



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06256

Date and time of decision: 26 March 2019 16:29:00  
M Anderton, Reviewer

**Decision**

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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

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### Visa application

1. The applicant claims to be a Sri Lankan citizen born in Northern Province who arrived in Australia by boat [in] October 2012. On 13 March 2017 he applied for a Safe Haven Enterprise Visa (SHEV).
2. His claims revolved around his fear of harm from the army, navy, police and CID as he was blamed for and accused of the drowning death of an army officer and hiding weapons in the sea in May 2010 and he suffered to constant harassment and accusations that was imputed to be part of the Liberation Tigers of Tamil Eelam (LTTE) due to his age and ethnicity. It was submitted also that as the applicant helped drive the boat to Australia upon return he will be taken to 4<sup>th</sup> floor for interrogation and torture and charged as a people smuggler or organiser and be detained.
3. On 15 January 2019 the delegate refused to grant the visa because she was not satisfied he was a refugee or that there was real risk of significant harm if the applicant was returned to Sri Lanka.

### 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. On 7 February 2019 the IAA received a submission.

#### *New information – Sri Lankan intelligence questions*

6. The submission outlined what it considered were standard questions for Sri Lankan intelligence to ask Tamil failed asylum seeker returnees, which included information about the pilots of boats, how many drivers and whether they were known to them.
7. I consider the information in above paragraph is new information and have considered it against s.473DD. However, I do not consider there are exceptional circumstances to justify considering the information. The information could have been provided earlier as the applicant had plenty of opportunity, was warned he may not be able to provide new information or claims, he had legal representation and lengthy post interview submissions were received which did not mention this information. I note also the boat driving issue was canvassed at length also. Further, there was no authority or reference to what was submitted to be a list of Sri Lankan intelligence questions. It was an assertion by the representative, without supporting evidence. It is not apparent to me that there are any exceptional circumstances to justify the consideration of this new information. I am not satisfied as s.473DD(a).

#### *New information- applicant will admit boat role if questioned*

8. It was also submitted that if questioned upon return to Sri Lanka the applicant would definitely admit he had driven the boat. I consider this is new information. He has not previously suggested that this may be the case or may give rise to a claim for protection. Nevertheless, I accept it is credible personal information, as on its face, it is capable of being believed, and which may have affected consideration of the claims. Relevantly, the delegate

did not accept that other fellow travellers would have disclosed the applicant drove the boat. In light of this and that the applicant's admittance of his role was not discussed by the delegate, I am satisfied there are exceptional circumstances to consider the information and s.474DD(b)(ii) was met.

9. I have considered the information.

### **Applicant's claims for protection**

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10. The applicant's claims can be summarised as follows:

- In his entry interview he said the army gave him trouble and demanded he bring [food] and do compulsory work in the camp without pay and clean crown lands. He was arrested four years ago and taken to a camp and beaten and released that evening. They did not tell him any reason why they took him to the camp. On the boat to Australia the people smuggler and another main driver drove the boat but the applicant drove as well as he was asked and because the driver wanted to sleep and the applicant was a fisherman, so the applicant offered to help.
- In his application the applicant claimed he was a young Tamil Hindu fisherman from Northern Province.
- He did not complete his studies due to the unsettled nature of the war and had to relocate at a young age for his safety.
- He fears serious harm from the army, navy, police and CID because of his Tamil ethnicity and political opinion as a Tamil man with imputed links to the LTTE.
- He encountered ongoing harassment due to his age and ethnicity, was constantly the target of accusations and threats. He was stopped by the roadside and interrogated and held on the spot. He was beaten and verbally abused in Sinhalese because he could not speak Sinhalese. They laughed at him.
- In 2008 while at sea fishing the navy called out to them. They were afraid so turned their boat away from them. The navy followed and started shooting, but they escaped. He faced constant harassment like this. He lived in fear.
- In May 2010, during a curfew in the area (they could only fish four to five hours a day). Two army members asked to come with the applicant and his friend on the fishing trip. They said they wanted to ensure they were fishing in the restricted area and abiding by their rules. As it was high tide season, while in the middle of the sea, the boat capsized and everyone fell into the water. One of the army and fisherman got back on the boat but the other army man could not swim and was drowning. The applicant went to save him, but the army man held on tight and the applicant thought he would drown so pushed the army man back. The applicant reached out to help, but the army man thought he wanted to kill him and kept pushing him away. After five minutes the applicant could not find the officer. Other fishermen in the area came to the rescue and helped the applicant onto their boat. The surviving army member also got onto this boat. He suspected the applicant had killed the other army person and intentionally got rid of the weapons so started to beat and kick him. They went back into the water to look for weapons and the missing army member but could not find anything. They got back on the boat and accused the applicant of intending to kill them as he was Tamil male with imputed LTTE links.

- The applicant was taken back to the army camp and kept for a day and beaten. He was accused of hiding the weapons in the sea for the LTTE and killing the army officer. The next day he was taken to another army camp and kept a week where he was beaten and tortured and accused of being LTTE. He was released on condition he would be arrested if there was any bombing in the area and was warned to stay in the area. They threatened they would not hesitate to kill him.
- Afterwards the army constantly and everyday threatened him, beat him up and made him sit in one place for up to three hours. (In the protection interview he said it was four hours). He was not able to live an ordinary life.
- In 2011 an army camp was set up in [a location], which made his situation worse and he was constantly harassed by the army as a young Tamil male and was blamed for the death of the army officer.
- Due to the 2010 incident, the applicant was constantly monitored by the army and navy. So he started to make plans to leave but was unable to do so. His movements were restricted and he was not allowed to leave the village without permission.
- In August 2012, through services of an agent, he managed to organise to leave the country.
- The applicant fears his life will not be protected as the ethnic tension is still ongoing and there has been evidence of this torture in the news articles published by BBC and United Nations.
- Today a more subtle war rages in the northern and eastern provinces. His family has have witnessed torture, sexual violence, surveillance, militarisation, discrimination, intimidation. There are ongoing allegations of unlawful attacks, killings, disappearances, rape and sexual violence and intentional denial of humanitarian assistance. If he returns he knows he will be the target of any one of these tortures.
- In his protection interview the applicant added he feared torture upon return because he piloted the boat for 18 days and people know he did; he was accused of the death of the army officer, wishing to assist the LTTE and hiding weapons and seen as doing it on behalf the LTTE ; he left his area and the country without permission which will be seen as an offence and admission of his guilt and his ethnicity and being a fisherman are always thought as LTTE.
- He also added that the army went to his mother's place asking where he was. They threatened his mother telling her when he returned they would be with him and shoot him.
- If questioned upon arrival he would definitely admit he had driven the boat.

## Refugee assessment

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11. 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

12. 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.
13. I accept the applicant is a Tamil Hindu fisherman from Northern Province.
14. I accept that he may not have completed studies due to the unsettled nature of the war. However, he was educated to grade [year deleted] and worked thereafter as a fisherman, as did his [family] and earned living. Further, he owned his own boat. In Australia he has also been gainfully employed in a [factory] since July 2015. It was evident also at interview that he was able to articulate his claims and engage meaningfully. I do not accept the applicant faced any harm or faces a real chance of harm due to his education levels in the future.
15. I accept the applicant may have encountered some harassment from the army during the conflict as he has consistently claimed this and the country information before me indicates this was not uncommon experience for young Tamils during the conflict. I have some doubts about the credibility of the applicant's claim that in 2008 when the navy called out to their boat they turned away and escaped as it is difficult to believe that their boat could outrun the navy. However, I am prepared to give him the benefit of the doubt particularly given it was not uncommon that Tamils were so harassed and checked on by authorities during the conflict. I am also prepared to accept that four years prior to his departure from Sri Lanka (ie. 2008) that the applicant was taken after work to the army camp for a day and beaten as he claimed this in his arrival interview. However, the circumstances and when this occurred have not been consistent.
16. While in his arrival interview he claimed he was required to bring [food] and do compulsory work without pay, the applicant did not claim that in his statement or since then and did not elaborate. Given this, I do not accept the applicant was required to bring [food] or do compulsory work.

### *2010 boat drowning incident, detention, harassment, monitoring*

17. The applicant also claimed he was continuously and frequently harassed by the authorities. In particular he claimed he was accused of helping the LTTE and deliberately drowning an army officer who was in his boat in 2010. He was taken to camp and beaten and held for a week and constantly monitored and harassed and not allowed to leave the area without permission.

18. I have considered the applicant's claims and his explanations. In post interview submissions the representative stated the applicant suffered fear and anxiety over his future and because of his traumatic experiences and he was still disturbed and confused in mind. I was submitted that at the protection interview the applicant was nervous, excited and unable to answer questions to the full extent to clarify doubts and the stress may have led to some inconsistencies and oversights in his evidence. In addition, it was submitted that the applicant had only grade [year deleted] education and as a result has difficulties in understanding and answering questions satisfactorily.
19. Having listened to his interviews, I do not accept that the applicant was unable to understand or provide responses as required. I consider the applicant was given a meaningful opportunity to provide his information and respond to credibility issues raised at the protection interview. The applicant confirmed he understood the interpreter. The applicant was asked to tell his story, which he did. It was also evident that the applicant understood the questions put and responded appropriately. The delegate also checked with applicant a number of times whether he had further information he wanted to provide. He was also given time to confer with his representative at interview. I do not accept the applicant's education level impacted on his ability to provide information. I accept there would have been a degree of nervousness and anxiety at interview as this is not uncommon and I have taken that into account. However, I do not accept the applicant has any mental health issues or condition as there was no documentary evidence of that.
20. For the following reasons, I consider the applicant has fabricated these claims.
21. Firstly, the applicant had not made any claims about the boat drowning incident in his arrival interview. The applicant stated he did not do so because it was new to him and feared Australian authorities, as he was used to Sri Lankan authorities harsh treatment and it was like being interrogated by the army in Sri Lanka. He feared that he would be considered LTTE and sent back to Sri Lanka. It was submitted this was a common fear and explained this omission. Further, he stated the arrival interview was short, told to keep his answers brief and was not aware the information was going to be used to assess his claims.
22. While mindful of the obiter dicta in *MZZJO v MIBP* about the cautions that should be exercised in relying on omissions in arrival interviews and the applicant's explanations, I do not accept that he would not disclose such a crucial and critical part of his claims, that he had been accused of causing the drowning death of an army officer. Such disclosure would not have meant he was LTTE or suspected LTTE. Even though the applicant later asserted that he was accused of being LTTE by the army as a consequence of the event, it is not apparent how recounting the drowning incident that was precursor to a detention (which he did mention) would of itself have led Australian authorities to impute him as an LTTE supporter. Further, it is evident the applicant provided some evidence at the arrival interview, including a claimed arrest, which is at odds with his claims to fear Australian authorities or being sent back to Sri Lanka.
23. Further, I do not accept he was confined by the time restriction at the arrival interview. The interview was one hour and 9 minutes. Even if told to be brief, I do not accept that he would not have disclosed the most recent and main reason for his departure from Sri Lanka. Having listened to the arrival interview, I do not accept the in interview was like an interrogation and I consider the applicant was afforded respect and given plenty of opportunity to respond to questions. Further, I do not accept that he was not aware the information would be used in the assessment of his claims. The applicant was specifically asked why he left Sri Lanka. He was asked what would happen to him if he returned to Sri Lanka. He referred to the army

beating him and asked to do jobs. The applicant did not mention the 2010 event, detention, LTTE accusations and restriction of movement.

24. In his arrival interview he mentioned that he had been arrested on his way back from work and taken to an army camp four years previously and released that evening but he was not told why he was taken to the camp. He did not mention that it was due to a drowning incident. Further, his arrival interview statement that he was not given a reason for his arrest was contrary to his later claims that he was accused of drowning the army officer. I find it difficult to believe that the applicant would not have mentioned the 2010 incident, particularly given he raised his arrest and detention in the arrival interview. I find it difficult to believe that he would claim he was not told of the detention reason, when he later he claimed it was because of the drowned army officer. It is just not credible that he would not have mentioned such a key event in the circumstances.
25. Secondly, while in his arrival interview the applicant claimed to have been detained for one day, this was inconsistent with his protection interview claims he was taken to the camp for a week and beaten. Further, at the arrival interview the applicant claimed he was detained four years ago (which would have been mid 2008) which was not consistent with his later claims he was detained [in] May 2010. While I accept there may be differences and difficulties in recalling accurate dates, the applicant was very specific about the [May] 2010 date in his protection interview and in his application. I consider it is odd therefore that there would be such a difference in dates.
26. Thirdly, the applicant's account of the 2010 incident lacked credibility. For instance, I find it difficult to believe that given such rough seas (at least 10 meter waves and winds according to the applicant) that the other army officer (who could not swim) was able to get on the upturned boat, particularly given (on the applicant's evidence) they were wearing heavy shield corset with, gun and grenade.
27. Similarly that the applicant was able to make a couple of attempts to rescue the other officer and see him for five minutes in such rough conditions when the army officer could not swim and was wearing heavy armoury lacks credibility.
28. Further as the delegate also observed, that the army officers, who could not swim would go out on the boat in high tide and rough seas lacks credibility. At the end of the protection interview, the applicant said the weather was fine when they got on the boat but it was rough out at sea. I consider the applicant added that account in response to the delegate's concerns.
29. Further, I find it difficult to believe that given the rough conditions and rescue by another fishing boat, that the applicant would be accused of deliberately drowning the army officer (and doing it for the LTTE). It is also at odds with the fact that the other army officer survived. Further, it does not make sense that he would be accused of trying to hide the weapons for the LTTE as the boat capsized and any weapons that may have been retrieved would have been damaged by the sea. It is just not a plausible way of hiding weapons.
30. At interview the applicant claimed the army found the weapons and army officer two or three days later in the sea. However, this is contrary to his statement of claims that they did not find the weapons or the army officer. I consider this is a significant difference in account.
31. Further, I consider the applicant's claims that the army would go and retrieve the army officer's weapons (grenade, revolver and shield) three days later also lacks credibility.

Further, that they found these items on the bottom of the sea (15 km offshore) two or three days later after such rough conditions further lacks credibility. Having listened to the applicant's evidence about this at interview I consider also that he was making it up as he went along.

32. Further, I find it difficult to believe that if such event occurred and the applicant was blamed that there was not an enquiry or charges laid.
33. At the end of the protection interview the applicant claimed he tried to get documents but was unable to as it was hushed up. I consider such an explanation lacks credibility. Such a hush up claim is at odds with his claims that the authorities had accused him of the drowning, being LTTE, detained him for one week and monitored him for two years. I do not accept his explanation that the incident was 'hushed up.'
34. Having considered the applicant's evidence and explanations, I do not accept that he was involved in, or accused of, drowning an army officer and hiding weapons for the LTTE. I do not accept he was detained, beaten or harmed or that he was monitored or not allowed to leave his area.
35. Further, I note the applicant was able to continue to live and work as a fisherman in the same area until his departure more than two years later. On the applicant's own evidence, he was issued [many] fishing licences with varying validities of one to two years and he received a new one each time one expired. I consider this further reinforces my view that the authorities had no interest in him.
36. Further, in his arrival interview when asked if the police or military impacted on his daily life the applicant replied, 'No'. If his movements had been restricted and he had been harassed daily, I find it difficult he would not have said so at this point. I consider this further reinforces my view that the applicant was not monitored or precluded from moving around.
37. At the end of the protection interview the applicant claimed authorities conveyed a threat to him through his mother when looking for him. However, the applicant provided little detail of this claimed incident. I have taken into account that the applicant was not present at the authorities visit to his mother, which may account for some lack of detail. However, given that the visit and threat directly concerned him I find it difficult to believe that he was not able to provide some more information or found out more about the claimed threat. Further, it was a late claim in his protection interview. Having listened to the interview, I consider the applicant was making it up as he went along.
38. I accept the applicant may have encountered harassment during the conflict as young Tamil male during the conflict. I accept he may have been detained for a day and beaten during the conflict (probably in mid-2008). However, I do not accept that his claims regarding the 2010 boat incident or subsequent claimed harassment, detention, ill-treatment and monitoring. I do not accept he departed out of his area without permission or was wanted by authorities. I do not accept authorities conveyed threats to his mother. I do not accept he was or will be imputed as LTTE or LTTE sympathiser or supporter. I do not accept the authorities had or will have any adverse interest in him.
39. The applicant feared he would be abducted upon return and a target of serious harm. It was submitted it was likely to happen because he has accumulated profile of being perceived as LTTE supporter and sympathiser.



40. As discussed above, I do not accept the applicant was accused of, or suspected of being, LTTE. I have not accepted his claims of the 2010 boat drowning incident and subsequent accusations, harassment, detention and monitoring claims. Further I do not accept he will be perceived as or have a LTTE profile upon return for any other reason. I do not accept he has or will have such a profile
41. Country information is that the war ended in 2009 and the LTTE is a spent force. The applicant has no LTTE connections past, present or future. The applicant has not been involved in or interested in any political activities. Further, I do not accept being a fisherman or Tamil or failed asylum seeker or his residence overseas means he will be perceived as such. As discussed below, I do not accept his assistance in driving the boat means he was is or will be so perceived. He was a fisherman, not a facilitator or smuggler, and provided relief boat driving as he had the skills and offered to help the boat driver who needed to rest. Further, many thousands have departed illegally for economic and other reasons. DFAT assessed that economic reasons act as a significant push factor for external migration. Many thousands have gone abroad and many thousands have returned as failed asylum seekers and voluntary returnees from Australia (eg. 2,400 between 2008 and 2017). DFAT noted there had also been 5000 IOM supported returnees, a quarter of whom returned to Jaffna. Further, the Sri Lankan government has consistently said refugees are welcome to return.
42. The DFAT 2018 report also states reports of abductions and disappearances have dropped considerably and while there was a history of enforced disappearances, several credible sources told DFAT that disappearances are no longer common occurrence.
43. Given his particular circumstances and the country information, I do not accept the applicant faces a real chance of any such abduction or harm from others upon return.

#### *Fisherman employment*

44. I do not accept that he could not return to his employment as a fisherman as I do not accept that he was targeted or harassed as claimed. Further, the war has ended and the credible reports (eg. UK Home Office and DFAT report) are that security and other conditions have improved. Further, he was able to continue his livelihood before he left Sri Lanka and was issued fishing licences. Further, I note his [family] continue to have a fishing business and operate in the same area without any claims of harm. I do not accept that fishermen are or will be perceived as LTTE sympathisers or supporters.

#### *Boat Driving*

45. In his arrival interview, the applicant claimed there were two main drivers of the boat, but he offered to help drive the boat as one of the drivers said he wanted to stop the boat to sleep. The applicant offered to help as he knew boats and could assist. The applicant did not make such a claim in his application statement. However in his protection interview, the applicant claimed he assisted and helped drive the boat for 18 days because he had experience and was a fisherman. He claimed others who had been returned to Sri Lanka knew he did this and he was concerned that when questioned by Sri Lankan authorities they may have told him he was a driver, which would count as an offence.
46. It was submitted that the applicant was not a mere passenger would undergo investigation. It was submitted that CID would have details of his role in the people smuggling venture as it is plausible that returnees from the boat would have been questioned and statements taken about the boat. It was submitted also that if questioned the applicant would definitely admit

he had driven the boat. It was submitted he could be considered a crew member. It was submitted the authorities would consider he aided and abetted the people smuggling venture and charge him and faced imprisonment due to his extended role in the boat. It was submitted he would be subjected to significant physical ill-treatment while in detention. It was submitted the applicant would be perceived as a LTTE support or sympathizer because of that he was involved in facilitation irregular migration of Tamils to Australia.

47. It was submitted that upon arrival processing the authorities would focus on the applicant's past issues and more recent role as a driver of the boat in a people smuggling venture and he could be detained longer than usual whilst investigating and be charged, and due to lengthy delays will spend longer periods on remand and the likelihood of facing ill-treatment is high which would amount to serious harm.
48. I accept the applicant may have assisted the drivers when they needed sleep and as he had requisite skills. I do not accept he drove the boat everyday or had a significant role or was crew, but he assisted as relief. I accept if questioned he will admit his role, as he did to Australian officials in the entry interview. It may be that others from his village on the boat who have returned have provided that information also.
49. However, I do not accept that he was a crew member or involved in smuggling venture or organiser or will be perceived as such. While I have considered the submissions about the applicant's role, I do not accept that his role was significant as there were two other drivers who were the main drivers and known people smugglers (as was evident from the applicant's entry interview description). Further, it is telling that the applicant did not identify his boat driving role in his application or statement of claim. While I accept he mentioned this in his arrival interview, when describing the smugglers, I consider the fact that he did not mention this or any fear as a result of his boat role in his statement suggests it was not a significant role or of concern, but incidental. I note he provided little detail in his protection interview but was consistent in claiming he assisted because of his skills and to help out. I do not accept that the applicant will be perceived as smuggler or crew. I consider the applicant could explain his role as he has done before and if others from his village have informed Sri Lankan officials then it will be evident he was a passenger also who assisted because he had the skills, but was not a crew member or part of the smuggling operation.
50. I do not accept he faces a real chance of charges (other than for illegal departure as a passenger). I do not accept the authorities will lay false charges or investigate him longer or he will face longer detention as I do not accept he has been, is or will be of interest to authorities. I do not accept that his boat role means he will be perceived as LTTE sympathiser or supporter or involved in irregular movement of Tamils to Australia. I do not accept he has or will have any adverse interest from the Sri Lankan authorities.

### *Tamil*

51. The applicant was also fearful that his life would not be protected as ethnic tension was still ongoing and there was evidence of ongoing torture in articles published by the BBC and United Nations. I have considered the articles in the post interview submissions.
52. I accept that at least until the end of the civil war in 2009 Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities, particularly in North and East areas. I accept, based on the country information before me, that there are continuing detentions and torture against Tamils, who may be suspected LTTE or criminals, even since the end of the war. I am mindful of the information that people with significant links to the LTTE may still face a real chance of harm, if returned to Sri Lanka.
53. The UK Home office 2017 stated that persons of Tamil ethnicity would not of itself warrant international protection and neither in general would a person who evidences past LTTE membership or connection unless they have or are perceived to have had a significant role in it or in active in post conflict Tamil separatism and threat to the state.
54. However, the applicant was not an LTTE supporter. Further, I have not accepted the applicant was or will be suspected LTTE supporter, sympathiser, detained, beaten, monitored or of any adverse interest to authorities. I do not accept he has or will be perceived to have a significant role in or be active in post conflict Tamil separatism or threat to the state.
55. I do not accept that because of his ethnicity or race that he will be imputed with an adverse political opinion.
56. While I accept he may have been harassed during the conflict, this was remote in time and the credible country information before me is that the security situation has improved considerably since the end of the conflict in 2009. Further, I consider the applicant has lived and worked in the same area for many years without harm since the end of the war. Further, I do not accept the applicant will be detained (other than for illegal departure, discussed below).
57. UNHCR eligibility guidelines confirmed (at around the time of applicant's departure) that due to the improved human rights and security situation there was no longer a need for group based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity. The credible country information in the material before me (eg UK Home office) continues to confirm this is the case.
58. I do not accept he faces any harm on the basis of his race, ethnicity, as a fisherman, or young Tamil male, his past experiences, living in a formerly LTTE controlled area (or Northern province) or as a relief boat driver.

### *Failed asylum seeker*

59. The applicant claimed to fear harm because he departed Sri Lanka illegally by boat and because of his membership of a particular social group as a failed asylum seeker. He also feared the authorities would bring charges against him under s.45C of the Immigrants and Emigrants Act (IAEA).

60. I accept that if the applicant returns to Sri Lanka, he would do so as a failed asylum seeker on a temporary travel document. I accept that he may face questioning at the airport as a returned asylum seeker or returnee.
61. The DFAT report indicates that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, and claimed asylum. Although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants and I have not accepted that the applicant has such a profile or would be reported as such.
62. I do not accept the applicant faces torture, arbitrary arrest, detention or any harm upon return. Credible country information indicates that there is no mistreatment upon arrival or questioning at the airport. All returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamil returnees are treated differently.
63. I note country information in DFAT 2018 report about social stigma for returnees or asylum seekers as people resent the financial support provided to refugee returnees and that they may face practical difficulties finding employment and accommodation. However, I do not consider the applicant in this case faces a real chance of serious harm as a returnee resettling, finding employment or accommodation. He is contact with his family in Sri Lanka and there is no reason he could not return to fishing. I note also his [family] continue to live in the same area and have a fishing business also. I am not satisfied that he faces a real chance of social stigma or other difficulties as a returnee.
64. I note while the government has decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and calls by CID to failed asylum seekers in the North in 2017. UNHCR survey reported 49 percent of returnees in the north received a visit in 2015.
65. I accept the applicant may receive a visit from authorities when he returns home. However, I do not accept he faces any harm as a result, as I do not accept he has any profile of interest or is or was ever wanted by authorities. Even considering his boat driving and the current situation in Sri Lanka, I do not accept the applicant would be targeted or attract adverse attention of authorities. Further, and in any event, I do not consider such a visit amounts to serious harm.
66. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish his identity and any criminal history. I have not accepted that he was monitored or left his area without permission or needed permission to leave. Further, I do not accept he faces a real chance of any harm as a result of authorities checking with his home area about his identity as I do not accept he was, is or will be of adverse interest to CID, the authorities or anyone. I do not accept there is a real chance of torture, arrest, detention, or mistreatment.
67. Having regard to the country information in the material before me, I am not satisfied there is a real chance the applicant would face serious harm upon return by the Sri Lankan authorities or because he applied for asylum in Australia, is a returnee from a Western country or Australia, resided overseas, was a relief boat driver or would be returning on a

temporary travel document. I do not accept the applicant will be targeted or faces a real chance of serious harm upon return.

*Illegal departure*

68. I accept the applicant departed Sri Lanka without a passport and therefore illegally. For that reason, he has committed an offence under IAEA and will very likely face questioning at the airport and may be charged and fined.
69. The country information before me indicates that all returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamils are treated differently. I accept that processing may take several hours. However, the country information is that returnees are not subject to mistreatment during processing at the airport.
70. As discussed below, while the applicant may face questioning upon return due to his illegal departure, country information does not support claims of ill treatment and even if there is a period of detention; it is short over the weekend and persons are released if they plead guilty or bailed if they plead not guilty. I do not accept the applicant faces harm upon questioning. Further, I have not accepted that the applicant has a profile of interest to authorities.
71. Country information is that if a person pleads guilty to illegal departure, they are free to go and required to pay a fine in instalments. Country information is that a guilty plea by a returnee attracts a fine of LKR 3000 (approximately \$25AUD) for a first offence to LKR 200,000 (AUD\$1670). As this is a first offence, I find that it is highly likely the fine will be at the lower end. . If they plead not guilty, bail is usually granted.
72. I accept the applicant will be charged for illegal departure. The applicant has not informed whether he would plead guilty or not to the charges. Although I note he said he would admit to boat driving, so it may be that he will equally admit to illegal departure and plead guilty. I find if he pleads guilty he will be free to go.
73. If he pleads not guilty, country information is that bail is granted immediately to the returnee on the basis of his own personal surety or a guarantee by a family member. If a guarantor is required, returnees may need to wait for the guarantor come to court.
74. The applicant has not presented any credible evidence that leads me to conclude he would not be granted bail. In any event, I do not accept the applicant would not have a family member, such as his mother or siblings to vouch for him in the remote chance it was required. I do not accept he faces any harm if he is required to travel to attend court appearances in the future.
75. However, facilitators and organisers of people smuggling venture can be charged under s.45C of the IAEA and are not usually released on bail. The applicant claimed as he drove the boat and others may have informed authorities about this (and he would admit his boat driving role, if questioned) he would be charged, detained or imprisoned or detained longer. I have accepted that authorities may be aware he assisted in driving the boat. However, as discussed above, I have not accepted that the applicant will be considered or perceived as a facilitator or people smuggler and do not accept he will be charged, detained as such, or imprisoned or detained longer because of his boat driving role.

76. While there are reports of arrests and torture, they were known as former LTTE members. As discussed above, I do not accept the applicant has an LTTE or anti-government profile. I do not accept the authorities, CID or anyone have or will have any adverse interest in him. I do not accept that the applicant has an LTTE or anti-government profile or is of any interest to authorities now or upon return in the foreseeable future.
77. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish identity, any criminal history and bail. Further, I do not accept he faces a real chance of any harm as a result of authorities checking with his home area about his identity as I have found he is not of adverse interest to any of the authorities or anyone.
78. I accept that if the applicant arrives over the weekend he may be briefly held in airport holding cell until before a magistrate. However, DFAT has assessed risk of torture or mistreatment to detainees is low, and considered with the applicant's profile, I do not accept the applicant faces a real chance of torture, interrogation or mistreatment upon arrival, during questioning or possible brief detention. While prison conditions are poor, I do not consider there is a real chance the applicant will be held in prison. The country information is that he may be held in an airport holding cell.
79. I do not consider the applicant will be detained, imprisoned, held on remand longer or questioned longer or at risk of being suspected LTTE because of his role as a relief boat driver. I have not accepted the applicant is or will be of adverse interest to authorities.
80. Further the applicant does not have an anti-government or LTTE profile, outstanding charges or is of interest to authorities and do not accept there is a real chance of torture, assault or mistreatment if held on remand, or that any brief detention in these conditions amounts to serious harm for this particular applicant.
81. Furthermore, I do not accept that the 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.
82. I am not satisfied, that questioning, arrest, detention at the airport and the application of a penalty such as a fine or possible repeated bail appearances for illegal departure amount to systematic and discriminatory conduct as required by s.5J.
83. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution from CID, police, army, navy or any Sri Lankan authorities, or anyone for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.

**Refugee: conclusion**

84. 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

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85. 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

86. 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.
87. As to treatment for the illegal departure and any questioning and detention the applicant may experience in relation to this, I find the applicant is very likely to be issued a fine and released. In the event he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances. If he arrives on a weekend he may be held in an airport holding cell over the weekend while waiting to come before a magistrate. I am not satisfied there is a real risk he would be subject to the death penalty, arbitrarily deprived of his life or be tortured or other significant harm.
88. Even with his admitted or known boat driving, as discussed above, I do not accept the applicant faces a faces imprisonment or charges as a smuggler or facilitator. I have not accepted that he faces a longer detention, will be held in prison or closely monitored or ill-treated.
89. Having regard to his circumstances (even as a relief boat driver) I am not satisfied that the treatment, travel to court appearances, possible costs and penalties the applicant may face as an illegal departee amount to severe pain or suffering, pain or suffering that is cruel or inhuman in nature or extreme humiliation, intentionally inflicted or caused.
90. As to treatment and any questioning upon return as a failed asylum seeker, returnee I am not satisfied there is a real risk of significant harm. I have accepted that the applicant may encounter a visit from authorities upon return. However, I do not accept that amounts to significant harm as I do not accept the applicant is or will be of adverse interest to authorities. I am not satisfied the applicant faces a real risk of significant harm as a result of such visit as I am not satisfied that the authorities have or will have any adverse interest in him.
91. I am not satisfied that, individually or cumulatively, even considering his boat driving role that the treatment the applicant may encounter under the IAEA or as a returnee or failed asylum seeker, would constitute significant harm as defined under ss.36(2A) and 5 of the Act.

92. In relation to the balance of the claims which I have accepted, I have found that the applicant does not have a real chance of harm on any of the bases claimed. For the same reason and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not satisfied the applicant will face a real risk of harm if removed to Sri Lanka.

**Complementary protection: conclusion**

93. 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**

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



## Applicable law

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### ***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.