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.