



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09438

Date and time of decision: 17 August 2021 14:19:00
D Power, 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) is a Tamil Hindu. Although born in India, she claims to be a national of Sri Lanka. On 30 May 2017, she lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 29 June 2021, a delegate of the Minister for Immigration (the delegate) made a decision to refuse to grant the applicant a protection visa. The delegate accepted that the applicant's father had been suspected of working with the Liberation Tigers of Tamil Eelam (LTTE). However, the delegate did not accept that she faced a real chance or real risk of serious or significant harm on return to Sri Lanka, pointing to the considerable social and political change in Sri Lanka since the applicant's departure. The delegate also accepted that the applicant may be charged with offences related to her travel to Australia but that any resultant fine or brief period of detention would not amount to serious or significant harm. The delegate also found that the applicant did not face a real chance or real risk of serious or significant harm for any other reason including her ethnicity, health issues, the unauthorised disclosure of her personal details on the internet, or having sought asylum in Australia.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - She would be perceived to be a supporter of the Liberation Tigers of Tamil Eelam (LTTE) due to her Tamil ethnicity and because her family comes from an area formerly controlled by the LTTE.
 - Her father was suspected of aiding the LTTE and she fears she will also be imputed to support the LTTE through association with her father.
 - She heard from a friend that the friend's father had only just been released from prison after six years because he was suspected of involvement with the LTTE.
 - She knows no-one in Sri Lanka. As a young woman on her own, she would have no-one to protect her from harm.
 - She will also be targeted as a returning asylum seeker who departed the country illegally.
 - She further fears being targeted on return to Sri Lanka because she was affected by the 2014 Departmental data breach, in which her personal details were inadvertently published on the internet.
 - She cannot relocate within Sri Lanka as the authorities have control of the whole country.

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 is a Tamil who was born in India when her parents fled there to escape the civil war in Sri Lanka. The family were originally from Jaffna in Northern Province. The applicant has given a consistent account of her identity and provided documents in support of that identity. She provided consistent information on her religious affiliation and ethnicity, and her interview with the Department was conducted with the assistance of a Tamil interpreter. I accept that her identity, ethnicity and nationality are as claimed, that she is a national of Sri Lanka, and that Sri Lanka is her receiving country for the purposes of this decision.
9. The applicant was born in India, although her family originally come from Jaffna in Northern Province. She has never lived in Sri Lanka and at interview she claimed that she was no longer in contact with any relatives remaining in Sri Lanka. However, Northern Province remains a majority Tamil area¹ and the only area of Sri Lanka with which the applicant has any personal ties. The applicant has also expressed concerns about forced conversion and discrimination because of her ethnicity. Given the above, I consider that Tamil-majority Northern Province is the area to which the applicant would very likely return if she went back to Sri Lanka.
10. As discussed further below, the applicant’s family fled to India in 1990 before the applicant was born. The applicant has made a number of observations about the difficulty of life as a refugee in India, including the impact on her parents, the significant restrictions on her freedom of movement, and the instances of discrimination she suffered there. I have taken note of these and the claimed impact that these events have had on the applicant. However, as the

¹ Department of Foreign Affairs (DFAT), “DFAT Country Information Report Sri Lanka”, Department of Foreign Affairs and Trade, 4 November 2019, 20191104135244

applicant's country of reference is Sri Lanka and not India, I will not otherwise be considering these further in the current review.

11. The applicant claimed that her family were directly affected by the civil conflict in Sri Lanka, leading them to flee to India. In 1983, the LTTE began an armed insurgency against the Sri Lankan government in pursuit of a separate Tamil state². The civil conflict that followed is estimated to have cost 100,000 lives and displaced 900,000 more. The LTTE surrendered in May 2009 but not before atrocities on both sides that may have cost the lives of 40,000 civilians³.
12. The applicant indicated in an earlier written statement that the war had made accessing medical facilities difficult. She said that her mother had previously lost a child when denied medical services in 1983 and that she had another miscarriage in 1986, while sheltering from a sustained bombardment.
13. The applicant stated that her family had moved to India sometime around 1990. In her initial handwritten statement, she said that her father had been driving through a contested area during the civil war when he was waved down by a Sri Lankan Army (SLA) soldier. The soldier allegedly forced her father at gunpoint to drive him over a bridge. Although it was an army soldier, the army thought that her father was ferrying an LTTE soldier. In a subsequent typed set of claims, she clarified that her father had actually stopped to pick up an LTTE soldier.
14. The applicant account of this incident at interview was at odds in some respects with her previous written statements. At interview, she again stated that her father had picked up an army soldier but had nonetheless been suspected of assisting the LTTE despite specifically correcting that information in her typed statement. She claims that the SLA came to their area and abducted another person on the mistaken assumption that they were actually detaining her father. She stated at interview that this person was her uncle, although in her earlier written statement she appeared to state that it was her father's cousin. When that person returned home after being detained, the family decided to flee to India. However, all of this happened well before the applicant was born so it is perhaps unsurprising that she is not clear exactly what happened.
15. In her written claims, the applicant also stated that two of her cousins had gone missing in 1990 and that the family has not heard from them since. At interview, she noted that three or four of her cousins had gone missing but did not otherwise expand on this account at interview. Again, the applicant was not born at the time and it is not surprising that she had little detail to offer on the circumstances of their disappearance. Given the conditions that prevailed in Sri Lanka at the time, I accept that the applicant lost members of her extended family and that her father had an adverse interaction with the SLA after being forced to assist a soldier.
16. However, the applicant confirmed at interview that no-one in her family had been involved with the LTTE prior to their departure. The incident with her father was the only example the applicant provided where there was ever any adverse interest in the family from the Sri Lankan authorities. By the applicant's own account, the incident with her father and the soldier happened more than thirty years ago and the family have been absent from Sri Lanka since 1990. Given this, it is difficult to imagine that anyone in Sri Lanka would even recall the incident, let alone link it to the applicant who was not even born at the time.

² Ibid

³ Ibid

17. In any case, there have been considerable changes in Sri Lanka since the war.
18. Multiple sources have noted widespread abuses of the Tamil population during the civil war by both government forces and non-state actors, such as militia groups⁴. Tamils were also disproportionately subject to arrest under the Prevention of Terrorism Act (PTA)⁵. Abuses under the PTA have been documented by the US Department of State and other reliable sources⁶ and I do not discount the terrible toll such treatment must have taken on the individuals themselves and the Tamil community. However, I do not accept that persons with the applicant's profile and attributes are currently subject to detention or torture by the government.
19. The PTA remains in force, although its use was "effectively suspended" between 2016 and April 2019⁷. While it was still used sporadically during that time, there were just five known instances which all related to very serious crimes – assassination plots against politicians and cases involving the seizure of explosives and drugs⁸. Notably, one of the instances involved the arrests of those plotting the assassination of the spokesperson for the Tamil National Alliance (TNA). Detentions after that time appear to relate exclusively to arrests made in connection with the 2019 Easter Sunday terrorist attacks⁹.
20. DFAT notes that sources in Sri Lanka "including Tamils, say mistreatment and torture by police continues to occur, but is primarily due to outdated policing methods and is not ethnically-based"¹⁰. As noted above, I do not accept that the applicant would be of adverse interest to the Sri Lankan authorities on her departure from Sri Lanka. I do not consider that there is any reason she would face arrest on return. Although she may face a brief period of detention on return to Sri Lanka in regard to her illegal departure, as discussed further below, these are standard procedures carried out "regardless of ethnicity and religion" and DFAT's understanding is that detainees do not face mistreatment during processing at the airport¹¹.
21. Abduction and forced recruitment were a feature of the civil war and occurred on both sides of the conflict. "White van abductions", a practice in which Tamils (and others) were abducted by unknown perpetrators using unmarked vehicles, was prevalent during the civil conflict (and for some time afterwards)¹². DFAT notes a small number of reports in 2016 and 2017 of such abductions but states that they were likely instances of police failing to follow protocols during arrests and considers that such disappearances are "no longer common"¹³. In its 2019 report, the USDOS states that during 2019 "there were no disappearance cases registered with police"¹⁴. A recent UK Home Office report stated that "All sources consulted stated that there had been no recent reports of white van abductions"¹⁵.

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

⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418

¹⁵ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

22. DFAT has stated that the government no longer restricts travel to the North and East, and security checkpoints on major roads were removed in 2015¹⁶. Even those checkpoints briefly re-established in the wake of the 2019 Easter Sunday attacks, a major terrorist event unrelated to the LTTE, have since been removed¹⁷.
23. DFAT acknowledges that some monitoring continues but that it is more subtle and much less pervasive than before. Some direct and indirect questioning of former LTTE members was reported by some local sources but this “did not involve violence”¹⁸. DFAT does not note any instances of direct visits to failed asylum seekers, even in the North, after 2017¹⁹. The Human Rights Commission of Sri Lanka (HRCSL), which deals with reports of monitoring and harassment of former LTTE members, received “few such complaints” in 2018²⁰. USDOS reports that Tamils have complained about monitoring and harassment of their community, but no specific sources or examples are provided²¹. Tamils also have a “substantial level of political influence”, and even former LTTE members were able to openly run for office in the 2015 Parliamentary elections²². DFAT now assesses that “Tamils, including those with imputed links to the LTTE, are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links”²³. There were reports that in June 2020, the main LTTE activist based in Norway had been briefly detained while attempting to depart Sri Lanka²⁴. However, he was released after providing a statement²⁵.
24. The UK Home Office notes that Tamil returnees with actual or perceived links to the LTTE may face questioning on return but does not indicate that mistreatment occurs, and notes that even high-profile returnees may face additional questioning but would not necessarily be detained²⁶. It also states quotes the Attorney General’s Department and the Criminal Investigation Department as stating that “mere membership of the LTTE would not make someone of interest”, and notes that this was also confirmed by an NGO²⁷.
25. The US Department of State also noted in its 2019 report that the Sri Lankan Government had returned approximately 8,000 acres of land formerly occupied by the military and had supported the resettlement of internally displaced persons (IDPs) by constructing houses, schools and other social amenities on the released land²⁸. It had also made “additional state land available for landless IDPs”²⁹. The progress of land returns appears to have been sustained since that time, with a total of almost 90,000 acres of former military held land being released, including almost 6000 acres in 2018³⁰. Though there have been reports that Sinhalese settlers have received preferential treatment to establish businesses or in the allocation of desirable land, these could not be verified.

¹⁶ DFAT, “DFAT Country Information Report Sri Lanka”, Department of Foreign Affairs and Trade, 4 November 2019, 20191104135244

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

²¹ US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 11 March 2020, 20200312151418

²² DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244

²³ Ibid

²⁴ Asian Tribune, “Key LTTE activist in Norway - Nadaraja Sethuparan arrested at BIA”, 23 June 2020, 20200624105850

²⁵ Ibid

²⁶ UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928

²⁷ Ibid

²⁸ US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 11 March 2020, 20200312151418

²⁹ Ibid

³⁰ Ibid

26. Although some returnees reported social stigma on return, particularly where they had benefited from financial reintegration assistance, DFAT assesses societal discrimination is not a major concern for returnees or former asylum seekers³¹. Tamils who went back to Northern Province stated that they did not experience societal discrimination on return³². Returnees from Tamil Nadu have attracted some stigma. However, DFAT quotes sources as saying that locals were “generally welcoming” and returnees did not feel that they received different treatment. More importantly, the applicant would not be returning directly from Tamil Nadu, but from Australia. The applicant has not made any claim that she would suffer stigma on return because of her time in India. I am not satisfied that there is a real chance the applicant would suffer stigma or similar harm on return to Sri Lanka.
27. Some sources have pointed to issues such as a tightening in the latitude given to civil society actors and lack of progress towards reconciliation and accountability for actions carried out during the civil war³³. There have also been reports of some people being prevented from carrying commemorations related to the LTTE or being harassed when they have attempted to do so³⁴.
28. However, the applicant’s family has been out of Sri Lanka for more than 30 years, and the applicant has never set foot there. She is not a journalist, nor has she shown any interest in politics, either in Sri Lanka or during her time in Australia. She has not had any involvement with diaspora groups aimed at supporting or commemorating the LTTE, nor is there anything to suggest she would be imputed to have such an association. She has not indicated that she ever attended LTTE related commemorations in Australia or had any particular interest in doing so, and at interview confirmed that neither she nor her family had any involvement with the LTTE. She also stated that she had not done anything in Australia that would be likely to bring her attention of authorities and had kept a low profile.
29. The applicant has claimed that she does not know anyone in Sri Lanka and as a woman alone she would have no way of protecting herself from harm.
30. DFAT has noted that sexual harassment and gender-based violence is a significant issue in Sri Lanka, particularly in domestic settings³⁵. Although Sri Lanka leads South Asia in positive social indicators for women, DFAT notes that this has not led to greater political or economic participation³⁶.
31. However, there are signs that the Sri Lankan authorities are committed to addressing issues of gender-based violence and discrimination. Sexual harassment is now a criminal offence in Sri Lanka, carrying a maximum penalty of five years’ imprisonment³⁷. Sri Lanka is also a party to the Convention on the Elimination of All Forms of Discrimination against Women and its

³¹ DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244

³² Ibid

³³ INFORM Human Rights Documentation Centre, “Repression of Dissent in Sri Lanka: 1st - 31st May 2020”, 29 June 2020, 20200702160949; OHCHR, “Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka”, 18 February 2020, 20200221140652

³⁴ INFORM Human Rights Documentation Centre, “Repression of Dissent in Sri Lanka: 1st - 31st May 2020”, 29 June 2020, 20200702160949

³⁵ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

³⁶ Ibid

³⁷ US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 11 March 2020, 20200312151418

Optional Protocol³⁸. In November 2016, the government launched a national action plan to address gender-based violence³⁹.

32. Although the political participation of women in Sri Lanka is significantly less than that of men, there are no laws which limit women's participation in the political process⁴⁰. There have been high profile female politicians in Sri Lankan political life, including three-time former Prime Minister Sirimavo Bandaranaike and her daughter, former President Chandrika Bandaranaike Kumaratunga⁴¹. The first female mayor of Colombo was elected in March 2018⁴². A 25% quota for women's representation in local government was been formally mandated in the Local Authorities Elections (Amendment) Act in August 2017⁴³. The quota has resulted in greater representation of women at this level⁴⁴.
33. The police Bureau for the Prevention of Abuse of Women and Children conducted awareness programs in schools and at the grassroots level to encourage women to file complaints about harassment or violence, and police continued establishing women's units in stations⁴⁵. District hospitals have mental health facilities and NGOs provide mental health support to women, including in Tamil populated areas. Legal aid and counselling for victims of gender-based violence, including through legal officers, is provided by the government. The Ministry of Women and Child Affairs operates a helpline available in Sinhala, Tamil and English to victims of gender discrimination.
34. DFAT has noted local sources as indicating that there is social stigma attached to single women in Sri Lanka⁴⁶. Traditional attitudes carry an expectation that women will marry and bear children by a certain age⁴⁷. However, there is no suggestion that such stigma, where it does arise, amounts to serious or significant harm. DFAT also indicates that the greatest issues were those faced by females who were previously involved with the LTTE.
35. Attitudes in Sri Lanka are also changing. DFAT notes sources as saying that divorce in Sri Lanka is more common today than in previous generations⁴⁸. There is also the country evidence cited above indicating that the authorities have made tangible efforts to address issues of gender discrimination and female participation in Sri Lankan society. The applicant also has educational attainment and a history of workforce participation, along with a proven ability to live independently here in Australia. I consider that these advantages and her demonstrated resilience will assist her on return to Sri Lanka.
36. While there are still considerable issues and resourcing constraints, I also consider that the measures outlined above indicate a level of genuine commitment to addressing the challenges faced by women in Sri Lankan society.

³⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

³⁹ Ibid

⁴⁰ US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418

⁴¹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁴² Ibid

⁴³ Ibid

⁴⁴ Freedom House, "Freedom in the World 2021 - Sri Lanka", 3 March 2021, 20210304102827

⁴⁵ US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418

⁴⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁴⁷ Ibid

⁴⁸ Ibid

37. In the wake of post-war reconstruction, the Sri Lankan economy grew at an average rate of 5.8 per cent between 2010 and 2017⁴⁹. While growth has now slowed somewhat, the IMF still predicts a healthy growth rate of 3.5 in 2019 and 4 per cent in 2020⁵⁰. At 7.7 per cent per cent, unemployment in the Northern Province is higher than the national average, but still relatively low. DFAT notes that the government announced economic support packages for the north and east. As recently as 27 May 2019, the government announced the Palmyra Fund to create greater employment opportunities in those areas⁵¹.
38. DFAT assesses that there is no official discrimination in the public sector based on ethnicity and that Tamils face a low risk of discrimination in regard to employment generally⁵². The USDOS also notes that Sri Lanka's constitution prohibits discrimination "on the basis of race, religion, language, caste, sex, political opinion, or place of birth", although it does state that the government did not always effectively enforce such laws⁵³.
39. The applicant claimed that she had been deeply affected by the experiences of her parents, both in Sri Lanka and on arrival in India. She claimed that her parents had been detained and her father imprisoned for a period of some years. The most significant of these experiences occurred either before the applicant was born or when she was just an infant. I accept that the applicant has been affected by the experiences of her parents. However, she noted at interview that she has not ever sought to access mental health services here in Australia. She has been able to work consistently since coming to Australia. There is no evidence from a medical practitioner that the applicant is unable to work or restricted in the work she could perform. I do not consider that there is any reason that the applicant would be constrained from working on return to Sri Lanka.
40. The applicant stated at interview that she currently works [in a specified role] at [a named employer]. Her protection visa application indicates that she has also previously worked in a [different] role. In addition to her native Tamil, she speaks very good English and claimed some fluency in [another language]. She is relatively well-educated, having completed schooling up to year 12 and partially completed a [degree course].
41. DFAT notes that economic dependence is a significant factor in women being forced to persevere with abusive relationships. The applicant is relatively well-educated, multi-lingual and with a consistent work history. Although the social environment in Australia is very different to that in Sri Lanka, the applicant has nonetheless established herself here in the absence of any familial supports. I consider that she would well-placed to achieve a level of economic and social independence on return to Sri Lanka.
42. The applicant also raised at interview that she feared being subjected to forced conversion on return to Sri Lanka. There is nothing in the country information before me to suggest that this occurs in Sri Lanka. The applicant was not able to give a specific source for her claim that forced conversions of Hindus (or any other religion) occurred in Sri Lanka. The delegate gave the applicant a period of one week following the interview to provide any further information, and followed up by email, but no additional information was provided from the applicant. No information has been put before the IAA to support the view that forced conversion is an issue in Sri Lanka.

⁴⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418

43. In their decision, the delegate noted that the applicant was one of a number of detainees whose personal information was inadvertently published by the Department in February 2014. The applicant has claimed that this data breach would bring her to the attention of Sri Lankan authorities and result in her being imprisoned.
44. I accept that the applicant was subject to unauthorised disclosure of her personal details (the “data breach”) by the Department of Immigration. It is possible this information may have been accessed and viewed by the Sri Lankan government, or by other parties. However, there is nothing to indicate that the applicant would be subject to undue attention from the Sri Lankan Government (or any other party) on account of seeking protection in Australia. The data breach occurred while the applicant was detained and some years before the applicant made a SHEV application in May 2017.
45. The delegate notes that the information disclosed about the applicant consisted name, date of birth, nationality, unauthorised maritime arrival status and detention status. It did not include any details of the applicant’s reasons for seeking protection. As noted above, the data breach occurred several years before the applicant made a formal application for protection. I am not satisfied that the information released about the applicant would have disclosed whether she had sought protection in Australia, or the nature of her claims.
46. A 2019 UK Home Office report quotes the International Organisation for Migration (IOM) as stating that claiming asylum abroad would not be considered an offence by Sri Lankan authorities⁵⁴. The Sri Lankan government has repeatedly stated that refugees are welcome to return to Sri Lanka, comments publicly affirmed by former Prime Minister Wickremasinghe on a visit to Australia in February 2017⁵⁵. The information before me does not suggest that any individuals returning to Sri Lanka have been targeted for reasons relating to the data breach.
47. The applicant has claimed that if she returns to Sri Lanka, she will be imprisoned, tortured and possibly killed. She has cited her father’s previous issues in Sri Lanka, her ethnicity and the disclosure of her personal details on the internet as factors that would bring her to the attention of authorities in Sri Lanka.
48. As noted above, I do not accept that the applicant is or was of interest to the Sri Lanka authorities for any reason connected to her father or disclosure of her personal details online, or that persons of her background or ethnicity are currently at risk of serious harm in Sri Lanka. The applicant noted in her entry interview that she did not have any involvement in crewing the vessel that brought him to Australia. There is nothing before me to suggest that she was involved in facilitating that journey. There is no evidence she has been charged with any immigration offences in Sri Lanka nor is there any evidence she ever faced such charges in Australia. However, the applicant’s entry interview indicates that she departed Sri Lanka illegally. I accept that she may be identified as a returning asylum seeker from Australia and that she would be regarded as having departed Sri Lanka illegally.
49. DFAT confirms that the Attorney-General’s Department has directed that all passengers of people smuggling ventures be charged under the Immigrants and Emigrants Act (I&E) Act, not just those responsible for organising or facilitating the venture. DFAT also indicates that the I&E Act carries penalties of up to five years imprisonment⁵⁶.

⁵⁴ UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928

⁵⁵ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

⁵⁶ Ibid

50. However, the Sri Lankan Attorney-General's Department, responsible for prosecuting I&E offences, claims that no-one whose involvement was limited to being a passenger has received a custodial sentence⁵⁷. Individuals charged under the I&E Act may be held for up to 24 hours after arrival, or in cases such as an arrival on a weekend or public holiday, up to two days at the airport⁵⁸. DFAT states that it is not aware of any mistreatment of returnees during the entry procedure on return to Sri Lanka⁵⁹. As noted above, a 2019 UK Home Office report quotes the IOM as stating that claiming asylum abroad would not be considered an offence⁶⁰.
51. DFAT notes that in practice most cases result in a fine, sometimes as little as \$25 AUD for the first offence but usually between \$122 AUD and \$163 AUD⁶¹. I note that there is no indication (nor has the applicant claimed) that she ever left Sri Lanka illegally prior to coming to Australia and that this would therefore be the applicant's first offence. From there, outcomes depend on the defendant's plea. A guilty plea will attract a fine which can be paid by instalment and then the defendant is free to go⁶². A plea of not guilty will usually lead to the grant of bail on the surety of a guarantor or family member. Although bail may continue for many years, again the end result is usually the payment of a fine⁶³. A recent UK Home Office report quoted the Sri Lankan Attorney General's Department as confirming that a fine is the punishment for those who departed Sri Lanka illegally but were not involved in facilitating the journey⁶⁴.
52. As noted above, there is nothing to suggest that the applicant had previously departed Sri Lanka illegally and this would be her first offence. The applicant has not indicated any reason why she would not plead guilty and pay a fine. She has also worked consistently in Australia. Even in the event the applicant chose to plead not guilty, I do not consider that the applicant would be unable to obtain bail or pay the resultant fine (even in the event that she was unable to receive any financial assistance from her family in India) or that this would threaten her capacity to subsist. I note that even such fines as are levied can be paid in instalments⁶⁵.
53. I consider that it is very likely the applicant will be detained only briefly at the airport, have to pay a relatively small fine or, alternatively, be released on bail, and pay associated costs (which may involve returning to court on one or more occasions). I do not consider that this treatment amounts to serious harm, nor does the available country information indicate that there is a real chance the applicant would be mistreated in any way while so detained.
54. In any event, I am also not satisfied that the treatment the applicant may experience as a consequence of the I&E Act is systematic and discriminatory conduct. The relevant sections of the I&E Act make it an offence to depart Sri Lanka from other than approved port of departure, usually a seaport or airport. These are measures aimed at controlling and regulating the flow of people across the border, and especially irregular migration. Regarding entry procedures generally, DFAT states that investigations can be undertaken on arrival to confirm a person's identity, and to determine if they have a criminal record or an outstanding criminal matter. I note that there is no evidence that the applicant has ever been charged with or convicted of any crime in Sri Lanka or in Australia. DFAT notes that the entry processes noted above are standard procedures carried out "regardless of ethnicity and religion" and its understanding is that detainees, including Tamil returnees, "are not subject to mistreatment during processing

⁵⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

⁶¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

⁶² DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

⁶³ Ibid

⁶⁴ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

⁶⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

at the airport”⁶⁶. Similarly, the evidence does not indicate that the I&E Act itself is applied selectively or enforced in a discriminatory manner.

55. Taking into account the available country information, and the applicant’s personal circumstances, I am not satisfied that she would suffer harm from the Sri Lankan authorities or any other person due to her Tamil ethnicity, her father’s adverse interaction with the SLA decades ago, her religion, personal circumstances, societal stigma, or the fact that her personal details were disclosed on the internet. I am also not satisfied that she would face any harm due to the fact that she departed the country illegally or for any other reason.

Refugee: conclusion

56. 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

57. 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

58. 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.

59. 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.

60. I accept that the applicant will very likely be detained briefly at the airport on arrival, where she is likely to pay a relatively small fine or, alternatively, be released on bail, which may incur costs (and involve additional court visits or procedures). I accept that the applicant’s period of detention at the airport may extend over a weekend depending on when she arrives back in Sri Lanka⁶⁷. However, information from DFAT quoted above does not indicate that returnees are subject to mistreatment during entry procedures or during the brief period the applicant may be detained prior to coming before a magistrate. The country information before me does not include any accounts indicating that there is any intention to inflict severe pain or suffering, or pain and suffering that could reasonably be regarded as cruel and inhuman, or extreme

⁶⁶ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

⁶⁷ Ibid

humiliation. Nor I am satisfied there is a real risk of the death penalty being carried out, the applicant being arbitrarily deprived of her life or tortured in these circumstances. I do not consider that the consequences the applicant faces in regard to her illegal departure amount to significant harm.

61. As noted above, I have considered whether the applicant is likely to be monitored on return and consider such a prospect to be remote. Even if such monitoring or questioning was to occur, I am satisfied that, while possibly unwelcome, it would not rise to the level of significant harm.
62. The applicant is also Tamil and would be returning to Northern Province which has a majority Tamil population⁶⁸. The applicant is currently employed in Australia, is relatively well-educated, multi-lingual, with a stable work history and proven ability to live independently. I am not satisfied that the applicant would be unable to subsist on return to Sri Lanka. Although she may initially face some stigma as a single woman on return, I note the changing social attitudes and steps made to address female participation in Sri Lanka in recent years. There is nothing before me to suggest that such stigma would involve significant harm as defined.
63. In respect of the remainder of her claims I have otherwise found that the applicant does not face a real chance of any harm. Based on the same information, and for the reasons set out above, I find that the applicant does not have a real risk of suffering significant harm on return to Sri Lanka in connection with those claims.
64. After having regard to all of the applicant's circumstances, and the country information noted above, I am not satisfied that she faces a real risk of suffering significant harm on return to Sri Lanka.

Complementary protection: conclusion

65. 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.

⁶⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

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.