



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09719

SRI LANKA
IAA reference: IAA21/09722

SRI LANKA
IAA reference: IAA21/09721

SRI LANKA
IAA reference: IAA21/09720

Date and time of decision: 21 September 2021 16:45:00
M Anderton, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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 applicants are a mother and her children from Sri Lanka. Applicants 1, 2 and 3 arrived in Australia by boat [in] June 2013. Applicant 4 was born in Australia.
2. On 31 August 2017 the applicants lodged a combined safe haven enterprise visa application. Applicant 1's claims revolved around fear of harm due to imputed LTTE (Liberation Tigers of Tamil Eelam) connections due to Tamil ethnicity and a pro-LTTE opinion imputed to applicant 1's husband and mother in law, and as a failed asylum seeker and repeat offender under the Sri Lankan Immigration and Emigration Act (IAEA) (with pending trial and warrant) who is a Tamil mother in poor health with limited family support.
3. On 19 August 2021 the delegate of the Minister for Immigration refused the visas. The delegate did not accept that the applicant or her husband were imputed with LTTE connections or that there were any ongoing requirements or warrant for applicant 1 to appear in court in relation to her illegal departure or that authorities searched for her.

Information before the IAA

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

Applicants' claims for protection

6. The applicants are a mother and her children. Applicant 1 is the mother and main applicant and her claims are outlined below. The other applicants are her children and they made no claims of their own. Applicant 1's husband (father of the children) had made separate protection visa application at another time, which had been refused.
7. Applicant 1's claims can be summarised as follows:
 - She is a Tamil Hindu born in Batticaloa district. She is married with three children, with two daughters born in Sri Lanka and her son born in Australia.
 - When she was [age] years old the family moved to [Town 1]. She did not attend school as it was not safe due to frequent bomb attacks. It was hard to be a Tamil in Sri Lanka. It was dangerous to walk freely outside due to the conflict and van kidnappings.
 - In September 2007, applicant 1's mother in law was arrested on LTTE supporter suspicion when she returned to Sri Lanka from visiting her daughter in [Country 1]. She spent some time in gaol and was suspected of being involved in an attack relating to [a prominent person, Mr A] in 2006. Applicant 1's husband hired a lawyer to defend the mother in law in court, but she does not know anymore details. Applicant 1's husband had to leave Sri Lanka on a few occasions ([countries listed]) to avoid problems with the CID and sometimes applicant 1 accompanied him.
 - Applicant 1's husband left Sri Lanka by boat for Australia in 2012. After he left CID visited applicant 1 four or five times and asked about the husband's LTTE involvement.

They accused him of being LTTE and said applicant 1 was also involved with the LTTE. They suspected them as they were Tamil. But none of them were LTTE. CID pulled applicant 1's hands and she was scared. She could not go outside as she was frightened the children would be abducted. Many times the children did not attend school as they were too scared. Many people were being abducted in white vans and it was for these reasons they decided to leave Sri Lanka.

- Applicant 1 and her daughters tried to depart Sri Lanka boat in March and April 2013, but they were caught attempting to board the boat. The first time they were charged for attempting to leave illegally and released on bail but did not attend court when asked to. In April applicant 1 was detained in gaol for 3 days with applicants 2 and 3. The case against them was [number deleted] in [named] Court. They were badly treated in gaol and applicant 1 was beaten by guards, CID and the police. She was sick and not provided medicine or food. They were not allowed to shower, had to lie on the floor and told if travelling by boat they would also not have enough food or be able to shower. Applicant 1 was asked about her and her husband's LTTE involvement. Applicants 2 and 3 remember gaol and become frightened because officers screamed at them and used bad words. They were released when the mother in law provided her identity card as bail.
- A month later CID came to the home and warned them not to leave for Australia and if caught they would be treated badly. Applicant 1 was still pending trial for leaving illegally. They were successful in departing on the third attempt on [date] May 2013.
- Applicant 1 fears serious harm and imprisonment for leaving illegally, due to Tamil ethnicity, because suspected LTTE supporter because of Tamil ethnicity and because she was twice arrested by CID and they were jailed for one week. When questioned at the airport they will be immediately taken to jail as they will know they departed illegally while applicant 1 was on bail.
- She fears harassment and threats because of her LTTE support and her husband's suspected LTTE support and because she has experienced harassment and threats in the past.
- She believes a warrant has been issued as she did not attend court when called. Applicant 1's mother in law said authorities came to applicant 1's home and asked about applicant 1. She is afraid her daughters will also be gaoled because they were previously arrested and gaoled with her.
- She has [Medical Condition 1] and needs [surgery for another condition] and if detained she will be deprived of her medication and her medical condition will deteriorate.
- She fears her children will have no future in Sri Lanka and no one to look after them if applicant 1 is imprisoned. They will suffer harm because they are also Tamil, and imprisonment for leaving illegally.

Refugee assessment

Well-founded fear of persecution

8. 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.
9. All of the applicants (and their mother on their behalf) has consistently claimed they are Sri Lankan citizens and have provided birth certificates which confirm this. While I note applicant 4 was born in Australia, his parents are Sri Lankan citizens and the family have consistently claimed he is also a Sri Lankan citizen. I accept this to be the case and find the receiving country is Sri Lanka.
10. I accept applicant 1 was fearful during the conflict, did not attend school and tried to stay at home. This was not uncommon in the context of the conflict and bomb attacks. However, the war ended in 2009. While not specifically claimed, I do not accept applicant 1 faces any harm in the future upon return as a result of that. Further, I consider she will have the support of her husband upon return.
11. Applicant 1 claimed upon return from a visit to [Country 1] in 2007, her mother in law was arrested, accused as LTTE supporter and involved in attack in relation to [Mr A]. She claimed she went to gaol and applicant 1's husband paid for a lawyer to defend her. Applicant 1 however had no other information. Like the delegate, I found the applicant's evidence lacked details about the mother in law's arrest. While I acknowledge this did not happen specifically to applicant 1, I find it difficult to believe that she would not have more information about this, particularly given it would have been such a critical and distressing event. Further, applicant 1 had been married to her husband since 2001 and if applicant 1's husband engaged a lawyer for his mother, I also find it difficult to believe that applicant 1 would not know or have more information about the events given she would have been involved, heard and seen events, given the relationship. Further, it is key part of her claims relating to LTTE imputation which I would have considered she would have found out more to assist her case. I note the delegate raised similar concerns.
12. Further, it is not credible that if the mother in law and applicant 1's husband were accused of or suspected LTTE, that applicant 1 and her husband could have travelled in and out of Sri Lanka so often during the conflict or after such an accusation and gaoling of the mother in law.
13. The delegate put these concerns to the applicant at the protection interview. The applicant said they travelled when there was no problem, but did not when there was a problem. However, as the delegate pointed out, this explanation contradicted her statement that her husband travelled to avoid harm and problems. The applicant said they went to [Country 1] for a relative's wedding and the lawyer said they should stay away for long time. I do not accept the explanations as they are contradictory to the applicant's statement and unconvincing.

14. I have considered the representatives submissions also in response to the delegate concerns about applicant 1's ability to lawfully depart and return Sri Lanka without harm. It was submitted that applicant 1 did not face issues after the end of the civil war and it was only after CID visited in 2012, after the husband's departure, that she was questioned 4 or 5 times. It was submitted it was reasonable for her to depart lawfully between 2009 and 2012 because there was no active investigation. It was submitted that stop and watchlists prevented departure if there was a criminal investigation or suspicion of past or present LTTE membership, so there was no reason for the applicant to have been prevented from lawfully departing prior to the 2012 and 2013 events.
15. I reject the submissions as they are at odds with the applicant's claims that her husband travelled out of Sri Lanka to avoid harm from authorities after his mother was arrested. Further, the applicant's claims were that the mother in law was suspected of an attack on [Mr A] and of being part of the LTTE and gaoled. This would have been a particularly serious accusation, given [Mr A]'s importance. If this were true, it is difficult to believe that the rest of the family would not have been under suspicion and of adverse interest. This would have been at the height of the conflict and as demonstrated by the country information authorities very interested in any persons suspected of LTTE and particularly if accused of attack on [Mr A]. Further, the submissions are at odds with the applicant's claims that the authorities were looking for her husband due to his connections to the mother in law and her arrest.
16. Further, applicant 1's account of her husband being in hiding to avoid authorities was poor and unconvincing. She had difficulty elaborating on specifics despite being asked. While she said he was hiding, he returned to her and they were together during the period. Further, she claimed that they travelled out of the country to avoid harm, to [various countries] and returned each time.
17. It is not credible that the husband and applicant 1 could or would travel in and out of Sri Lanka so frequently if applicant 1's husband was of interest or trying to avoid harm. Firstly, in my view such travel would have made them highly visible travelling in and out of the country through the airports. Secondly, if they travelled to avoid problems it is difficult to understand why they would return to Sri Lanka each time. In the protection interview, applicant 1 said they used their own passport and did not know they could be refugees. I find that explanation unconvincing, particularly given the claims of fear, and applicant 1 being accused of being LTTE at that time and in hiding. Thirdly, I do not accept that if they were of such adverse interest that they would not have been found either at home or at the airport or passports office in the 5 years after the mother in law was arrested and gaoled. Fourthly, it is not credible that they could have travelled so frequently in and out of Sri Lanka if the husband was wanted by authorities as claimed and not be caught. It is not credible that they could have travelled given claims about the mother in law's arrest and authorities' interest in applicant 1's husband.
18. Further, according to the country information, many thousands of Tamils suspected of LTTE involvement were rounded up and sent to rehabilitation camps or prosecuted. That they were not sent to rehabilitation camps is strong evidence that they were not suspected LTTE.
19. On the evidence, I am not satisfied that applicant 1's mother in law was arrested, gaoled, had a case in court or was accused of being involved with the LTTE or an attack on [Mr A] or of adverse interest to authorities.

20. Further, I do not accept that applicant 1, her husband or mother in law are or were imputed with LTTE involvement or as LTTE supporters or pro-LTTE. I do not accept the authorities had any adverse interest in them.
21. Applicant 1 claimed to have made 2 unsuccessful attempts to depart Sri Lanka by boat with the children in April (or March on another account) and May 2013 before successful departure in May 2013.
22. While I have some doubts that the applicant and her two children were able to make so many unsuccessful attempts to depart in a such a short time, she has claimed this consistently and I am prepared to accept that they did so..
23. However, applicant 1's account of the consequences was exaggerated.
24. In her statement applicant 1 claimed on the first attempt she was charged and bailed and did not attend the court date, so a warrant was issued. On the second occasion she and the children were gaoled, and they were badly treated, and she was beaten and was released on bail as the mother in law provided her identity card. Applicant 1 fears harm including imprisonment for her and the children upon return for illegal departure and because she had not attended court and has an outstanding warrant.
25. However, at the protection interview she claimed on the *first* occasion they were detained overnight, appeared in court and were released on bail because of the children. I consider applicant 1's account varied regarding whether she was charged, and a warrant issued to being released because of the children.
26. Applicant 1 gave differing accounts of the gaoling experience also. On one account the detention was for 3 days, on another account it was for a week (see statement). In her protection interview it was 3 or 4 days. I acknowledge that 3 or 4 days is not a big difference on its own, but it is different to a week's detention, which I suggests an exaggeration. Taken in the context of other concerns discussed herein, her account is problematic.
27. While applicant 1 said she had the court file number, she did not have documentary evidence of being bailed, a requirement to appear in court or a pending trial or warrant for her arrest. I note she stated she was unable to obtain it due to Covid lockdown. However, Covid only appeared in 2020, whereas the applicant's illegal departure attempts were in 2013, many years before Covid. I do not accept the applicant's explanation Further, given the importance of such documents, I find it difficult believe she would not have documentary evidence of any. Further, I find it difficult to believe that she would remember the court file number but have little else other information about the claimed court proceedings or warrant.
28. Her account of how she found out that that there was an arrest warrant was also unconvincing. In the protection interview applicant 1 stated that her mother in law told her. Applicant 1 said when she asked her mother in law to get things from her place, the neighbours told her the authorities were looking for the applicant.
29. However, this protection interview account was at odds with her statement. The statement indicated as she was not present in court when her case was called, she believed there may have been a warrant issued because she did not attend. This account suggests her knowledge a warrant being issued stemmed from not attending court on the day called (that she knew what the court date was not explained) as opposed to neighbours having informed the mother in law. I note also her statement account indicated the warrant was issued after the

first departure attempt which is at odds with her claims the mother in law found out (and told the applicant) a warrant was issued from the applicant's neighbours after the applicant left.

30. Further, given applicant 1's claims that an arrest warrant was issued against her, I find it difficult to believe that she would not have more information about this and provided meaningful account. I found her account unconvincing.
31. I note also the country information about illegal departure, failed asylum seekers and returnees. While there were some reports of returnees being detained, they were detained as suspected LTTE connections. I have not accepted any of the applicants have LTTE connections or were suspected of such.
32. The country information is that illegal departees were not imprisoned or charged with criminal offence unless involved in people smuggling or trafficking, of which the applicant was not. Mere passengers were considered victims. If they pleaded guilty, they were fined, released and could pay the fine in instalments. If they pleaded not guilty, they were bailed or a surety was given and return for court appearances.
33. It may be that the applicants were detained overnight before appearing in court or that they were detained until the mother in law could provide surety. It may be that they were mistreated while in prison as the country information indicates that this was not uncommon for Tamils in detention at that time and prison conditions are poor. However, I do not accept that they were charged with criminal offences or that a warrant for applicant 1's arrest was issued. I do not accept any of the applicants had or have future court dates. Beyond quoting a file number, the applicant had no evidence of such and like the delegate, I did not consider her account persuasive.
34. Further, the fact that applicant 1 was released on both occasions further reinforces my view that she is not of adverse interest to authorities or suspected LTTE. I do not accept she was questioned or accused of being LTTE. I do not accept applicant 1 has a pending court date, was issued a warrant for her arrest or that authorities came looking for her or have any adverse interest in her due to her illegal departure attempts.
35. I do not accept any of the applicants face imprisonment or harm as a consequence.

Health issues

36. Applicant 1 provided a medical certificate that indicated she suffered from [health] problems, would need [surgery] eventually, [Medical Condition 1], anxiety, depression, iron deficiency and osteopenia (I note this is not osteoporosis). Applicant 1 said she had difficulty sitting and standing in the one position for very long. Applicant 1 asked the delegate to be able to remain in Australia so that she could have [surgery] eventually (Applicant 1 was told she was too young but would need [surgery] eventually) and that she could not get treatment in Sri Lanka.
37. I accept the applicant 1 has some health issues. However, I do not accept that upon return she would not have access to treatment. Country information indicates that Sri Lanka inherited a well-developed health care system at independence and the health care system has a long record of strong performance. There is also a universal free public health system. Improving access to mental health services, including at the community level, is a government priority. District-level hospitals have mental health facilities and some non-governmental organisations (NGOs) (e.g. Women In Need and Women's Action Network)

provide psychosocial support services, including in Tamil-populated areas. While some regional disparities exist between urban and rural areas, and particularly in the north and east, the applicants lived in [Town 1] in Central Western province. The UK Home office reported the National institute of Mental health has 24 hour emergency care and comprehensive treatment for people with all ranges of mental health issues. The country information does not indicate that health care is discriminately withheld. I do not accept that applicant 1 would not have access or be able to receive treatment, if required. Further, as discussed below, I do not accept that she would be denied medications or health care if on the off chance she were detained for illegal departure. Further, I do not accept that she would be denied for any s5J reasons.

38. I accept 3 of the applicants are female. Applicant 1 feared harm as a Tamil female. She also feared harm for her children. Applicant 1 is still married to and living with her husband. She said that his visa had been refused and he should have been returned to Sri Lanka, but that immigration had allowed him to stay in Australia until her visa application process was finished, so that he could assist her and the children, given her health issues. I find that the applicants will return with their husband / father and have his support and protection.
39. I acknowledge country information about sexual harassment and violence against women in Sri Lanka. Violence against women is most common in domestic setting. Sexual harassment of women is common, particularly on public transport, but is rarely reported — according to a 2017 UNFPA study, 90 per cent of Sri Lankan women and girls had experienced sexual harassment on public buses and trains, only 4 per cent of whom sought help from the police. In October 2016, the National Police Commission designated provincial senior female law enforcement officers to respond to sexual harassment claims. Anecdotal evidence suggests that victims of sexual violence are reluctant to report the matter to the police due to social stigma. DFAT assesses that women throughout Sri Lanka face a moderate risk of societal discrimination, including violence, and that support mechanisms available to women in these circumstances are inadequate. In 2017, the UN Special Rapporteur on minority issues reported a decrease in the incidence of sexual assault by the military as it drew down in the north and east, but Tamil women continue to fear sexual assault in locations where the military presence remains. DFAT is aware of reports of women living near military bases, particularly single women, reporting sexual harassment by military personnel. DFAT is unable to verify these claims. One local source told DFAT that sexual harassment in these circumstances was not prevalent. DFAT assesses that female-headed households are vulnerable to societal discrimination and official harassment and exploitation. Authorities continue to monitor those believed to have family links to the LTTE.
40. However, the applicants will be returning as a family with applicant 1's husband (and other applicants' father). I consider they will have male protection. They will not be returning as a female headed household. Further, I do not consider they will be returning to the north or east or near military camps as they previously lived in [Town 1]. They do not have LTTE links. Further, there is no claim of domestic violence fears... Further, I note applicant 1's mother in law continues to reside in Sri Lanka and there was no evidence of her facing any harm since the end of the war (e.g. I note the 2007 arrest claims, but I have not accepted that). I do not accept applicant 1 faces a real chance of serious harm as a Tamil, Tamil mother or Tamil mother with children.
41. While it may be that as females the applicants may face some societal discrimination, based on their circumstances and the country information I am not satisfied that they face a real chance of serious harm. I am not satisfied that any of the female applicants have a well-founded fear of persecution upon return.

42. Further, I do not accept any of the children face no future or no future due to applicant 1's imprisonment as I do not accept applicant 1 will be imprisoned. Further, I consider the children, who are currently at various stages of education in Australia, will continue to have the support of their parents and education in Sri Lanka upon return.
43. I have considered the country information and submissions about the situation in Sri Lanka for Tamils, Tamil females and returnees. I have considered the submissions of criticism of the DFAT report. However, I reject those as it is based on credible reliable reports from reputable government and non-government agencies such as US Department of State, UK Home Office, UNHCR, Amnesty International, UN Special Rapporteur. I note also the representative relies on the DFAT in part also.
44. I acknowledge that during the conflict and shortly thereafter Tamils were disproportionately harmed and affected, including being detained and tortured and killed.
45. While I accept during the conflict that applicant 1's activities were curtailed out of fear of harm due to bomb attacks and the conflict, it ended in 2009. I have not accepted that the applicant, her husband or mother in law were suspected LTTE, detained or that authorities were looking for them.
46. Since the conflict ended and particularly since 2015 the situation has improved significantly. Country information (DFAT, UK Home office,) indicated that Tamils per se no longer face persecution. The Sri Lanka authorities have sophisticated intelligence and take an interest in those who advocate for Tamil separatism and threaten the integrity of the Tamil state. However, I do not accept the applicants have such profile, interest or perceived as such, even with multiple attempts to depart Sri Lanka.
47. I note the submissions about the return of Rajapaksa in November 2019 to government and the concern this has brought to Tamils given his links with the conflict. I note the submissions that and country information that reconciliation and accountability efforts under Sirisena have regressed since Rajapaksa has come to power, with anti-Tamil sentiment.
48. Even in the current political situation in Sri Lanka, I do not accept the applicants face a real chance of harm on the basis of ethnicity, past experiences, gender, departure and attempted departures and absence from Sri Lanka, or their familial connections.
49. I note the recent US DOS report about Tamils reporting monitoring and harassment in the north and east of some Tamils, especially activists, journalists and former or suspected LTTE members.
50. However, I do not accept that any of the applicants have such profile of interest. They have not claimed, and I do not consider, that they are or will be perceived as activists, human rights activists, journalists. Further, I have not accepted that they are or will be perceived as former LTTE, critical or anti-government, pro-LTTE, protesting or investigating disappearances or otherwise of adverse interest.
51. Even considering their time spent in the Tamil diaspora in Australia, I do not accept the applicants have such a profile or interest. I do not accept they have a pro-LTTE opinion that has been imputed to the mother in law or applicant's husband as I do not accept the mother in law or husband or applicant 1 have such a profile. It is just not credible that they had such or would have such profile given the length of time in Sri Lanka without harm and husband's visible travel profile. I do not accept any of the applicants have familial LTTE links, are anti-

government or perceived as such. I do not accept any of the applicants have a negative or adverse profile.

52. I do not accept applicant 1 has limited family support upon return. She continues to be in contact with the mother in law. Further, I do not accept any of the applicants face no future or the capacity to subsist as discussed I consider they will have the family unit support (including applicant 1's husband) and the mother in law who resides in Sri Lanka.
53. I have noted applicant 1's health issues and I do not accept that she would not have access to treatment should she need it for her illnesses. Further, I do not accept that she would be denied access or treatment for any s5J reason.
54. I have considered the information about discrimination. However, I am not satisfied on the evidence that they face a real chance of harm upon return. While I note applicant 1's lack of education during the conflict she, along with her husband were able live in Sri Lanka for many years and able to travel to a number of other countries and return without harm. The applicant's mother in law remains in Sri Lanka without harm. They will return as a family and have the support and protection of each other. I note also that the older children have received or are receiving education in Australia, with applicant 2 in [year level]. I acknowledge that the children (in particular the youngest who was born in Australia and does not know Sri Lanka) may have adjustment difficulties upon return, but they are young and have the support of their parents in adjusting. I do not accept such difficulties amount to serious harm.
55. The present government has been in power now for well over a year and the evidence before me does not support a return to civil conflict or a real chance of harm to someone with the applicants' profiles.
56. Even considering the present the situation, I do not accept any of the applicants face a real chance of harm as Tamils, being away for a long period in the Tamil diaspora in Australia or due to their past experiences. In respect of their female gender and adjustment difficulties for the children, I do not accept that they face a well-founded fear of persecution.

Failed asylum seeker, illegal departees, data breach

57. I accept the applicants will return as failed asylum seekers. I note also that applicant 1 received an immigration letter which advised that some of her personal information was online for a short period (department of immigration data breach February 2014) and she feared authorities will know she sought asylum in Australia. I accept the applicants were subject of the data breach. As the applicants will return on temporary travel documents, I consider the authorities will be aware that they sought asylum in Australia in any event. The data breach did not disclose the nature of any claims. I do not accept the applicants face any harm as a result of being failed asylum seekers subject to the data breach.
58. According to the country information there are many thousands of failed asylum seekers who are returned to Sri Lanka, including from Australia, without harm. I have considered the country information reports about some failed asylum seekers being detained. However, they had LTTE or suspected LTTE links, which the applicants do not. Further, the overwhelming credible evidence is that failed asylum seekers and returnees return without harm. While there were some reports of monitoring in the north upon return, the applicants are not from the north. Further, they do not have any LTTE connections. I do not accept they face any

monitoring harm upon return as failed asylum seekers, returnees or subject to the data breach.

59. Three of the applicants departed Sri Lanka illegally as well (and there were two prior attempts which were thwarted by authorities).
60. I note DFAT reports that children under 12 at the time of departure do not face any charges for illegal departure. As the children were under 12 at the time, I do not accept that any of the children face a real chance of any charges or penalties under the IAEA. I acknowledge though that they may be with their parents upon arrival during questioning and when applicant 1 is charged for illegal departure and have considered their circumstances also.
61. I accept that applicant 1 will face penalties under the IAEA for her illegal departure. If she pleads guilty a fine is imposed, she is free to go and can pay instalments. The fine imposed varies from LKR3,000 (approximately AUD25) to LKR200,000 (approximately AUD1,633). Well-placed sources told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163). If she pleads not guilty, she is released on bail to return for future court appearances in that regard. I note also the country information that at applicant 1 may need to attend subsequent court appearances. Further, I note DFAT information is that the severity of the fine for fare-paying passengers charged under the I&E Act does not necessarily increase for those who have departed Sri Lanka illegally on more than one occasion. I do not accept submissions that repeat offenders are not bailed as that is not supported by the country information. It is only facilitators and organisers who are not bailed, which the applicant was not. I do not accept questioning, penalties faced by applicant, including travel or court appearances amount to harm.
62. While I note the applicants claimed they were detained in prison last time when they tried to leave illegally the country information indicates that this does not occur for those returning now via the airport as a failed asylum seeker returnee/illegal departee. The country information is that after questioning at the airport for identity checks, and attendance before the magistrate (for illegal departure) they are released. If they arrive over the weekend and cannot go before a magistrate, they may be held in airport cell overnight or the weekend. DFAT was not aware of mistreatment of returnees. Unlike the applicant's experience in her illegal attempts in Sri Lanka, returnees and illegal departees are not imprisoned or sent to prison, unless they are involved in people smuggling, which the applicants were not. Even considering their multiple departure attempts, I do not accept there is a real chance the applicants will be detained in prison or sent to prison or face harm. I do not accept the applicants will not be bailed or released. I do not accept that there is a real chance they face interrogation harm or punishment harm.
63. I do not accept that COVID 19 means the applicant's face a real chance of false justification of extended detention as a failed asylum seeker. I consider that is unfounded speculation. Further, other than a remote possibility of brief detention in the airport (as discussed above), if they arrive on the weekend, I do not accept they will be detained.
64. Even considering the multiple illegal departure attempts and being caught, I do not accept that the applicants face detention (other than possibly at airport cell if on weekend arrival), gaol or imprisonment upon return. I do not accept that upon return the applicant's mother in law would not act as guarantor or funds to bail them upon return. At interview the applicant confirmed she was in regular and frequent contact with the mother in law. Further, I am not satisfied that any funds would be required for bail as I note the applicant did not refer to bail funds being paid the last time her mother provided surety, rather her mother in law provided

her identity card. I note also according to DFAT that any fines are paid by instalments. Even with the multiple departure attempts, I do not accept any of the applicants face a real chance of monitoring upon return, as I have found they are not perceived with LTTE connections or of adverse interest or involved in politically sensitive activities. Country information indicates monitoring may occur sometimes for those from the north and east, with LTTE connections or involved in politically sensitive activities. I note also the applicants resided in [Town 1]. I do not accept any of the applicants will be monitored and detained in prison upon return.

65. Even considering applicant 1's health issues and the children's ages and their past experiences, I do not accept the applicants face a real chance of harm, while questioned at the airport or upon their return to home and travel to court appearances or payment of fines. Even if on the off chance they arrive on weekend and detained before going before a magistrate, I am not satisfied that they face real chance of serious harm. I acknowledge that the applicants may be anxious and stressed, but they will have the support of each other as a family. Further, I do not accept that being anxious or stressed by the process or brief detention amounts to serious harm. Further, I do not accept that applicant 1 will be denied medication or health care. I do not accept that her health will deteriorate over such a short period of time. Further, while the applicant may require [surgery] in the future when she is older, I do not accept that she will be denied [surgery] in the future for any reason. Further, I do not accept that she will be imprisoned and not able to receive surgery, as I do not accept that she will be imprisoned. (I do not accept that a brief detention for a couple of days for illegal departure would mean she would be denied [surgery] either.) I note DFAT is not aware of any mistreatment of returnees during the process, which includes the off chance they are held in airport holding cell. I do not accept the applicants face a real chance of mistreatment or being badly treated, upon return.
66. I have considered the submissions about possible psychological distress upon return. For the reasons set out above, even considering applicant 1's health issues and the children's ages and their past experiences (and that the children may be with applicant 1 during the relevant time), I do not accept the applicants face serious harm (as defined) upon questioning, possible brief detention over the weekend or upon return home.
67. Further and in any event, I am not satisfied that Tamil returnees are treated differently and find the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. Furthermore, I am not satisfied that the Immigration and Emigration Act (IAEA) provisions that deal with breach of the departure laws from Sri Lanka are discriminatory on their face or disclose discriminatory intent or that they are implemented in a discriminatory manner. I do not accept the representative submissions that the IAEA operates discriminatorily in practice. Rather I find it is applied in a non-discriminatory manner and not selectively enforced.
68. I am not satisfied that questioning, process, and being held in airport holding cell if they arrive on a weekend, travel or possible costs for court appearances and the application of a penalty for illegal departure amount to discriminatory conduct for the purposes of s.5J of the Act.
69. I have had regard to all the evidence before me and the totality of the personal circumstances of all of the applicants and the recent political landscape. I am not satisfied any of the applicants has a well-founded fear of persecution from anyone for any reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, upon return to Sri Lanka.

Refugee: conclusion

70. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

71. Under s.36(2)(aa) of the Act, 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

72. 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.
73. 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.
74. As noted above, I do not accept the children face a real chance of being subject to any charges or penalties for illegal departure from Sri Lanka as they were children at the time. As to treatment for the illegal departure for applicant 1, the country information indicates she will be issued a fine and released. If she pleads not guilty, she will be released pending court date and may have to return to court for future appearances. If arrival is on a weekend, they may be held in an airport holding cell over the weekend while waiting to come before a magistrate. However, I am not satisfied there is a real risk any of the applicants would be subject to the death penalty, arbitrarily deprived of life or be tortured or face cruel or inhuman treatment or punishment or degrading treatment or punishment (as defined) or significant harm as defined.
75. Even considering the previous illegal departure attempts, I am not satisfied that the treatment faced as an illegal departee, including brief detention if arriving over the weekend, travel to court appearances, possible costs and penalties, involves an intention to inflict severe pain or suffering, pain or suffering that can reasonably be regarded as cruel or inhuman in nature or an intention to cause extreme humiliation or significant harm.
76. Even considering applicant 1's health issues and the children's ages and their past experiences (and that the children may be with applicant 1 during the relevant time), I do not accept the applicants face a real risk of significant harm (as defined) upon questioning, possible brief detention over the weekend or upon return home.

77. I am not satisfied that, individually or cumulatively, any processes or penalties the applicants may encounter under the IAEA would constitute significant harm as defined under ss.36(2A) and 5 of the Act.
78. While it may be that as females the female applicants may face some societal discrimination, based on their circumstances and the country information I am not satisfied that they face a real risk of significant harm (as defined). They will return as a family unit with applicant 1's husband (who is with them now and awaiting the outcome of their applications, his having been already refused) and will have male protection and the support of each other.
79. While they may face adjustment difficulties given their absence from Sri Lanka, I am not satisfied that any of these difficulties amount to significant harm as defined. They will all have the support of each other as a family. I do not accept that any or adjustment difficulties they may face upon return amount to significant harm.
80. In relation to the remainder of applicants' claims which I have accepted, I have found that none of them has a real chance of harm on any of these bases. For the same reasons and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not satisfied they will face a real risk of any harm, including significant harm on any of those bases if removed to Sri Lanka.

Complementary protection: conclusion

81. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

Member of same family unit

82. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include dependent children. I note applicant 2 is over 18 years old but at the protection interview she was still studying in grade 12, was not employed or in a relationship.
83. As **none** of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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.