



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/07766

Date and time of decision: 11 February 2020 10:15:00
J Jennings, 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 Tamil born in Jaffna, Sri Lanka. On 5 May 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 15 January 2020. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

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 6 February 2020 the IAA received a submission from the applicant which addressed the delegate's decision and findings. I am satisfied this is essentially argument about matters that were before the department and therefore not new information and I have had regard to the submission.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil. He was born in Jaffa, Northern Province, Sri Lanka.
 - The applicant is a Christian. He has not advanced any protection claims on the basis of his religion although the submission to the IAA comments that those killed in the 2019 Easter bombings were mainly Christian.
 - During the civil war in Sri Lanka his father witnessed the killing of members of his family and the deaths of other innocent people. His father was concerned for the safety of the family and decided to leave Sri Lanka.
 - In 1990, when the applicant was an infant, the family departed Sri Lanka illegally and travelled to India. In India they were registered as refugees and lived in a refugee camp. The applicant was mistreated in India and as refugees he and his family did not have any rights. He decided to leave India and in April 2013 he travelled by boat to Australia.
 - The applicant has provided a copy of his Sri Lankan birth certificate and Indian issued refugee documents. The birth certificate is the only Sri Lankan identity document he has.
 - The applicant fears that if he returned to Sri Lanka he would face harm as the authorities are concerned about a resurgence of the Liberation Tigers of Tamil Eelam (LTTE) and impute all Tamils as supporters of the LTTE.
 - The IAA submission noted significant events in Sri Lanka in 2019 and the possibility that the recent change in government will lead to a changed attitude by the government to the Tamil people.

- The applicant has lived all of his life since infancy outside of Sri Lanka. He fears he will face substantial discrimination in Sri Lanka which will amount to persecution. He will have difficulty establishing himself in Sri Lanka and finding employment and his right to subsist will be threatened. He will be recognised as someone who has been away by his accent. The submission to the IAA is critical of the delegate’s decision regarding what assistance the applicant may be able to access in Sri Lanka. His only family in Sri Lanka are [specified relatives] in Jaffna who are not in a position to support him.
- The IAA submission noted that persons who departed Sri Lanka illegally are subject to payment of a fine and indicated this is a factor in regard to the applicant’s ability to subsist.
- The applicant is concerned as to his deteriorating mental health and the prospect of having to live alone and unsupported in Sri Lanka. He fears he will not receive appropriate medical assistance in Sri Lanka. Due to his ongoing depression he injured his hand at work in Australia and has been involved in pedestrian and car accidents.
- In a further statement dated 23 September 2019 the applicant stated he submitted photographs and a police report to support these claims but these were not submitted with the statement. Nor were they included with the IAA submission, although the omission of these documents was noted by the delegate in the decision record.
- In her post-interview submission the applicant’s representative advanced that the applicant would be persecuted for his Tamil ethnicity, as a failed asylum seeker and as a member of a particular social group, being mental health problems. Additionally he fears harm as a Tamil from the north of Sri Lanka; his absence for over 30 years; leaving Sri Lanka illegally; and as a member of a particular social group of young Tamil men who have escaped to and claimed asylum in a western country.
- She advanced that should the applicant return to Sri Lanka there could be delays in applying for and obtaining the necessary identity documents and that he may be harmed in the meantime or in the application process.
- Returning to a country where he has no familial link, where adequate resettlement services are not available and to a country which continues to have high military occupancy amounts to serious harm.
- The post-interview submission stated the applicant’s “fear and concerns place him a severe psychological torture. In his post interview statement [the] applicant has stated as a result of constant state of anxiety and uncertainty, the physical harm he has experienced”.

Refugee assessment

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

Well-founded fear of persecution

7. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

8. The applicant has consistently claimed to be a Tamil born in Jaffna, Sri Lanka and to have lived as a refugee in India since 1990. He has provided identity documents in support of his claimed identity and residence and status as a refugee in India. I note his comments at the SHEV interview that he is not a citizen of Sri Lanka and his comments that he could return to India. However the post-interview submissions correct the comments about possible return to India and state the applicant has no right of return to, or residence in India and that his "legal status as a refugee became void when he departed India". In his SHEV application the applicant declared his citizenship to be Sri Lankan and the applicant's birth certificate shows he was born in Sri Lanka to parents identified on the certificate as Sri Lankan Tamils born in Sri Lanka. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review. I accept that despite his long residence in India he has no right to citizenship or residence in India.

9. It has been asserted that the applicant is a member of a particular social group, being mental health problems and that his fear and concerns indicate he may experience severe psychological torture. The delegate noted at the SHEV interview that no medical reports had been submitted to demonstrate the applicant's mental health conditions and the applicant advised that he was not receiving any treatment or on any medication for his mental health. In his post-interview statement the applicant explained that he had not been to counselling in Australia as his friends would tease him and it was not acceptable in the Tamil community for men to speak with a counsellor. It is difficult to reconcile his statement that he fears he may not be able to seek professional help in Sri Lanka due to social stigma and is concerned at any possible delay in accessing services with the fact that he has not obtained, nor seemingly sought such professional help in Australia. However, even putting aside my concerns in this regard I am not satisfied that as a result of any mental health condition the applicant may have that he would face harm in Sri Lanka.

10. Although it is apparent the applicant has not received a professional medical diagnosis he described himself as struggling with "lifelong depression". Yet despite this lifelong depression for which seemingly he has not received any treatment he completed [number] years of school and a diploma in India and was employed for a short period in contract work, and this was in the context of the difficult life he described as a refugee living in a camp under constant police surveillance and experiencing discrimination, including being beaten by other

students. He has also been in employment for periods in Australia. As such the indications are that this depression did not prevent him being educated and working in India despite the difficult conditions he reported. I take into account that while studying and working in India he had the support of his immediate family but I note he has been living independently in Australia and been able to work. While he would not have the same family support in Sri Lanka, and I accept that the situation in Sri Lanka is more volatile than Australia, the applicant is not without support in Sri Lanka. Even though the applicant cautioned his [specified relatives] are elderly and limited in what practical support they can provide, he clearly has a substantial enough relationship with them to send them money from Australia. Similarly he has relationships with friends in Jaffna which are close enough for him to also send these friends money and he remains in contact with these friends by telephone. Overall I am not satisfied that the applicant would be without access to familial links and friends in Sri Lanka. I do not dispute that the applicant would miss his immediate family and that his access to support in Sri Lanka is limited and that it would be preferable if he could access professional support without being concerned about stigma, but I am not satisfied that the lifelong depression the applicant describes would give rise to a real chance he would experience harm in Sri Lanka.

11. I accept that the only Sri Lankan identity document the applicant possesses is his birth certificate and that in Sri Lanka he will require a National Identity Card. The National Identity Card is the primary form of identity in Sri Lanka and all nationals over 16 years of age require this document. The National Identity Card is required to access government services and can only be obtained in Sri Lanka. However there is no indication in the information before me to indicate the applicant would experience any difficulty in obtaining a National Identity Card in Sri Lanka; he has his birth certificate and Indian issued refugee documents to support his identity. Nor do I accept he would be harmed in the process of obtaining a National Identity Card or while waiting for this to be issued, as is contended in the post-interview submission. No independent information has been put forward in the post-interview submission to support these contentions. The Department of Foreign Affairs and Trade (DFAT) reports do not point to any difficulty faced by returnees requiring National Identity Cards to be issued, although it does note some returnees may experience some delay in obtaining documents, nor does UNHCR and the UK government's advice booklet to Sri Lankans returning to the country confirms the importance of obtaining a National Identity Card and advises applicants to make contact with the appropriate authority to access the one day service for issue.¹ There is no indication that people waiting for National Identity Cards to be issued are harmed while waiting for their card to be issued. I am not satisfied that there is a real chance the applicant would experience harm in the process of obtaining or waiting for the issue of his National Identity Card.
12. The applicant fears that he would face harm as the authorities impute all Tamils as supporters of the LTTE and the post-interview submission referred to a number of reports documenting "the real circumstances of Tamils and returning asylum seekers". I accept that the applicant's father witnessed atrocities during the civil war, prompting him to leave Sri Lanka in 1990, and that the applicant is concerned as to his safety should he return to Sri Lanka, but considering the country information before me as discussed below I am not satisfied his fear is well-founded. Reporting in 2017 the UK Home Office commented that

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; UN High Commissioner for Refugees, (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; UK Foreign & Commonwealth Office, "Coming Home Booklet – Sri Lanka", 10 February 2015, CISEC96CF1147

being of Tamil ethnicity itself would not warrant international protection and that Tamils of concern are those perceived to have had a significant role in the LTTE or to have been active in post-conflict Tamil separatism.²

13. I note the country information provided with the SHEV application and post-interview submission; the UN Special Rapporteur on Torture is cited as reporting “anyone deemed to have had any link to LTTE during the conflict and political and human rights activists remain subject to extensive surveillance and intimidation by the military, intelligence and police forces”; Human Rights Watch referred to the “draconian Prevention of Terrorism Act, which has long facilitated torture and other abuse [which] remains in effect”; and Amnesty International and the UN Committee against Torture noted allegations of routine torture during police detention up to 2016. The post-interview submission noted the continued militarisation in Sri Lanka and that the Special Rapporteur reported “surveillance continues to be used as a tool of control and intimidation”. However it is important to note that such reports relate overall to those “deemed to have had any link to LTTE”³ similar to reporting from other agencies.⁴ The US Department of State continued to report human rights abuses but noted cases of harassment, arbitrary arrest, detention and torture relate to civil society activists, journalists, and LTTE sympathisers.⁵ There is no indication from the applicant’s account that he or his family had any LTTE connections or would be so perceived.
14. I note criticism of the Sirisena government’s slow progress with reform and dealing with human rights abuses since its election in 2015⁶ and the concerns about the past human rights record of Gotabaya Rajapaksa who was elected as President in 2019.⁷ The submission to the IAA is critical of the delegate’s decision in regard to assessing the situation post the 2019 Presidential election and commented that the delegate “demonstrated a failure to properly consider the issue of change of government and bombings in the context of asylum returnees”. However it is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the war. President Mahinda Rajapaksa, the brother of the current President, was elected in 2005 and his government oversaw the end of the protracted civil war through the brutal crushing of the LTTE and repression of the general Tamil population. Gotabaya Rajapaksa was Defence Secretary in his brother’s government and was charged with the military defeat of the LTTE. It was in this environment that the excesses of human rights abuse were committed and continued to be committed in the aftermath of the war in attempts to quash any resurgence of the LTTE.⁸
15. However the election of the coalition Sirisena government in 2015 saw a significant shift in respect for human rights for Tamils and the general population in Sri Lanka, although there

² UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)”, 15 June 2017, OGD95BE926320

³ Post-interview submission: UN Special Rapporteur on Torture, December 2016; Human Rights Watch; Amnesty International; UN Committee against Torture

⁴ Freedom From Torture, “Sri Lanka – Update on torture since 2009”, 6 May 2016, CIS38A8012881; Freedom From Torture, “Tainted Peace: Torture in Sri Lanka since May 2009”, August 2015, CISEC96CF13070; International Truth & Justice Project Sri Lanka, “Silenced: survivors of torture and sexual violence in 2015”, 07 January 2016, CIS38A801275

⁵ US Department of State, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, OGD95BE926320

⁶ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064; US Department of State, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, OGD95BE926320; Post-interview submission: Human Rights Watch, January 2018; Amnesty International, 9 December 2016

⁷ Aljazeera “Sri Lanka’s new president picks brother Mahinda Rajapaksa as PM”, 21 November 2019, 20191121171701; Post-interview submission: Human Rights Watch, January 2018

⁸ Landinfo, “Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province”, 1 December 2012, CIS25286; Post-interview submission: Human Rights Watch, January 2018

continued to be ongoing criticism of slow progress with reform.⁹ The change of government in 2015 provided Sri Lanka an opportunity to break from the repressive policies of the past and the cloud of suspicion of Tamils imbued by the long running civil war and Gotabaya and Mahinda Rajapaksa are returning to government in a very different environment from that in place between 2005 and 2015. The IAA submission referred to the change of government in 2019 and commented that the delegate “appears not to have made any significant effort to obtain current evidence of the situation in Sri Lanka”. The delegate referred to “the absence of evidence of any significant changes to government policies and practices” and, despite being critical of this decision the IAA submission does not identify any information or current evidence of the situation in Sri Lanka that points to a changed attitude by the new government to the Tamil population, or harm to the general Tamil population as a result of the security response by the authorities to the Easter bombings. The indications are that those people of concern to the authorities are activists and those seeking to challenge the unitary state and I am not satisfied that the change of government in 2019 gives rise to a real chance that Tamils in general, or Tamils with the applicant’s profile, will be imputed as being of concern now or in the reasonably foreseeable future.

16. I accept that the military continue to have a presence in Sri Lanka but DFAT assessed that military involvement in civilian life has diminished, and although military involvement in some civilian activities continues in the north the government no longer restricts travel to the north and has removed military checkpoints on major roads. While the military maintains a strong presence the armed forces personnel are generally restricted to their barracks. The Sri Lankan police are now responsible for civil affairs across Sri Lanka. Some of the land held by the military since the war has been returned to its former owners.¹⁰ I note the concerns as to the ongoing application of the Prevention of Terrorism Act, but notwithstanding the use of the Prevention of Terrorism Act in the wake of the 2019 Easter terrorist attacks¹¹, use of the Prevention of Terrorism Act has been in steady decline.¹²
17. Overall country information supports that people with a past LTTE connection or who have been involved in Tamil separatist activities may face harm on return to Sri Lanka. However the applicant has not been so involved. I am not satisfied that the county information supports a finding that Tamils are imputed as of concern on the basis of their ethnicity. Nor am I satisfied that the country information supports a finding that Tamils from the north of Sri Lanka, or young Tamil men who have escaped to and claimed asylum in a western country are so imputed, even considered together with having departed illegally and being absent for 30 years. I accept that the applicant’s personal details were released in the data breach in 2014 and that the authorities may be aware of his asylum claim but I am not satisfied this, even considered together with the foregoing, would result in a real chance of harm to the

⁹ US Department of State, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, OGD95BE926320; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)”, 15 June 2017, OGD6E7028826; DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064

¹⁰ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064

¹¹ The Island, “Govt urged to review ‘security reforms’ as 60 suspects taken in under PTA”, 25 April 2019, 20190508133730; Journalists for Democracy in Sri Lanka, “Sri Lanka police warned about illegal arrests after Easter Sunday Massacre”, 4 July 2019, 20190710122335

¹² Office of the United Nations Higher Commissioner for Human Rights, “Human rights and counter terrorism: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka, Preliminary findings of the visit to Sri Lanka”, 14 July 2017, CXC90406610453; Office of the High Commissioner for Human Rights, “Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka”, 23 July 2018

applicant. Reports of returning asylum seekers who have come to adverse attention relate to those who have an actual or imputed profile of concern to the authorities.¹³

18. In his post-interview statement the applicant expressed concern that if he was taken for questioning by the Criminal Investigation Department (CID) or other authorities he has no family to follow up on his safety or pay his bail, but I am not satisfied that there is a real chance he would be so questioned. I do not accept that there is a real chance the applicant would be detained, tortured or otherwise mistreated by the authorities or others, or experience any harm for reason of being a young Tamil man from the north, who escaped and claimed asylum in a western country and who departed illegally and has been absent for 30 years. Nor do I accept that should he have to wait for a National Identity Card to be issued that there is a real chance he would be harmed for reason of not having this document.
19. The applicant further fears that as a Tamil and returnee without family support in Sri Lanka he would experience discrimination amounting to serious harm in Sri Lanka. I accept that the applicant will experience difficulty returning to Sri Lanka and that he has no immediate family support. His network in Sri Lanka is limited to extended family, being only [specified relatives], and some friends. I accept that his [specified relatives] may only be in a position to provide limited, if any, practical support and I note that he has sent them money from Australia, which while it may indicate a close relationship, also indicates a degree of limited financial resources on the part of the [specified relatives].
20. Information from UNHCR and others points to agencies assisting returnees, although this is largely in the context of those returning directly from India as part of UNHCR sponsored voluntary repatriation packages.¹⁴ The UK government's advice booklet to Sri Lankans returning to the country from overseas provides some practical advice on matters such as obtaining employment and while it identifies some agencies that may assist in this regard this assistance appears to be limited.¹⁵ I accept that there are limited resettlement services available to returnees in Sri Lanka and I note that those referred to by the delegate in the decision record relate to Tamils returning directly to Sri Lanka from India under the auspices of organised repatriation programs, unlike the applicant. DFAT advises that in general failed asylum seekers receive limited reintegration assistance.¹⁶ I note the comments in the post-interview submission that the applicant may face "lack of opportunities and ethnic discrimination" but I am not satisfied that this "is likely to deprive [the] applicant of his life" or amount to other serious harm.
21. The DFAT 2019 reports outlines conditions for returnees to Sri Lanka and the practical challenges that may be faced, noting that experiences vary between returnees. While noting the difficulty many returnees face I am not satisfied that the country information points to discrimination that would amount to a denial of the right to subsist as claimed by the applicant. In its analysis of the experience of returnees DFAT notes the limited resettlement services available for returnees and limited job and housing availability in the north but does not signify that returnees are denied the right to subsist. DFAT's assessment is also that

¹³ 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; Freedom From Torture, 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881

¹⁴ Thomson Reuters Foundation, "Promised land and homes, Sri Lankan refugees to return from India", 26 October 2018, CXBB8A1DA37484; Organisation for Eelam Refugees Rehabilitation, "Refugee Return", 27 February 2018, CXBB8A1DA23005; Colombo Page, "'Over 80 Sri Lankan Tamil refugees return home from Tamil Nadu", 1 February 2019, 20190204121210

¹⁵ UK Foreign & Commonwealth Office, "Coming Home Booklet – Sri Lanka", 10 February 2015, CISEC96CF1147

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

returnees do not experience societal discrimination for being asylum seekers, and its opinion is that returnees face a low risk of societal discrimination.¹⁷

22. Despite his lifelong depression the applicant has some employment history in both India and Australia, although he stated an injury in Australia has restricted his ability to lift anything heavy and he has not worked in [a specified field] which is the field in which he trained in India. I note the concern that his Indian qualifications will not be recognised in Sri Lanka and would not be of assistance in obtaining employment but DFAT reports that the Sri Lankan government has undertaken to recognise qualifications obtained overseas although returnees have reported delays with this process.¹⁸ The applicant's representative has expressed caution as to the applicant's ability to be resilient in Sri Lanka and put forward that the political and security situations in Sri Lanka are "highly volatile" and differ to India and Australia. The applicant also expressed concern in the IAA submission that he may have to pay a fine if convicted for his illegal departure from Sri Lanka and this may affect his ability to subsist however I note that fines imposed for illegal departure convictions may be paid in instalments.¹⁹
23. I accept that the applicant may face difficulties returning to, and establishing himself in Sri Lanka, and that he may be recognised by his accent as someone who has been away but I am not satisfied that he would be denied the ability to subsist or face other harm amounting to serious harm, even considered with his lifelong depression.
24. The submission to the IAA comments on the Easter bombings in Sri Lanka in 2019 and noted that those killed were mainly Christians. The applicant has consistently claimed to be Christian but apart from this reference to Christians being killed in the Easter bombings he has not advanced any protection claims on the basis of his religion. In April 2019 local Islamist extremists conducted co-ordinated attacks on Christian churches and hotels killing more than 250 people. The government reacted by arresting those linked to the bombings and instituting an effective clamp down on Islamist groups.²⁰ Horrific those these attacks were, noting the immediate suppression of those responsible and the ongoing security operations to suppress Islamist extremism I am not satisfied that there is more than a remote chance the applicant would be harmed in such an attack should he return to Sri Lanka. Nor does the country information before me indicate that as a Christian the applicant would be harmed in Sri Lanka. While there have been reports of anti-Christian violence this largely relates to evangelical Christians²¹ and there is no indication that the applicant is an evangelical Christian or would seek to evangelise should he return to Sri Lanka. I am not satisfied that there is a real chance he would be harmed in Sri Lanka for reason of his religion.
25. The applicant departed Sri Lanka as an infant in 1990 and from his account the family departed illegally. As such I accept that should he return to Sri Lanka he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act).
26. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival. In support of his identity the

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ The Sunday Reader, "Police arrest 2289 over Easter Sunday terror attacks – Police Spokesman SP Ruwan Gunasekara", 3 June 2019, 20190711142139; DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²¹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

applicant has his Sri Lankan birth certificate and Indian issued refugee documents. Checks are made to identify those suspected of concealing a criminal or terrorist background; this may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT advises that at the earliest possibility after investigations are complete police transport persons charged under the I&E Act to the closest Magistrate's court. Persons can remain in police custody at the CID office at the airport for up to 24 hours after arrival and in cases where a magistrate is not available, such as a weekend or public holiday, may be detained at an airport holding cell for two days. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.²²

27. The penalties under the I&E Act for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,633). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine and the Sri Lankan Attorney-General's Department advises no fare-paying passenger on a people smuggling venture has been given a custodial sentence. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis and payable by instalment.²³
28. DFAT advises that the Attorney-General's Department has directed that passengers of people smuggling ventures be charged under the I&E Act and appear in court. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, and may include reporting to police at the returnee's expense.²⁴ In the event that the applicant pleaded not guilty (which he has not claimed he would) he may experience delay in arranging payment of bail, noting his only connections in Sri Lanka are his elderly [specified relatives] and some friends in Jaffna.
29. Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The frequency of court appearance depends on the Magistrate and DFAT understands that most persons charged under the I&E Act appear in court every three to six months. Cases are only progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.²⁵ As the applicant departed 30 years ago in 1990 this may present a significant impediment to finalising the matter but I take into account the proposed pending legislation to streamline the process.
30. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. Even having regard to general detention conditions, I do not consider that a brief period in detention would amount to serious harm for the applicant for the purposes of s.5J of the Act. Similarly, I do not consider

²² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²³ *ibid*

²⁴ *ibid*

²⁵ *ibid*

any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm.

31. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. That law is not discriminatory on its terms, and the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution, punishment or detention of the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
32. I have considered the difficulties the applicant would face establishing himself in Sri Lanka with limited family or other support, together with his mental health and his profile as a Tamil man from the north of Sri Lanka and Christian who has been absent for 30 years and who escaped to and claimed asylum in a western country having departed Sri Lanka illegally. However, considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka on any of the bases claimed either individually or cumulatively.

Refugee: conclusion

33. 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

34. 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

35. 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.
36. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
37. I accept that the applicant will be identified on return as a person who departed illegally and that he will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I accept that the applicant

may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources.²⁶ I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm.

38. Similarly, nor do I accept that any discrimination the applicant would experience or difficulties establishing himself in Sri Lanka would amount to significant harm.
39. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the “real risk” test for complementary protection is the same standard as the “real chance” test,²⁷ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

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

Decision

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

²⁶ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

²⁷ *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.