



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05719

Date and time of decision: 29 October 2018 11:11:00
F Kerr, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Christian Tamil from Sri Lanka. On 12 September 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 18 September 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

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. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - In 1990, he travelled from Sri Lanka to India with his family because of the tension between the Sinhalese and Tamils. He resided in India legally as a refugee.
 - He and his family returned to their home village of [Village 1] in [District 1], Sri Lanka, in 1996.
 - Their area was controlled by the government so there were lots of checkpoints. The LTTE went to [Village 1] to buy food and goods and fishermen would help them transport the goods.
 - The Liberation Tigers of Tamil Eelam (LTTE) attacked an army camp in 2006. The Sri Lankan Navy (SLN) retaliated by killing, torturing and harassing people in [Village 1] for three days because they thought the villagers were helping the LTTE. Four of his friends died. The villagers moved to the church for shelter. The SLN attacked the church. They also burned fishing boats and equipment.
 - After this, the SLN would check their boats as well as identification, accuse him and other fishermen of helping the LTTE and on occasion would beat or hit him with guns. The harassment made it difficult to fish which made it difficult to support the family and make money.
 - His brother, R, transported items for the LTTE and he would assist his brother on occasion but never knew what they were transporting. He assisted the LTTE for approximately five years. R was the main person who was transporting things for the LTTE in their area.
 - [In] 2007, the Sri Lankan Army (SLA) came to his home and took R. The following day his brother's body was found.
 - Two months after R's death, the SLA came in search for him and he thinks someone told the SLA he assisted to transport things for the LTTE.
 - He wasn't there at the time and went to stay with his uncle for two weeks before going to India.

- After he left, the SLA went to his house searching for him.
- In 2010 his brother, J, was arrested and jailed in [Town 1] Prison for [a number of] years. They thought he had helped the LTTE and wanted to get back at him. His brother was released on bail in 2012 but is still monitored by the Criminal Investigation Division (CID).
- He fears that if he returns to Sri Lanka he faces danger from informants for the CID.
- His children were born in India and he does not know if they have a legal right to live there. He married an Indian citizen but their marriage is not registered. He cannot live in India legally or get permission to live there legally.

Refugee assessment

5. 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

6. 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.

Applicant’s identity

7. The applicant provided a number of documents in support of his identity. The delegate raised with him some differences in the way his name was recorded in different documents. He stated, and I accept, that his name had been translated incorrectly. I accept his identity is as claimed and that he is a citizen of Sri Lanka, a Tamil and a Christian. I find that Sri Lanka is the receiving country for the purposes of this decision. The applicant’s wife and children continue to live in India and he has made a number of claims regarding his own inability to live in India legally. There is no suggestion in the material before me that the applicant would be unable to stay in Sri Lanka or that he would be sent to India and I have not considered this matter further.

Applicant's background

8. The applicant's evidence is that he was born in [Village 1] in [District 1] in the Northern Province, in [year]. He and his family left Sri Lanka and travelled to India in 1990 to escape what he described as 'racial issues' in Sri Lanka. He and his family registered as refugees in India and lived in a refugee camp, supported by the Indian government. Life in the refugee camp was hard and they returned in the middle of 1996 in the belief that life was safe and normal in Sri Lanka. The applicant has only ever worked as fisherman with his father who had his own boat and also with one or more of his brothers. He has a wife and [children] who live in India. The applicant has been consistent about these aspects of his life and other than as set out below I accept his address, education, work and family history as set out in his SHEV application and at his SHEV interview.

Troubles in [District 1]/involvement with the LTTE

9. The applicant referred in both the written statement submitted with his SHEV application and in his SHEV interview to an incident [in] 2006 when the LTTE attacked an SLA camp in [District 1] which led to reprisals by the SLA (boats and equipment burnt, people killed, tortured and harassed) which, in turn, forced people in the town to shelter in the church for three days to escape the SLA. In his SHEV interview he made the new claim that [a number of] of his relatives were killed when the Sri Lankan security forces opened fire in the incident and added the detail that the SLA came to the church and fired on people there. He said [a number of] boats and equipment belonging to his relatives were destroyed in the incident which lasted around three days.
10. Contemporaneous country information refers to the situation for Tamil civilians living in the north and east who were stuck between two adversaries with poor and deteriorating human rights records.¹ Typical incidents in areas like [District 1] included assassinations, kidnappings and attacks by the LTTE against the security forces and reprisal attacks on civilians by the security forces.² [In] 2006, [Tamil] fishermen in [Village 1] were allegedly murdered by the SLN who then attacked the church where [people] had taken refuge; one person was killed and more than [a number] people injured in the naval attack on the church.³
11. The applicant is from [Village 1] and his family have always worked in the fishing business and I accept that the applicant and his family were caught up in an incident involving the Sri Lankan security forces in [2007], possibly as a reprisal for action by the LTTE against the security forces. Given the fatality figures quoted in the DFAT report referred to above, I am satisfied the applicant has exaggerated the number of relatives who were killed in the incident and I note he does not claim any members of his immediate family were either killed or injured in the attack. I accept some friends died in the attack and that his family suffered equipment losses in the incident. I also accept that the local Bishop complained about the incident but that nothing was done and the Government did not help them.
12. In his SHEV statement the applicant claimed that following that incident the SLA and the SLN commenced harassing the fishermen almost every time they went to go fishing. Their boats would be checked, as would their identification cards, and they were accused of helping the LTTE and sometimes assaulted. He also claimed that during these checks he was physically beaten or hit with guns by SLN personnel many times and that such treatment made it difficult to fish which made it difficult to support their family and make money. There is ample credible

¹ [Source deleted].

² ibid

³ ibid

information in the referred material setting out the intimidation, harassment and violence to which Tamil fishermen particularly in the north were subject, as well as the discriminatory pass system which was implemented and controlled by the SLN and used as a means of controlling the movements of Tamil fishermen.⁴ In the context of the prevailing security environment at the time and as it is consistent with the country information before me, I accept the applicant's claims regarding the harassment, checking and violence to which he was subject by the SLN at around this time and I also accept that it made pursuing fishing difficult and this affected his family financially.

13. I have more trouble accepting the applicant's claims to have assisted the LTTE around this time by transporting things on a boat. The applicant's claims in this regard have gone from never helping the LTTE with transporting goods because he was too scared (entry interview on 10 January 2013) to helping on a few occasions to transport things for the LTTE (SHEV statement) to transporting goods for the LTTE once a month for four to five years (SHEV interview).
14. His claims as to what was transported for the LTTE have also evolved from it being food that was being transported by others including his brother R (entry interview) to not knowing what was being transported because it was always wrapped up (SHEV statement) to it possibly being metals for machines or weapons although they didn't look at it (SHEV interview).
15. The involvement of his family in the transporting of materials for the LTTE has similarly evolved from it being just his brother R along with some other unidentified people who helped transport the goods (entry interview) to R being the main person in their area to transport the goods and the applicant helped (SHEV statement) to R, the applicant, and his other brothers R2 and J helping in the same way (SHEV interview).
16. Leaving aside R's death which I deal with below, I find it extremely difficult to accept that all four brothers were involved in transporting goods at the same time for the LTTE but only R and the applicant were ever identified and pursued by the authorities at that time because of it. I did not find the applicant's explanation in his SHEV interview for why the authorities did not look for either R2 or J at the time they came for him (because they were married and lived with their families apart from the family home) convincing or plausible.
17. He claimed that the authorities caught up with J in 2010 and in his SHEV statement said J was jailed for one and a half years and was released in 2012 although in his SHEV interview he said J was arrested in 2010 and kept in [Town 1] for a year. He also claimed for the first time that the authorities started searching for R2 after J was released from prison and that led to R2's decision to leave Sri Lanka with his family and relocate to India and that J's case is ongoing and he still has to go to court.
18. When asked why he hadn't mentioned J's arrest and imprisonment in [Town 1] in his arrival interview the applicant hesitated for some time before answering that it was the first time he'd faced an interview, he didn't know how it would go and the sort of questions he'd face, and he wasn't prepared to provide all the details. This explanation is plausible as far as it goes. I am also aware that arrival interviews are not conducted for the purpose of exploring protection claims, that applicants have only limited time to summarise their reasons for leaving and that they do not have the benefit of representation. It is also the case that some interviews are held soon after arrival when a perilous sea voyage and associated trauma may impact on the person's ability to recall events. I note, however, that the applicant's arrival interview was

⁴ North East Secretariat on Human Rights (NESOHR), "Fishing communities of Northeast and ethnic factor", 1 April 2006, CIS25427.

conducted some two months after his arrival in Australia and even allowing for these other factors, it is not apparent to me why the applicant would refer only to his brother R's activities for the LTTE and death at the hands of the authorities in 2007 but not refer to J's more recent incarceration for the same activity which I would expect would be fresh in his mind, as he claims J was released in 2012, that is, the same year the applicant arrived in Australia.

19. After initially indicating to the delegate he could try to obtain a copy of J's court documents to corroborate these claims, the applicant appeared to suggest that his family were expecting him to provide them with some financial support from Australia so he had only limited contact with them. I note that the applicant stated on his SHEV application form that he spoke to his brother, J, in Sri Lanka approximately once a month. This evidence does not suggest any estrangement from his family in Sri Lanka or that he has difficulty in communicating with J. I also note that the delegate reminded the applicant at the end of his SHEV interview about providing documents relating to J's detention. As at the date of this decision, no documents have been provided.
20. The applicant's evidence about his own experiences in 2007 was vague and generalised and, as discussed above, has evolved over the course of the protection visa process. In his SHEV interview he reiterated the claims in his statement and appeared unable to expand on them in any way. He told the delegate that he wasn't at home when the authorities came looking for him so they passed a message to his family that he was required to report to their camp. In his SHEV statement he said that as soon as he found out they were looking for him, he left to go to his uncle's house and then two weeks later left for India. In his SHEV interview his evidence changed. He said he stayed with friends or his uncle for two or three days before taking a boat to India. I find it difficult to believe that the applicant would be unable to consistently recall for how long he was trying to avoid the authorities in his village and with whom he sought shelter. The country information indicates that Tamils suspected of having an association or affiliation with the LTTE at the time were dealt with harshly and were vulnerable to abduction and killing.⁵ As the brother of someone he claims was killed by the security services for the same thing, I consider it highly implausible that if he was seriously suspected of involvement in transporting goods for the LTTE the applicant would have been able to avoid the authorities by the simple expedient of going to stay with either friends and/or his uncle in the same village for up to two weeks.
21. Nor do I consider it credible that if R2 and J had both been suspected of involvement in transporting goods for the LTTE the authorities would wait until 2010, three years after he claims they were involved, before making enquiries and in the case of J, arresting and jailing him.
22. The applicant has consistently claimed that R was shot by the authorities because somebody passed information to them that he was helping the LTTE. In his SHEV statement he claimed the SLA came to the family home and took R; the following day they found his body in the [a specified] area. This was also his evidence at his SHEV interview save for claiming that R's body was recovered from the seashore.
23. A copy of R's death certificate was included with the referred material. It indicates that R died [in] 2007 and the cause of death is given as [specified reason]. It does not corroborate the applicant's claims that R was shot by the authorities and I am not satisfied that this was the case.

⁵ DFAT "Update on human rights and humanitarian situation in Sri Lanka", CIR No. 07/24, 26 February 2007 CX172345

24. Considering his evidence overall, in light of the significant changes, inconsistencies, implausibility and credibility issues in his evidence, I am satisfied the applicant has exaggerated, embellished and fabricated parts of his evidence in order to boost his claims for protection. Country information before me indicates that it would not have been possible for a young civilian man living in the north during the conflict not to have had any contact with the LTTE.⁶ On the other hand, the SLN tightly controlled boating activity off Sri Lanka's coast and implemented restrictions on fishing including a ban on night-time fishing in the [Village 1] south area.⁷ This tends to indicate that it would have been extremely difficult to smuggle goods by sea in that area without attracting the interest of the SLN. However, the applicant has been consistent about this aspect of his claims, and while I have some doubt I am prepared to accept that R had some involvement in transporting items, probably food, for the LTTE. However, the evidence does not corroborate the claim that R was killed by the authorities and I am not satisfied that R's involvement with the LTTE was ever known to the Sri Lankan authorities. I also reject the claim that R was known as the main person who was transporting things for the LTTE as a later embellishment.
25. While I am prepared to accept that R had some involvement with the LTTE, albeit unknown to the authorities, I am not satisfied the applicant or R2 or J were also involved in helping the LTTE. As discussed above, his later evidence about his own involvement in transporting goods by sea directly contradicts his earlier claim to have been too scared to be involved. The difference in his later evidence between helping on a few occasions to helping once a month over four to five years is a further very material change in his evidence which in my view, reflects poorly on his credibility. Even if I accept that R was suspected as being involved (which I do not) I do not consider it plausible that the authorities would not have taken steps at that time to locate and question his brothers R2, J and the applicant instead of waiting two months in the applicant's case and three years in the case of R2 and J. In light of his evidence about these matters overall, I am not satisfied that either R, the applicant, R2 or J were ever of interest to the authorities. I am not satisfied that the applicant left Sri Lanka in 2007 because he was being looked for by the authorities, that the SLA went to his house looking for him after he left, that J was taken by the SLA in 2010 and imprisoned in [Town 1] during which he was tortured and harassed, or that R2 was being looked for by the authorities which forced him to relocate to India with his family.
26. As I do not accept the applicant's claims to have been involved in smuggling items for the LTTE or that he had a profile with the authorities in Sri Lanka for that reason, it follows that I do not accept that he is at any risk from informants for the CID if he returns to Sri Lanka or that he would be of any interest to the authorities if he returns. I find the applicant has fabricated the claims regarding his involvement with the LTTE and I am satisfied there is no real chance that the applicant would be subjected to harm now or in the reasonably foreseeable future on the basis of his claim to have assisted to smuggle goods for the LTTE.

Tamil male from the north

27. For the reasons set out above, I do not accept that at the time he left Sri Lanka in 2007, the applicant had a profile with the authorities and I am satisfied that if he is returned to Sri Lanka the applicant is not at risk of harm because of any real or imputed connections to the LTTE.

⁶ UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017 CISED50AD3780

⁷ North East Secretariat on Human Rights (NESOHR), "Fishing communities of Northeast and ethnic factor", 1 April 2006, CIS25427.

28. The applicant claims that he left Sri Lanka because it was not safe there as a Tamil. The mere fact of originating from an area previously controlled by the LTTE does not in itself give rise to a need for protection nor generally, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.⁸ The applicant does not fit this profile and I am satisfied he is not at risk on this basis.
29. I accept that Tamils have, in the past, been singled out by the authorities for adverse attention. During the war, more Tamils were detained under emergency regulations and the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA) than any other ethnic group.⁹ This was primarily due to LTTE members and supporters being almost entirely Tamil, but DFAT notes that there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity.¹⁰
30. It is, however, eleven years since the applicant left Sri Lanka and in that time, there have been significant developments in the country. The US Department of State noted that in 2017 there continued to be reports of Tamils, particularly in the north and east, being regularly monitored and harassed, especially activists and former or suspected former LTTE members.¹¹ DFAT, however, assesses that monitoring of Tamils in day-to-day life has decreased significantly under the current government, although surveillance of Tamils in the north and east continues, particularly people associated with politically sensitive issues including, for those in the north, missing persons, land release and memorial events.¹² The operation of the PTA was suspended in late 2016 and had not been used in 2017 to detain, charge or arrest any individual.¹³
31. The UK Home Office fact finding visit in July 2016 identified a number of ongoing concerns for the Tamil population in relation to human rights and other issues, but the majority of the sources consulted agreed that there had been improvements for Tamils since the change of government in 2015.¹⁴ The major Tamil political party, the TNA, is supportive of the Sirisena government and its commitment to human rights although progress is very slow and in the view of the TNA, too cautious¹⁵ a sentiment echoed by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.¹⁶
32. DFAT has reported for a number of years that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. Some members of the Tamil community continue to report discrimination in employment, particularly in relation to public sector employment.¹⁷

⁸ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0 15 June 2017, OGD6E7028826 at 3.1.3

⁹ DFAT "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105 at 2.39

¹⁰ Ibid at 3.8

¹¹ US Department of State "Country Reports on Human Rights Practices for 2017 - Sri Lanka", 20 April 2018, OGD95BE927333

¹² DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 C157B839411064 at 3.9

¹³ DFAT "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka" 14 August 2017, CISED50AD5239

¹⁴ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017 OGD7C848D112

¹⁵ Ibid at 2.1.2

¹⁶ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 C157B839411064 at 2.26

¹⁷ Ibid at 3.6

DFAT assesses, however, that the limited Tamil appointments are a result of a number of factors including disrupted education because of the war and language constraints.¹⁸

33. Since its election the Sirisena government has cooperated with the United Nations and committed to a range of measures dealing with human rights, accountability and transitional justice which is said to represent a marked shift from confrontation under the former government, to consensus and cooperation¹⁹ although some human rights activists have expressed scepticism about the government's commitment to transitional justice mechanisms.²⁰
34. Some recent publications suggest that torture in Sri Lanka continues. The International Truth and Justice Project (ITJP) cited 24 cases of torture in 2016 and 2017 and an Associated Press (AP) article published in 2017 claimed 52 incidents of torture.²¹ Several local sources, including from the north, were not aware of the specific alleged incidents of torture documented in the 2017 ITJP report or the AP article and DFAT notes that verification of torture claims is complex as many allegations are made anonymously, often to third parties; they often involve individuals who are outside Sri Lanka and, in some cases, individuals who are in the process of seeking asylum. DFAT assesses that reports of torture carried out by Sri Lankan military and intelligence forces during the conflict and in its immediate aftermath are credible. However, DFAT is unable to verify allegations of torture in 2016 and 2017.²² The UK Home Office in 2017 reported a notable reduction in torture complaints and its report indicates that the risk of torture in Sri Lanka appears to exist whenever an individual comes into contact with law-enforcement officers; it is a systemic issue with policing in Sri Lanka and exists regardless of ethnicity.²³
35. Overall, most sources agree that there has been significant progress in Sri Lanka and the UK Fact-finding mission reported in 2017, on the basis of its interviews with a range of groups in Sri Lanka, that the previous climate of fear no longer exists nor the same harassment.²⁴
36. The country information referred to above indicates that although some monitoring still occurs, overall the monitoring and harassment of Tamils in the north and east has significantly decreased, there have been significant positive developments for Tamils politically, and the situation for Tamils generally has improved even if, as most sources in the country agree, progress is slow.
37. Assessing his claims overall, I have accepted that the applicant's brother, R, had some involvement with the LTTE although I do not accept that his smuggling activities were known to the authorities and I do not accept that R was taken from home and killed by the Sri Lankan security forces because of those activities. I have also accepted that there was an incident in 2006 in which [Village 1] villagers were killed and equipment damaged, although this happened during the war and the applicant has not claimed that the incident has had any ongoing implications for his claims for protection. I have otherwise found the applicant's claims not credible and I do not accept that he and his other siblings were also involved in smuggling

¹⁸ Ibid ibid at 3.7

¹⁹ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD) "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

²⁰ The Diplomat "Putting Sri Lanka's Office of Missing Persons in Perspective" 19 September 2017, CXC90406614377

²¹ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 4.15

²² Ibid

²³ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0 15 June 2017, OG6E7028826 at 2.3.13

²⁴ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017 OGD7C848D112 at 2.1.4

goods for the LTTE or that, at the time he left Sri Lanka, he was a person of adverse interest to the authorities either on his own account or because of R, or other of his siblings.

38. The material referred to above indicates significant changes in Sri Lanka in the six years since the applicant left and it does not support a conclusion that Tamils or Tamil men from formerly LTTE-controlled areas face a real chance of serious harm at the hands of the Sri Lankan authorities.
39. I accept that his experiences of being questioned, harassed and beaten by the SLN when going fishing were frightening. Country information indicates, however, that these were unfortunately common experiences among Tamils during the heightened security environment of the war and I do not consider them indicative of any adverse interest in him personally. I accept the applicant (and other family members) was subject to a pass system that required him to obtain permission from the SLA/SLN when fishing and that this was discriminatory and systematic conduct by the Sri Lankan authorities based on his Tamil ethnicity which made it difficult to support the family and make money. Notwithstanding such conduct, his evidence does not suggest that he was unable to maintain and support himself through his previous work as a fisherman. The applicant has only ever worked as a fisherman and it is likely that if he returns to Sri Lanka he will resume working in that occupation. DFAT advises that the Sri Lankan military continues to restrict access to some fishing areas²⁵ and fishermen have to undergo various security checks and clearance while entering the sea for livelihood activities.²⁶ There is also some indication in the referred material that Sinhalese fishermen are given priority over Tamil fishing areas although the fishing industry all over Sri Lanka is under pressure due to a range of external factors (overfishing, encroachment by Indian fishing boats).²⁷ I am satisfied that being subjected to various security checks and clearance and the pass system (if it remains in place) does not rise to the level of serious harm. The country information does not indicate that Tamil fishermen are vulnerable to being assaulted and beaten by the SLA/SLN during such security and checking as they were during the war and I am satisfied the applicant is not at risk of being physically beaten or hit with guns by navy personnel. The applicant has not claimed that he would be unable to support himself or his family if he returns to Sri Lanka or that he would be otherwise unable to subsist and I am satisfied that there is not a real chance of serious harm on this basis.
40. He claimed that anyone who supported the LTTE or were LTTE members are taken into detention and poisoned with slow moving poison; he heard that one of his friend's dad was killed that way. I am willing to accept that the father of a friend died but as there is no information to corroborate or substantiate the allegation regarding people being injected with poison,²⁸ I am not satisfied his friend's father died in that way. In any case, I have not accepted that the applicant was in any way involved with the LTTE.
41. Assessing the applicant's situation overall, I have formed the view that he is not at risk of serious harm if he is returned to Sri Lanka. I have found that he was not a person of any interest at the time he left Sri Lanka in 2007 and I am not satisfied that there is a real chance of serious harm if he is returned to Sri Lanka on the basis of his gender or ethnicity, imputed political opinion, family relationships, work as a fisherman, origins in an area formerly held by the LTTE, or for any other reason.

²⁵ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 2.11

²⁶ Ceylon Today "SL Govt allowing fishermen issue to drag out of fear", 23 February 2016 CX6A26A6E4368

²⁷ ibid

²⁸ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0 15 June 2017, OG6E7028826 at 9.2.2

Illegal departure/returning asylum seeker

42. The applicant does not have a passport. He left Sri Lanka in 2007 and travelled to India by boat without using a travel document. I accept that the applicant's departure from Sri Lanka was probably illegal. I also accept that as he will be travelling on an emergency travel document the authorities will surmise that he has made a claim for asylum in Australia. Both of these matters will have implications for the applicant on his return.
43. On arrival at the Colombo international airport, returnees travelling on temporary travel documents are subject to a series of investigative checks to confirm their identity and ascertain if someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants.²⁹ As I am satisfied the applicant has no profile with the authorities, I find he is not at risk of any increased attention from the authorities during this process. DFAT advises that all returnees are subject to these standard procedures regardless of ethnicity and religion; detainees are not subject to mistreatment during processing at the airport.³⁰ I have found that R's involvement with the LTTE during the war was unknown to the authorities and I consider there is no more than a remote chance that the applicant would be identified as a person of interest because of it and interrogated.
44. The Prime Minister of Sri Lanka stated publicly in 2017 that failed asylum seekers from Australia would be welcomed back.³¹ DFAT assesses that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka including finding suitable accommodation, employment, and in obtaining necessary documentation but assesses that reintegration issues are not due to a failure to obtain asylum but rather due to those practical issues.³²
45. A 2015 survey by the United Nations High Commission for Refugees (UNHCR) reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police.³³ The UNHCR interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return.³⁴ Refugees and failed asylum seekers also reported social stigma from their communities upon return; in some communities, people resent the financial support provided to refugee returnees.³⁵ I accept it is possible the applicant may be monitored for a period if he returns to [District 1], and may experience some social stigma on return as a returning asylum seeker/refugee. However, I am not satisfied that it would amount to serious harm.
46. Returnees who depart Sri Lanka irregularly are generally considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act) and may be arrested and charged at the airport.³⁶ Returnees can remain in police custody at the CID airport office for up to 24 hours after arrival while enquiries are completed, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held for up to two days in an airport holding cell.³⁷

²⁹ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 5.29

³⁰ Ibid at 5.29

³¹ Ibid at 5.38

³² Ibid at 5.41

³³ Ibid at 5.40

³⁴ Ibid at 5.41

³⁵ Ibid at 5.40

³⁶ Ibid at 5.27

³⁷ Ibid

47. Those charged are required to appear in court or in the location where the offence occurred which involves legal and transport costs.³⁸ Penalties for leaving Sri Lanka can include imprisonment of up to five years and a fine of up to LKR 3,000 for a first offence.³⁹ DFAT has been advised by Sri Lanka's Attorney-General's Department that no returnee who was merely a passenger on a people smuggling boat has been given a custodial sentence but fines are issued to deter future illegal departures.⁴⁰ A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go.⁴¹ If a person pleads not guilty, they will be granted bail by the magistrate on the basis of personal surety or guarantee by a family member.⁴² Anecdotal evidence is that most passengers of people smuggling ventures spend many years on bail, and most are free to go after paying a fine.⁴³ Bail is usually granted to voluntary returnees, conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.⁴⁴
48. In considering all of the above treatment that I accept the applicant is likely to experience - being detained and investigated for several hours at the airport, then potentially being detained for up to two days in an airport holding cell, and having to pay a fine and incur costs - I find that this treatment does not amount to serious harm. Further, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is a returning asylum seeker or refugee, or an illegal departee.
49. Considering those of the applicants' claims which I accept and taking into account the country information and his personal circumstances, it is my view that even considered together there is not a real chance of serious harm to the applicant if he is returned to Sri Lanka now or in the reasonably foreseeable future.

Refugee: conclusion

50. 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

51. 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.

³⁸ Ibid

³⁹ Ibid at 5.32

⁴⁰ Ibid

⁴¹ Ibid at 5.22

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid at 5.33

Real risk of significant harm

52. 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.

53. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes and probably identified as an illegal departee. As I have found that R's involvement with the LTTE during the war was unknown to the authorities, I consider there is no more than a remote chance that the applicant would be identified as a person of interest because of it. He is, however, likely to be investigated as an illegal departee and returning asylum seeker, may be detained for up to two days at the airport, fined for the offence of illegal departure and may incur costs associated with the judicial process. I am not satisfied, however, that this treatment amounts to significant harm. I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. Nor am I satisfied that it amounts to serious pain or suffering, pain or suffering that is cruel or inhuman in nature, or extreme humiliation. I similarly find that the imposition of a fine under the I&E Act for his illegal departure does not amount to significant harm within the meaning of s.5(1) and s.36(2A).

54. The applicant may face monitoring and some social stigma for a period as a returned asylum seeker and refugee. However, I am not satisfied that such treatment would amount to significant harm. It does not amount to the death penalty, arbitrary deprivation of life or torture and I am not satisfied that it amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment.

55. I accept that as a fisherman, he may be subject to various security checks and clearance by the authorities, and/or a pass system, before he is able to enter the sea. However, I am not satisfied that such treatment would amount to significant harm as defined in s.36(2A) of the Act.

56. I have otherwise found above that the applicant does not face a real chance of suffering serious harm from the Sri Lankan authorities now or in the reasonably foreseeable future for any of the reasons he has claimed. For the same reasons discussed above and based on the same information, I am satisfied the applicant is not at risk of significant harm for the reasons claimed.

57. I am not satisfied that any of his claims, even when taken together, mean that there is a real risk of significant harm within the meaning of ss.36(2A) and 5(1) now or in the reasonably foreseeable future if the applicant is returned to Sri Lanka.

Complementary protection: conclusion

58. 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.